Chapter 10
‘God Created Man αὐτεξούσιον’: Grotius’s Theological Anthropology and Modern Contract Doctrine

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Abstract Hugo Grotius, the seventeenth century Dutch scholar, is most famous for his contributions to modern international law, particularly the law of the free seas. Yet, he has had just as lasting an effect on the formation of modern contract doctrine, originating in the same text that produced his maritime law. Grotius instigates a change in the theological anthropology implicit in late scholastic contract doctrine by importing a radical sense of God-given, unfettered freedom. This he calls ‘natural liberty’. He thereby renders contractual freedom freer, as it is now liberated: from its divine *telos* as part of man’s salvation; from the constraints of moral philosophy; and from the need of any ultimate end. Yet, he does not set the will completely at liberty in its contractual relations; certain formal and moral constraints remain. But it is no longer required that, in order to be well used, contractual liberty must be busy building the New Jerusalem. For, its divine purposes are now more mundane: peace and order on earth, beginning with oneself. For the moral theologians who developed ‘freedom of contract’, our natural promissory powers, as manifested in contractual relations, were ordained as means contributing to our salvation. For Grotius, they had been reduced to the providential means of our survival.

The great sense of natural liberty that Grotius vested in the freedom of contract would eventually open the door to radical contractual liberalization of the kind that was seen in North Atlantic nations in the nineteenth century, the primary causes of which are still disputed by scholars. In this chapter I argue that modern contract doctrine has never lost its theology of the radically free will since Grotius installed it there. If true, this theology of the will does some work in explaining the persistent liberal tendency in modern law and in modern economics (albeit not in economic theory), reducing the need to resort to naturalistic, materialistic, or ideological accounts.

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10.1 Introduction

In describing the re-emergence of 'freedom of contract' as the result of the long development of contract doctrine by the late scholastics, Wim Decock says contract became 'the instrument of a self-conscious *dominus* who [could] decide to do whatever he wants with his private property'.[1]

True enough, but only within necessary limits. Those very scholastics who had freed *Christians* to arrange their affairs contractually—who had recognized and granted them 'freedom of contract'—did not allow for the rapacity of such newly-liberated *domini* to destroy their liberty with license. There were moral brakes, side constraints, and substantive limitations on just what could be contracted, as well as in what manner. There were considerations of justice, such as equilibrium and fairness in exchange that curbed 'freedom of contract' and thus limited how lawmakers might extend the freedom to contract in the law.[2]

However, Hugo de Groot, the seventeenth century Dutch scholar better known by the Latin name Grotius, instigates a change in the theological anthropology implicit in late scholastic contract doctrine. He imports a radical sense of God-given, unfettered freedom. This he calls 'natural liberty', which he describes, in a passage also discussed below, as the normal activity of the *dominus*' will. He thereby renders contractual liberty freer, in a sense, as it is now liberated from: its divine *telos* as part of man's salvation; from the constraints of moral philosophy (but not wholly loosed from all morality); and from the need of any ultimate end. Grotius does not set the will *completely* at liberty in its contractual relations: one must never *knowingly* trespass revealed religion (orthodox Christian faith), or commit any of a few truly egregious sins, even in war (poisoning of water wells, rape, use of assassin who betray loyalty).[3] But it is no longer required that in order to be well used contractual liberty must be busy building the New Jerusalem. For, its divine purposes are now more mundane: peace and order on earth, beginning with oneself. Peace and order have many possible ways, none being necessarily better or worse, according to Grotius. For the moral theologians who developed 'freedom of contract', our natural promissory powers as manifested in contractual relations had been ordained as means contributing to our salvation. For Grotius, they had been reduced to the providential means of our survival.[4]

The great sense of natural liberty that he vested in the 'freedom of contract' would eventually open the door to radical contractual liberalization of the kind that

[1] Wim Decock, *Theologians and Contract law: The Moral Transformation of the* Ius Commune *(ca. 1500–1650)* (Leiden 2013) 213.

[2] George Gardner, 'An Inquiry into the Principles of the Law of Contracts', *Harvard L. Rev.* 1 (1932) details several of the moral principles implicit in contract law.

[3] Hugo Grotius, *De jure belli ac pacis / On the Law of War and Peace* (1625) III: XV-XIX. '*DIBP*', henceforth.

[4] What then comes to the fore is the virtue of 'moderation', as it is translated. Cf. *DIBP* III.11–16. Each chapter attempts to curb excesses in war not by means of moral theology but by 'moderation'.

was seen in North Atlantic nations in the nineteenth century, the primary causes of which are disputed by scholars. Below I put forward an idea, the argument for which I am developing as a monograph: modern contract doctrine has never lost its theology of the radically free will since Grotius installed it there. If true, this theology of the will does some work in explaining the persistent liberal tendency in modern law and modern economics, reducing the need to resort to naturalistic, materialistic, or ideological accounts. Here as elsewhere, despite the long-held line on secularity in legal development, 'evidence is mounting that many legal concepts are derived from theological traditions'.[5] All the more, some theological concepts or doctrines remain present in or *as* legal doctrines after they have been so derived. As the origins of contractual liberalism are increasingly an object of study, the influence of theology and theologians on the emergence of it and other modern institutions is moving from grudging to open acceptance.[6]

10.2 Freeing 'Freedom of Contract' from Moral Theology

'Freedom of contract' is what Pedro de Oñate (1567–1646) celebrated as '*libertas contrahentibus restitutia*'.[7] This phrase should not be confused with the English-language phrase 'freedom of contract', which came into general use only in the nineteenth century as a term of contempt. That was during debates on granting limited liability to joint stock corporations, when there were great disruptions thought to be caused by hyper-liberal contractual freedom. Although, if I am right, a theological doctrine provided by Grotius ties these two 'freedoms of contract' together as two of a kind. The more ancient 'sacred history of 'freedom of contract'' is related by Decock in his *Theologians and Contract law: The Moral Transformation of the Ius Commune.* I pick up just after he leaves off, in the Protestant-led Low Countries that had by the early seventeenth century permanently severed their political ties with the Spanish king and with the Roman Church. However, they had not

[5] *Ibid.* 22–23, 22n75, 23n76 and following detail literature correcting the secular(ist) narrative in various areas of law. The formative influence of canon law is nearly nowhere denied.

[6] On the open acceptance side is the work of the late Harold J. Berman, in the two volumes of *Law and Revolution.* Volume 1 is *The Formation of the Western Legal Tradition.* Cambridge: Harvard University Press. (1983); and volume 2 is *The Impact of the Protestant Reformation in the Western Legal Tradition* (2003).

[7] Decock (2013) prologue; 212. Oñate put the result of taking promising seriously succinctly: '…natural law, canon law, and Hispanic law entirely agree and innumerable difficulties, frauds, litigations and disputes have been removed thanks to such great consensus and clarity in the laws. To the contracting parties, liberty had very wisely been restored [*contrahentibus libertas restituta*], so that whenever they want to bind themselves through concluding a contract about their goods, this contract will be recognized by whichever of both courts before which they will have brought their case and it will be upheld as being sacrosanct and inviolable. Therefore, canon law and Hispanic law correct the *ius commune*, since the former grant an action and civil obligation to all bare agreements, while the latter denied them just that.' *De Contractibus* (Romae 1646) 40 (I.I.2.5.166). Translation at Decock (2013) 163–164.

wholly rejected scholastic learning, at least not in the law. It would be the new theology, brought to bear on inherited legal doctrines, that accounts for the new trajectory taken towards liberalization.

To understand what that means for contractual liberalization, it must be remembered that the theologians who provided much of the apparatus of modern contract doctrine were more concerned with the salvation of souls than with economics or history or law or anything else *sub luna*.[8] They were not shy to enter into every area of human life where morals or God were wont to go. That was seen as the mandate of a *science* with so grand a *telos* as theology. Francisco de Vitoria noted that 'the office and calling of the theologian are so wide, that no argument or controversy on any subject can be considered foreign to his profession.'[9]

Besides the general mandate, particular interest in contract law related to the development of moral theology in the Western church in the later middle ages. Promising and promise-keeping, with its formal effects including contractual and quasi-contractual obligations, were natural fodder for theological reflection, especially within a Church built with Roman law. The result was the development by theologian(−jurists) of a general law of contract: a theorization of Roman law from its ancient action-based beginnings. Decock calls their doctrine 'early modern scholastic contract doctrine'. It revolves round notions of freedom, the will, and mutual consent.[10] Freedom, correctly understood and *effected*, participates in man's salvation.[11]

Yet, this 'freedom' would be extended far beyond the bounds of what scholastic moral theologians understand to be 'free'—to the point where liberty becomes license, and thus where, if it is still to be called 'freedom' it has been redefined. Compare 'freedom' as the ability to do what is good (virtue), to 'freedom' as a lack of any or all constraint. The latter is what nineteenth century will theories permitted in their volitional understanding of 'freedom of contract'.[12] 'Licentious liberty' came to be the meaning of 'freedom of contract' by the nineteenth century.

Popularly, Grotius gets credited with forming modern contract doctrine. Yet, the further claim, that in order to arrive at modern contract doctrine, he alters the anthropology of late scholastic contract doctrine *theologically*, has not to my mind been laid at his door. Oñate wanted 'freedom of contract' to be, in Decock's words, 'the juridical principle that best fosters peace and moral comfort' amidst scarcity.[13] A canonical understanding of freedom is not far from this.[14] Contract had ascended to the prominent place in the moral theological tradition, 'as the principal tool for the

[8] Decock (2013) 5.

[9] *On Civil Power*, prologue, in Pagden and Lawrence (eds), *Francesco de Vitoria, Political Writings* (Cambridge 2001) 3; Decock (2013) 43.

[10] Decock (2013) 9.

[11] James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon 1991) 30ff.

[12] *Ibid*, 'Liberalism and Nineteenth-Century Contract Law', 214ff.

[13] Decock (2013) 6.

[14] Helmholz, *The Spirit of Classical Canon Law* (London 1996) 49.

regulation of all human affairs, including international relations and the relations between citizens and the public authorities'; but this contractual freedom had erstwhile been, 'the freedom to develop virtuousness, to express moral responsibility, and to strengthen mutual trust amongst human beings.'[15]

With the canonists, the moral theologians were concerned with *cura animarum*. But connecting salvation of the soul to contractual liberty is almost never something that those who inherit contract doctrine from Grotius do.[16] Soteriology was already nearly absent in Grotius's own treatment of contract. This can be explained by the one glaring absence when compared to his Calvinist co-religionists and to the Catholic jurists who preceded him: Grotius seems not to have a robust doctrine of (original) sin and its (lasting) effects. In his wildly popular apologetical work written to be accessible to the common reader, *De Veritate Religionis Christiane* /The Truth of the Christian Religion (1627), neither the concept of sin nor its cognates nor even individual serious sins appear very often. And when they do, the topic is swiftly swept aside. Salvation is not a pressing psychological or social worry, if sin is viewed more as error or treatable disease than as terminal illness.

There are both practical and theological reasons that Grotius extends 'freedom of contract' in the way he does. Practically, many thinkers in his age had been chastened by theological conflicts. They were prevented, whether by others or by self-censorship, from developing theories that touched the exposed religio-political nerves.[17] By removing contract doctrine from a web of notably Catholic and Jesuit theology, thereby generalizing it, Grotius made it both palatable to liberal Dutch Protestants and Remonstrants; and less offensive to the strict Calvinists that governed his land with a watchful eye for 'popery'.

Nevertheless, there would have been many ways to accomplish the same end – some of which could have usefully retained the moral constraints on contract, especially, if he expected it to gain broad acceptance. Grotius could have, for instance, built a general law of contract using uncontroversial or under-utilized stories from the Bible including some already appealed to by the late scholastics: 'Let your yes be a yes', and stories from Judges, respectively. The contextual explanation might eventually account for why Grotius avoided specific paths, but it falls short of explaining why he developed his thought on contract *just as he did*. As a writer of several theological works,[18] Grotius's legal writings also benefit from his theological learning, at times explicitly. I thus look for the theological in the legal, to what Grotius actually believed about God and His creation, positing that without

[15] Decock (2013) 7; Zimmermann, *The Law of Obligations: Roman foundations of the civilian tradition* (Clarendon 1996) 544.

[16] *Ibid* 6.

[17] Mortimer, *Reason and Religion in the English Revolution: The Challenge of Socinianism* (Cambridge 2010) 9.

[18] Some modern editions of his theological works include, Grotius, H. (1990). Defensio Fidei Catholicae de Satisfactione Christi, adversus Faustum Socinum Senensem. Assen/Maastricht, the Netherlands, Van Gorcum; Grotius, H. (2001). De Imperio Summarum Potestatum circa Sacra. Studies in the history of Christian thought, v. 102. H.-J. v. Dam. Leiden, Brill; and Grotius, H. (2012). *The Truth of the Christian Religion*. Indianapolis, Liberty Fund (2012).

accounting for his theology of the will – or 'natural liberty'[19] as he calls it, and explains it using three carefully chosen terms – the question surrounding the origin of his contract doctrine remains only partially answerable.

10.3 The (Free) Will & Law

Mary Ann Glendon says modern law 'touches nearly every aspect of human life, and different areas of the law typically emphasize different aspects of the person.'[20] Contract law emphasizes the will and its activity. This becomes apparent in cases of mistake, coercion, and duress, as well as being implicit in English law doctrines of offer and acceptance. But 'the will' often serves as a placeholder; a name without a face, or a name with too many faces. In discussions about contract, it is variously: choice, wish, desire, that which is chosen (or would have been chosen if not coerced), that which chooses; evidence of intention to form legal relations, or to be bound contractually, or of consent. However construed, the will either refers to a true psychological will, or to a presumed or attributed will, for instance, that of the reasonable man or of the diligent man in such-and-such circumstances. It serves so many functions as the point of justification of, brief explanation of, or some ultimate place of origin for, contractual obligation. Yet, the term 'will' neither refers to a well-developed concept, nor usually does it assume anything that could be called a philosophy of the will.

Except, that is, when it does. The late scholastics knew what was meant by 'the will'. They knew its activities, its freedom and virtues, its limits and vices; and they could divide it out from the other parts of the soul with some precision. Although some nineteenth century will-theories also benefitted from a clear-cut doctrine of the will (particularly amongst German jurists), modern contract doctrine generally does not.[21] If there is a coherent philosophy of the will operating, a rational reconstruction would need to be done before conceptual analysis is possible. The absence of a clear *concept* does not leave modern contract doctrine bereft of doctrines relating to the will.

Grotius flirts with a few ideas of the will, often implicit in notions such as 'natural liberty' and '*sui juris*', and importantly with the use of the term 'αὐτεξούσιον', all within a theological context that is descriptively reactionary (which I detail below). It was anti-Calvinist regarding determinism and predestination, and thus regarding the doctrine of the free will. This may have led him to cleave to freedom wherever it could be found, and to freedom in its most accessible form. It also could have led to producing less well constructed concepts than a constructive theory might have. It is also the case that Grotius is not a careful philosopher, who seeks conceptual clarity and logical rigour above all else. He is too historically-minded,

[19] *De Iure Praedae Commentarius*, (Williams and Zeydel trs, Oxford 1950) 1:18.

[20] Mary Ann Glendon, '*Conceptualization of the Person in American Law*'. (Vatican City 2006).

[21] Gordley (1991), 162–164.

such that more than a third of his universally famous tome consists of quotes from long-dead authorities; as well as at times too much of a jurist. He does, however, manage to present both a notion of the meaning of the free will and clearly indicate its centrality to his contract doctrine.

10.4 The 'Person of Law'

The vessel that carries Grotius's doctrine of the free will forward is his 'person of law', namely, he to whom law is addressed or for whom it is written. This logically pre-legal entity (substance) is a natural person (a moral entity), *who* also might be given legal personality, as a 'person in law'. There is then a shared vision between legal philosophy and law that can thereafter be used to justify the law. I here offer – and in the following sections start at defending – a rationally reconstructed definition of Grotius's 'person of law' as: he who is owner of his own liberty as property.[22] When consenting and promising he does so with that very 'property', referring back to the 'self-conscious *dominus* who [could] decide to do whatever he wants with his private property', but now adding Grotian self-ownership to the mix.[23]

Grotius' substantially libertarian vision of man, which I endeavour to show in his own words below, is a specific form of volitional personhood. In a system designed for a libertarian 'person of law', one would expect the 'person in law' to be given broad contracting powers. Said otherwise: Where there is a positing of *natural* freedom of contract, as in Grotius, the legally-sanctioned freedom to contract should be great (barring system-specific reasons curbing freedom), or greater than it would otherwise have been with a more limited notion of freedom active. Now, Grotius was neither a legislator nor a judge. And the life of the Grotian person in law, say, in the European legal codifications lies outside of the scope of this paper. Below, however, I do suggest just how free he might permit his 'person in law' to be by way of implication.

In contrast to the Grotian 'person of law', the contract doctrine of the late scholastics had as its 'person of law' a moral agent with a particular hierarchy of faculties, bound to a particular hierarchy of goods. This moral agent, a '*persona*', was not far from what one finds in Thomas Aquinas. Put crudely: reason (or understanding, intellect) was meant to rule the passions (or appetites, desires, whether for good or bad) by way of the will (the 'intellectual appetite', which is also the 'power of choice').[24] This was fundamentally in line with earlier scholasticism, where the Boethian inheritance affirmed that 'person' is '*naturæ rationalis individua substantia* /the individual substance of a rational nature.'[25] Any freedom that was to be

[22] Partially derived from Richard Tuck, *Natural Rights Theories: Their origin and development* (Cambridge 1998) 60, 69.

[23] Decock (2013) 213.

[24] *Summa Theologiae* Ia.83.4 co (free-will); Ia81 (sensuality); Ia.79.8 (reason).

[25] Boethius, *Contra Eutychen et Nestorium.*

enjoyed could not be detached from reason, and reason was to be ordered to the good. With this 'person of law' in place, Christian moral philosophy transformed the *ius commune*, resulting in the restoration of 'freedom of contract'. Eventually, the 'person in law' was made to bend to the reality that was the *persona* of the later scholastic tradition, resulting in the legal revolution described by Decock.

10.5 Contract as Promise

Grotius's point of departure in thinking about contract doctrine is the conclusion of the late scholastics: 'The moral theologians reorganized the *ius commune* tradition on contracts around the meeting of individual wills as the natural, necessary and sufficient cause to create contractual obligation.'[26] The result is that legal contract is at bottom a juridical form of natural promissory powers, given social form; exercised in as much freedom as conscience, convention, and (material) scarcity allow. Grotius deals with promise immediately before contract in *The Law of War and Peace*, and substantially follows the logic and themes that are mentioned in the above quotation.

The intellectual background to the elevation of the will in contractual obligations is referred to as 'consensualism'. A doctrine of consensualism developed by the late scholastics is taken up by Grotius and folded into his natural rights theory. The result of consensualism in modern law is that it is now 'normal to call an agreement between two or more persons a contract or convention and use these words as synonyms.'[27] It is true that jurists of the sixteenth century school at Leuven professed *pacta nuda sunt servanda,*[28] but this had not yet been translated into a *general* rule in legal discourse (even if it had already been present in canon law, and was enforced there). It also deviated from the long-held Roman law principle that clearly separates a formless agreement from contracts as recognized agreements, enforced by actions.[29] Pacts lacked such enforcement and were therefore 'naked'. Even stipulation, a promise to do what the other party asks, required a formality in order to be enforceable. 'Consideration' in English contract law is a small example of the sort of extra assurances or formalities that the Roman law once required to 'clothe' contracts.[30] At times specific words were what the Romans wanted, and one could be bound to them, *even if one did not promise or intend to be bound*. Consensualism

[26] Decock (2013) 10.

[27] 'Change of paradigm in *contractus*', in Boudewijn Sirks (ed), *Nova ratione: change of paradigms in Roman law* (Wiesbaden: Harrassowitz 2014).

[28] Waelkens, 'Was er in de zestiende eeuw een Leuvense invloed op het Europease contractrecht?' in Tilleman and Verbeke (eds) Actualia vermogensrecht (Brugge 2005) 3–16; Decock (2013) 42.

[29] The consensualist principle is also in the *Decretum Gratiani.*

[30] Note that consideration was not a Roman law doctrine.

relies on promises being at the heart of contracts; whereas many forms of contract did not require it or look for evidence of it.[31]

Decock calls the result 'the victory of consensualism' as it offers a 'voluntarist account of contractual obligation'[32] Freedom of contract grants 'contracting parties the possibility to enter into whatever agreement they [want] on the basis of their mutual consent'. Moreover, '[t]hey could have the contract enforced before the tribunal of their choice'.[33] Again, this did not result in the ability to contract anything at any time. It emerged first amongst jurists many of whom were also moral theologians. Whilst nineteenth century versions of will theories of contract were 'characterized by the absence of moral considerations', so much so that fairness in exchange was seen to contest 'freedom of contract', earlier versions were safely ensconced in the world of the traditional pagan and Christian virtues and vices, divine revelation, natural law, and practical reason.[34]

This was a dramatic change. It was not only that 'Roman contract law did not universally recognize the principle that agreements are enforceable by virtue of mutual agreements alone'.[35] Although actions and remedies of various kinds were scattered about the law, there was not even a general category of contract in Roman law until the moral theologians developed one. As far as actionability based solely on consensualist grounds, for instance sale, lease, mandate, and partnership, those formed a small set.[36] The natural law principle used to turn contract law toward consensualism was that all agreements are binding, supported by Holy Scripture: 'Let your yes be a yes' (Matthew 5:37).

With the victory of consensualism, it became necessary to have only three things for valid contractual obligation: *Animus obligandi* / the promiser's will to be bound, *promissio externa* /communication of the promise externally, and *promissio acceptata* / the promisee's offer of acceptance. All accepted offers are binding.[37] Fictitious promises, such as a case in which one party was not in possession of an *animus obligandi* were considered by many not to be binding, since that is the essence of promise.[38] Early modern scholastics contributed by consecrating and systematizing this new paradigm.[39]

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[31] Consensualism in D 2,14,1–3 relies on the parties being of one in mind about what they want, because only then do they agree. Such agreement is at the heart of all contracts (according to Pedius and Ulpian). Stipulation is a crude (and partial) form of consensualism because the answer 'yes' to the question is a formal and evidentiary way of consenting. In Republican times error was not allowed in stipulation, suggesting the consensualism of Pedius did not lie at heart of it.

[32] Decock (2013) prologue and 163; 142 (victory of consensualism), 153 (*pacta nuda*), 339 (general principle of contract).

[33] *Ibid* prologue.

[34] *Ibid* 1.

[35] *Ibid* 2–3.

[36] Gordley (1991) 3–4, 69–71 notes Soto, Molina and Lessius; Decock (2013) 3.

[37] Decock (2013) 163, 178.

[38] *Ibid* 193.

[39] *Ibid* 162–163.

10.6 Contract as Private Legislation

It is hard to underestimate just how invested certain Jesuits in the generation just before Grotius were in this consensualist approach to contract, with the obvious caveat that enforcement had to take place in order for consensualism to work. But with universal enforceability of agreements in place, they had secured a guarantee for freedom (*libertas*), a value that they esteemed to be priceless.[40] Leonardus Lessius (1554–1623) is the spiritual and intellectual progeny of that tradition and one of the sources from which Grotius collects his esteem for liberty.[41] In those who follow Lessius, such freedom was envisioned by the return of the old metaphor of contract as a form of private legislation.

The near-contemporary of Grotius, Tomás Sánchez, says: 'Every obligation which does not ensue from a law comes into existence through the private will of man', adding, 'so where the will is absent, the obligation is absent.' And further: 'promissary [*sic.*] obligation arises out of a private law which the promisor imposes upon himself, but no law is binding unless the legislator intends it to be binding [*nulla lex obligat nisi legislator obligare intendat*]'[42] That was published in Antwerp in 1620, only 5 years before Grotius's *De iure belli*.[43] All of which relies on '*voluntas libertatem possidens*', that the will is controlled and controllable, either self-regulating or regulable by some other power,[44] such as reason or the 'self' in Charles Fried's conception.[45] Self-ownership *of a kind* is being sought by way of the will; the will *possesses* freedom.

Nevertheless, it is not yet called 'ownership of liberty' or construed as a form of *dominium*. Yet, one can see that the leap to shore is now not far. A curious fact is that there were other signs of ownership, more evidentiary ones, that could have been used, but were not. Decock notes that 'Lessius thinks it is the very sign of ownership that he who owns goods has the arbitrary power also to destroy them even out of pure lust, such as killing for pleasure [*perimere voluptatis causa*]'[46] The careful

[40] Decock (2013) 163.

[41] At least 24 overt references to Lessius occur in *DIBP*.

[42] Tomás Sánchez, *Disputationes de sancto matrimonii sacramento* (Antverpiae 1620) 30 (I.I.9.5) translation at Decock (2013) 193–194, where he discusses this locus and similar positions of early modern scholastics on contract as private legislation. Error and vices of the will are where volitional contract doctrine easily approaches difficulties, since each only ever has access to his own '*animus*'.

[43] Whether Grotius ever read Sánchez's *Disputationes* is unknown to me. But these themes return below in in Grotius's notions of αὐτεξούσιος and natural liberty.

[44] Decock (2013) 163.

[45] Charles Fried, *Contract as Promise: A theory of contractual obligation* (Harvard UP 1981) 21; at 137n9 Fried commends, and I second, P. S. Atiyah, *The Rise and Fall of the Freedom of Contract* (1979) 41–60, 649–659 for Anglo-American writing on promise from Hobbes to modern times; For the obligation of promise from the element of reliance, see Neil MacCormick, 'Voluntary Obligation and Normative Powers' *Proceedings of the Aristotelian Society*, supp. Vol. 46 (1972) 59.

[46] Decock (2013) 166; Lessius, *De iustitia et iure* II,3,3,8.

construal of certain forms of *dominium* that man could have, would certainly make *dominium* of liberty arguable on such evidentiary grounds: it is only the man in question who can destroy his liberty by contractually binding himself with it; ergo, it is his *dominium*. It is not clear if Grotius knowingly tracked this route by way of the *ius abutendi*. However, I am inclined to believe he did. It is now time to allow him to speak for himself.

10.7 Grotius on 'Natural Liberty'

Grotius's *De Iure Praedae Commentarius* (1604–1608)[47] gives us the major elements of the phrase I am using as his 'person of law': he who is owner of his own liberty as property.[48] He writes:

> Fecit enim Deus hominem αύτεξούσιον, liberum suique juris, ita ut actiones uniuscujusque et rerum suarum usus ipsius, non alieno arbitrio subjacerent, idemque gentium omnium consensu approbatur. Quid enim est aliud naturalis illa libertas, quam id quod cuique libitum est faciendi facultas? Et quod *Libertas* in actionibus idem est *Dominium* in rebus. Unde illud: *Suae quisque rei moderator et arbiter*.

> God created man αύτεξούσιον,[49] free and *sui iuris*, so that the actions of each individual and the use of his possessions were made subject not to another's will but to his own. Moreover, this view is sanctioned by the common consent of all nations. For what is that well-known concept, "natural liberty," other than the power of the individual to act in accordance with his own will? And liberty in regard to actions is equivalent to ownership in regard to property. Hence the saying: 'every man is the governor and arbiter of affairs relative to his own property'.[50]

Citing Aristotle immediately before and Plato immediately after this passage, he sandwiches this divine authority as the heart of the matter: 'God created man… free', Grotius says. Theologically there is no determinism, but freedom of the will, which he suggests is synonymous with 'natural liberty'. He communicates that *faith* into a legal reality in contract doctrine, first by proceeding to derive basic principles of justice: 'From the foregoing considerations the rule of good faith is derived: What each individual has indicated to be his will, that is law with respect to him. /

[47] For dating of the manuscript in relation to the development of his doctrines of law, see: Martine Julia Van-Ittersum, 'Dating the Manuscript of De Jure Praedae (1604–1608): What Watermarks, Foliation and Quire Divisions can tell us about Hugo Grotius' Development as a Natural Rights and Natural Law Theorist'. In: *History of European Ideas*. 2009; Vol. 35, No. 2. pp. 125–193.

[48] Although *DIP* (1604–5) remained in limited circulation until its publication in 1868, its influence on Grotius's *Mare Liberum* (1609) – which was a published section of *DIP* – and *DIBP* (1625) are discernible.

[49] For a use of '*exousia*' as authority, see Romans 13:1ff.

[50] Translation, slightly corrected by me, from Grotius (1950), 1:18. Cf. 4.35.21 for partial; substantially repeated in *DIBP* II.5.6, II.20.48.2n6, II.21.12.

Hinc illa fidei regula, *Quod se quisque velle significaverit, id in eum jus est*'.[51] As is evident in the longer passage, Grotius understands natural right and the original acquisition of a right of ownership to be based on control (persistent 'occupation' by way of the will).[52] This volitional route to (original) ownership shows up regularly in his treatises. It is thought by Grotius to be a logical extension of 'natural liberty' plus natural right: the will in the service of self-defence (broadly construed to include 'chastity') and self-preservation.[53]

What about the two terms he relies on: αὐτεξούσιον and *sui juris*? Regarding '*sui juris*' there is a juridical use that would not necessarily include natural liberalism. For the Romans it meant 'self-determination', 'being one's own *pater familias*', which would come with the end of paternal control, usually after the current *pater familias* dies.[54] In the middle ages '*sui juris*' status would be recognized at the age of majority. But Grotius's great legal treatises are not about the law of majority. They are about the law of nature in specific instances, especially in places where law has not or refuses to take cognizance, various untamed wildernesses of land and sea, as well as the 'moral desert' of war. There, law is only provided by the private legislator. '*Sui juris*' is thus best understood to be another way of presenting the workings of 'natural liberty' in ways that would cause agreements to be forged, promises to be made, and contracts to provide order. Grotius teaches that man is naturally sociable.[55] Robinson Crusoe has the capacities implied by *sui juris* even while alone in nature; but he is not meant to remain alone in nature. Being *sui juris* among others entails exercising the will as a source of order.

In *DIBP*, αὐτεξούσιος occurs three times, with Grotius seeming to use it in the same sense as in the passage from *DIP*. In one instance, a child which is no longer living at home and is grown is 'altogether αὐτεξούσιος, at his own disposal' or 'on his own'.[56] It, however, would seem to embolden the claim of *sui juris* but shade its meaning a little differently, appealing to being one's own *authority*, rather than a self-legislator.[57] One might even see a logical priority, placing authority prior to

[51] Concerning just how 'free' Grotius thought our divine endowment made us: he endorsed the freedom to act, but did not advocate the abolition of guilds, for instance.

[52] *DIBP* II.III.1ff.

[53] *Ibid* II.I.5–7.

[54] Once '*major*', you are no longer under the guardianship. With the Romans it meant 'the state of self-determination', since one had to be emancipated or wait until one's *pater* died.

[55] *DIBP* II.I.9: "…we are drawn to friendship spontaneously, and by our own nature'.

[56] *DIBP*, II.6, and also II.XX.48.2n6 and II.XXI.12.

[57] The famous 'αὐτεξούσιος' statement of *DIP*, I.18, is repeated in *DIBP* II.5.6, II.20.48.2 n.6, II.21.12. Grotius relies on the concept of '*sui juris*' which he allows to retain the meaning of the late scholastics. Yet, he might have changed its legal use. [I must investigate how it was used by, e.g. Donellus. Was it more restricted (i.e., related to the Germanic *Vormundschaft* [guardianship] and *voogdij* [ditto])? Grotius's *Inleidinge tot de Hollandsche Rechts-Geleerdheid* / Introduction to the Jurisprudence of Holland (The Hague 1631) is rather disorderly: II.1.47 & III.1.12 offer a broad sense. But in I.4.1 he merely distinguishes between '*mondigen*' [with a voice] and '*onmondigen*'. The first are defined narrowly as '*qui personam habent standi in judicio*'. Thomas Hobbes notably inherits Grotius and declares, to paraphrase him, '*Veritas non facit legem. Auchoritas facit legem*.'

legislation, such that it is the more basic fact (right) of nature. However, there is not much textual evidence for just how he wants it to be interpreted, and so this remains speculative. Below I dig into a possible source of the term in order to find some indication of how it would have been understood by Grotius's contemporaries, and thereby to suggest how it might be employed by him.

10.8 *Liberum* & αὐτεξούσιος

Grotius was allied with the theologians and statesmen in Holland supporting a doctrine of the radically free will against doctrines of divine predestination. These libertarians include the protestant theologian Jakob Arminius and the Remonstrants Brotherhood that was, and is still, associated with his theological legacy. Against them was Franciscus Gomarus and his Gomarists, called '*contra-remonstranten*' in Dutch, which included the strict Calvinists.

Grotius, although not known to be a member of the Remonstrants, did travel to London in 1613 in order to defend to His Majesty, the King of England, the orthodoxy of the Remonstrants Brotherhood.[58] Remonstrants differed from orthodox Calvinism on points affirming the free will: conditional (rather than absolute) predestination; universal atonement (anyone can choose God, for God has elected all); the possibility that one can resist divine grace (with the will); and the possibility of relapsing from grace (again with the will).[59] Their position was finally condemned, with political consequences to follow, at the Synod of Dort in 1618–19.

At the time, it might have been thought that belief in the doctrines of Arminius, along with other supposedly 'Catholic' or Jesuit-friendly teachings, meshed with foreign sympathies.[60] The Spanish crown had been expelled finally from the northern Low Countries within living memory. As noted above, the Jesuits had had an intellectual love affair with the restauration of the freedom of the Christian, and freedom as a divine good. Lessius was spreading a love of liberty – at the same time as Arminius was teaching – only a few cities south of the border in Antwerp. And Grotius's enemies were all too quick to smell 'popery' anywhere that their doctrines were denied. Moreover, any strong teaching on freedom seemed to lend itself to a Pelagian interpretation of salvation: that man has the power within himself to save himself (albeit only since God had done all the work already through Christ), which Augustine had been at great pains to reject, and which the Calvinists, purportedly following Augustine, condemned at Dort.

From either side Grotius was a proponent of the free will: as a theological claim about man as created by God '*liberum*' and αὐτεξούσιον; and as a residual claim

[58] Th. Marius van Leeuwen, Keith D. Stanglin, and Marijke Tolsma, eds. *Arminius, Arminianism, and Europe: Jacobus Arminius (1559/60–1609)* (Brill 2009) XVIII.

[59] 'Remonstrants' (2013) *The Columbia Electronic Encyclopedia* (Columbia UP) <encyclopedia2.thefreedictionary.com/Remonstrants>.

[60] Th. Marius van Leeuwen et al. (Brill 2009) 84.

about man's current state in the world, remaining *sui juris*, despite the effects of sin. But the most interesting and startling of Grotius's terms still has not been contextualized.

10.9 De libero arbitrio

These debates about the will were waged in terms of *voluntas* and *arbitrium*, with the opponents not always carefully distinguishing the two concepts. Grotius takes the debate up in very different terms, within his treatise on the law of plunder. And it is especially his use of αὐτεξούσιος that interests us. Where does it come from, and why that term?

The answer might be from Jakob Arminius himself. There exists a list of theses from a debate held in Basel between Jakob Arminius, while he was still a student, and Johann Jakob Grynaeus, who was also his teacher. It is not known (to me) whether the terms of the debate were chosen by the proponent or the opponent, something for which more research would need to be done. I have found no evidence that anyone has formerly presented these theses as the clue to a origin of Grotius's use of αὐτεξούσιον:

De libero arbitrio disputatio theologica
Johann Jakob Grynaeus
Basileae, Anno 1583[61]

1. The mind shows for the praise of God and our edification, that God indeed is *autexousios*, and a most freely acting agent, but that man is *hupexousios*, such that his liberty is circumscribed by his position and place in the universe (*centro spacioque*), namely by the law of God.
2. To him alone is rightly ascribed *he autexousiotēs*, who since he is supremely good, understands, wills, and makes – immutably and most perfectly – only that which is good; and he is supremely alien to every evil thing. But God alone is of this kind. Therefore, he alone is most perfectly *autexousios*.
3. On the other hand, to him is rightly ascribed *he hupexousiotēs*, who although in the beginning had been established both pure and good (but changeably / *sed mutabiliter*) unto the image of God, such that *ek prohaireseos* (from choice or decision) could obey God if he wished, by a willful disobedience made himself a slave of sin and freed himself from righteousness: but freed by the Son, becomes a slave of righteousness, and freed of sin, by the healed powers of understanding and choice within him. When once he has been perfectly restored (*restitutus*), he shall not be able to sin. Man is this kind of thing, by whose salvation the glory of the grace of God is manifested. He therefore is truly *hupexousios*.
4. …

[61] Translation made possible with help of Brian Lapsa.

5. A dutiful freedom (*pia libertas*), when it was joined by servitude to justice and righteousness, was gloriously manifested once in the state of creation, when man was first made right, and he was able not to sin, but he was also able to sin. Now, it shines forth in the grace of the one who regenerates by a state in which flesh and sin are mortified, and in man is established *eutaxia* (right ordering) of his powers, and someday *energia* will shine forth perfectly and perpetually in the state of our full redemption (*instauratio*): in this flourishing state, man will not be able, by choice (*ek prohaireseos*), not to obey the Lord his God, and indeed (to do so) perfectly.

Grotius's words were: '*Fecit enim Deus hominem αὐτεξούσιον, liberum suique juris*'. The accusation against Pelagius by Augustine, and the tradition that followed him, was that he was making God's work in salvation unnecessary. It would seem that Grotius does the same, by applying a category, formerly reserved for God, to man. Such a man has little need of grace in order to do the right thing. This could also explain why Grotius says so very little about the (lasting) effects of (original) sin. Said differently, Grotius merges a doctrine of creation with a doctrine of salvation: man remains more or less as God created him, free, αὐτεξούσιον, and also capable of being *sui juris*.[62]

10.10 The Limits of Freedom

Yet, one should not be tempted into thinking that Grotian 'natural liberty' is naked liberalism or even antinomianism. But the radical – novel even – claim of *perpetual* natural liberty must be addressed.

Originally one's duties and responsibilities, such as the familial responsibility to keep the property for the next generation, the *patrimonium*, were nothing that could be the subject of contract and could only be alienated from one by, say, moral turpitude (illegal forms of) or dire necessity (war). Grotius does not deny those obligations. But neither does he enumerate them. Moral considerations are notably absent in Grotius's understanding of legal obligation (if understood as perfect obligation). Where they return are in pious advice as to what a Christian *should* do (rather than what he *must* do, say, to avoid sinning). Following the Apostle, all things are permissible, if not all are profitable. As with the Apostle 'all things' for Grotius did not mean 'everything', but 'many things', or anything not strictly forbidden by natural liberty or divine law, particularly the New Testament.

Something libertarian present in Grotius later becomes definitional of modern contract doctrine. This is especially notable relating to his theological liberalism, which stands against both determinism and predestination: 'God created man… free.' Moreover, there is also liberalism in the role and priority of individual persons in Grotius, in the formation of legal orders and the derivation of the powers of the

[62] See Henk Nellen, Hugo de Groot. *Een leven in strijd om de vrede*.

state from the individual's natural liberty (as natural right).[63] The logical conclusions of this will be guarded against by later jurists, since self-slavery is one obvious eventuality under a doctrine of liberty as *dominium.* Modern contract doctrine tends to stand against total property of one's liberty, as the scholastics did, in order to protect that very liberty.

Secondly, 'natural liberty' in its sundry philosophical cognates is almost as old as political philosophy itself. Grotius is correct when saying he is using a 'well-known concept'.[64] However, placing man in a state of freedom before society – defining it as 'the power of the individual to act in accordance with his own will' – or allowing that men retain natural liberty even after being members of society (meaning, an implicit right of revolt), is new. As Richard Tuck points out: 'In Aquinas, men do not have a *prima facie* natural right to liberty any more than they have a *prima facie* natural right to dominate other men.'[65] Being born free and possessing Grotian 'natural liberty' are different things altogether.

That men were born free, and what its implications might be for society, were always objects of discussion. A surprising number of ancient sources agree with *in principle* free birth – or they lean in that direction – which implies a (limited) doctrine of natural liberty. None, however, imagine man to enjoy this perpetually, or as an inviolable part of his nature, like possessing a free will. In that case it could always be invoked as a right against society, not only for revolt but also for reform. It is thus no accident that natural rights become just that sort of tool following Grotius.

Free will is a concept that emerges in Augustine's thought, but 'freedom' has been with law for much longer, both as a value and a goal. It is noteworthy that *The Institutes of Justinian* indicate that freedom should be striven for. There is, however, no *principle* of freedom (such as a right) as the starting point or judge of the justice of law. There is, moreover, no extra-legal 'freedom' (*qua* principle) on which the law rests or which it guarantees, even if men are, as it says, 'born free'. A formal *bias* in favour of natural liberty or basic freedom *within the law* can easily be discerned in the *Institutes*, for instance, in its manifold laws against the unnecessary perpetuation of slavery. It also claims to be law 'for persons'. Since those 'persons of law' are not defined within it, logically they must pre-exist the law, and the law guarantees them civil protections that declare:

> A freeborn man is one free from his birth…whether both [parents] be free born or both made free, or one made free and the other free born. He is also free born if his mother be free even though his father be a slave, and so also is he whose paternity is uncertain, being the offspring of promiscuous intercourse, but whose mother is free.[66]

Some favour is shown to those who are of 'mixed' birth'. But what is more curious is how the passage continues to hope for freedom, right up to the last minute: 'It is

[63] *DIBP* II.XI.

[64] Grotius, *DIP*, 1:18.

[65] Tuck (1998) 20.

[66] *Institutes* (Moyle tr, 5th ed., Oxford, 1913) I,4 'On Free Birth' and following.

enough if the mother be free at the moment of [the child's] birth, though a slave at that of conception'. All the more, the rule even allows that a child be born free if the woman was free at the time of conception, and enslaved before the birth of the child. This is held, 'on the ground that an unborn child ought not to be prejudiced by the mother's misfortune.' We are finally told in this remarkable passage that Marcellus thinks, and Justinian agrees, that 'it is enough if the mother of an unborn infant is free at any moment between conception and delivery' for the offspring to be born free.[67]

Thus, it is not uncommon in legal systems for the prejudice to be on the side of freedom. Yet I know of no assumption of perpetual 'natural liberty', as Grotius sketches it, to be found in the ancient sources or in the Canonists and theologians who contributed to the development of freedom of contract. What are some other implications of the liberty of perpetual natural liberty? It proves to be both the blessing and the bane of the Grotian legacy in modern contract doctrine. For, it also frees man from the moral constraints on his liberty which formerly were thought to be just as natural as the liberty itself now is thought to be.

10.11 Natural Liberty and Conscience

What is often missed about Grotius's concept of natural liberty in legal or political analysis is its distance from any spiritual authority outside of rights exercised in nature. The theologians who incubated the freedom of contract could not imagine contractual obligation operating outside of the bounds of that which involves both regulation of the body and of the soul. In the world of man, law regulated both internal and external fora. Here the 'Protestant' part of Grotius's thought comes to the fore. The spiritual jurisdiction of law over the soul was removed from the Protestant church with the abolition of confession.[68] With the removal of an external check on the *forum internum*, conscience was gradually 'personalized, privatized and subjectivized'; yet, 'the rules of conscience were originally thought to be almost as objective as legal rules'[69] At the height of the influence of moral theology, '[a] theologian claiming to be able to solve a case of conscience without the support of the civilian and canon law tradition was considered to be arrogant.'[70]

Grotius's notion that man is created 'free', and especially the appeal to authority in αὐτεξούσιος, includes a spiritual freedom from external authorities (i.e., non-divine, for the Bible is still the word of God) as the condition. If convention has placed (or places) a church or body of law over oneself, which does not contravene

[67] *Ibid.*

[68] Decock (2013) 27–28.

[69] *Ibid* 27–28. Recall that the English Court of Chancery is also called the Court of Conscience, which means little when compared to the modern notion of 'conscience'.

[70] Decock (2013) 40.

natural right (i.e, protection of life, limb and the things necessary for life[71]) *and* allows natural liberty (self-regulation in practice), then it is to be granted the authority that commands obedience in us. Moral and legal authority begin in 'he who is the owner of his own liberty as property'. Grotius's defence of the state's power of punishment on the private right of defensive war illustrates this ably.[72] The tradition of increasingly isolating considerations of liberty from considerations of morality in modern contract law and its attendant disciplines, is a faithful adherence to the residual belief that God creates each of us αὐτεξούσιον.

[71] Summary of Grotius's natural right in *DIBP* II.I.

[72] *DIBP* II.I.16.