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Law, Religion and Debt Relief

Balancing Over the "Abyss of Despair" in Early Modern Canon Law and Theology

Wim Decock

Abstract

Debt forgiveness is at the heart of the Gospel message. The Lord sent his Son to redeem the debts of the world as created by Adam and Eve and transmitted to the subsequent generations of man. The New Testament restored older Biblical ideas of debt relief such as the Jubilee. In the Lord's prayer God is begged to forgive us our debts, as we also forgive our debtors (Mt 6:12). Yet, what, if anything, does that mean for legal practice? Is there a Christian way of collecting debt and enforcing contractual promises? Should Christian creditors refrain from exercising their rights? This paper wants to explore the responses given to these questions by canon lawyers and moral theologians in sixteenth and seventeenth century Europe, many of whom belonged to the so-called "School of Salamanca". They took natural law as the ultimate yardstick to evaluate the lawfulness of man's actions in the world. We will conclude that these moral and legal experts were sensitive to the needs of indigent debtors, but certainly not to the point of promoting cancellation of debt. They insisted upon the bindingness of contractual promises (*pacta sunt servanda*), considering extension of payment to be the most appropriate manner to deal with insolvent debtors. Debt relief in the strict sense of the word raised only suspicions, since the marketplace is subject to the dictates of justice, not charity.

Statement of Originality

The article has not been published elsewhere and has not been submitted simultaneously for publication elsewhere.[1]

Corresponding address

Prof. Dr. Wim Decock
KU Leuven - Faculty of Law
Tiensestraat 41 – box 3453
BE-3000 Leuven

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Law, Religion and Debt Relief

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1 INTRODUCTION

This contribution will investigate the practical answer given by early modern canon lawyers and Catholic moral theologians to the question of what legal grounds exist to relieve indigent debtors from their miserable plight and prevent them from falling into the "abyss of dispair" (*baratrum desperationis*).[2] Often referred to as "the late scholastics"[3] or "the early modern Catholic scholastics"[4], they are also called "early modern natural lawyers"[5], because their work started from natural law as the ultimate criterion to solve moral and legal problems, for instance regarding debt relief. Many of the theologians and canonists selected for study were connected to the so-called "School of Salamanca", others were active in Italy or the Low Countries, but the fundamental question remained the same: what are the legal grounds, especially deriving from natural law, to grant debt relief?[6]

[2] The term is borrowed from Juan de Lugo, *De iustitia et iure*, Lyons 1642, 1,21,1,10, p. 609. For an engagement with the wider philosophical and theological issues related to debt and debt relief, which fall beyond the scope of this article, see, for instance, B. Piettre and F. Vouga, *La dette. Enquête philosophique, théologique et biblique sur un mécanisme paradoxal*, Genève: Labor et fides, 2015. A larger historical overview is offered by A. Manfredini, *Rimetti a noi i nostri debiti. Forme della remissione del debito dall'antichità all'esperienza europea contemporanea*, Bologna: Il Mulino, 2013. From an anthropological point of view, David Graeber's *Debt. The First 5,000 Years*, Brooklyn NY: Melville, 2010 has become a classic, even if it should be read critically, as signalled in W. Decock's review of the book in *Comparative Legal History*, 2.2. (2014), 349-353. Slightly older but still inspiring is Carl Schmitt's, *Über Schuld und Schuldarten. Eine terminologische Untersuchung*, Breslau 1910.

[3] J. Gordley, *The Jurists: A Critical History*, Oxford, Oxford UP, 2013, p. 82-110.

[4] E.g. R. Ross, "Bargaining with the Soul at Stake: Early Modern Catholic Scholastics and Contract Law", *Jotwell* (April 1, 2013), http://legalhist.jotwell.com/bargaining-with-the-soul-at-stake-early-modern-catholic-scholastics-and-contract-law/.

[5] N. Jansen, *Theologie, Philosophie und Jurisprudenz in der spätscholastischen Lehre von der Restitution. Ausservertragliche Ausgleichsansprüche im frühneuzeitlichen Naturrechtsdiskurs*, Tübingen, Mohr, 2013. On the similarities and differences between early modern Catholic natural law and the Protestant natural law tradition, see M. Scattola, "Models in History of Natural Law", *Ius Commune*, 28 (2001), p. 91-159.

[6] On account of their major impact on the debate both within and outside the early modern natural law tradition, the following authors have been retained for investigation: Tommaso da Vio Cajetan (1469-1536), Juan de Medina (1490-1546), Domingo de Soto (1494-1560), Martin de Azpilcueta (Dr Navarrus) (1492-1586), Diego Covarrubias y Leyva (1512-1577), Pedro de Navarra (d. 1592), Luis de Molina (1535-1600), Lenaert Leys (Lessius) (1554-1623), Johan van Malderen (Malderus) (1563-1633) and Juan de Lugo (1583-1660).
Biographical details on most of these authors can be obtained from J. Barrientos García, *Repertorio de moral económica, 1526-1670: la Escuela de Salamanca y su proyección*, Pamplona 2011.
The editions used for the present research can be consulted online through the digital platform of the "Bayerische Staatsbibliothek" in Munich: https://www.bsb-muenchen.de/index.php.

We will proceed by successively analyzing two types of debt relief that were held to be legitimate: 1) postponement or extension of the deadline for payment (*dilatio debiti*); 2) the remission or cancellation of debt (*remissio debiti*). Only the latter form of debt alleviation qualifies as "debt relief" in the strict sense of the word. It remained the exception, because the Catholic natural lawyers did non want the logic of debt forgiveness to be accepted too easily in the realm of contractual relationships. Emphasis was laid on extension of payment as the most adequate means to relieve poor debtors from the urgent need to pay.

2 THE RIGHT TO EXTENSION OF PAYMENT (*DILATIO DEBITI*)

2.1 Terms of the debate

The early modern scholastics unanimously recognized that poverty entitled debtors to at least temporal relief from repayment. The Franciscan philosopher Duns Scotus (d. 1308) had taken a decisive step in the direction of this proposition by arguing – on the basis of canon law[7] – that the claim of the creditor was temporarily suspended albeit not extinguished by virtue of the incapacity of the debtor.[8] In other words, as soon as the debtor "came to a fatter fortune", he was obliged to pay.[9] In Latin, the state of incapacity urging debtors to seek temporal alleviation from their creditors was referred to as indigence (*inopia*) or impossibility (*impotentia*). Drawing on Aristotle and Thomas Aquinas, the early modern scholastic doctors distinguished between two types of impossibility: physical and moral impossibility.[10] Physical impossibility (*impotentia physica*) was used to denote a situation in which a debtor had absolutely no means of repayment, while moral impossibility referred to a situation where a debtor could pay back but not without incurring difficulties (*impotentia moralis*).[11] The situation of physical impossibility did not give rise to any debate, as it was clear to all jurists

[7] X 3,23,3 (= canon Odoardus).
[8] Duns Scotus, *In quartum librum Sententiarum*, dist. 15, q. 2, nr. 34 in *Opera omnia* (Ed. Wadding-Vivès, Paris, 1894), vol. 18, p. 341: "Quando enim est impotens, pro tunc non tenetur, tenetur tamen post, cum pervenerit ad pinguiorem fortunam, sicut probatur *Extra de solutionibus, c. Odoardus*; sicut etiam in *Gloss*. notatur, quod illa actio non expirat per inopiam debitoris, sed sopitur; unde est illud: *inanis est actio, quam inopia debitoris excludit*. Sed jus agendi manet, sicut obligatio in debitorem, licet sopita."
[9] X 3,23,3 in *Corpus iuris canonici* (Ed. Friedberg, Graz, 1959), vol. 2, col. 532: "Mandamus (…) ut, si [Odoardus] ad pinguiorem fortunam devenerit, debita praedicta persolvat."
[10] L. Molina, *De iustitia et iure*, Antwerp 1609, vol. 3.2 (*De delictis et quasi delictis*), 754,2, col. 1668, referring to Aristotle, *De caelo* 1,11; T. Cajetanus, *Commentarii ad IIamIIae D. Thomae* (ed. Leonina), Rome 1897, vol. 9, ad q. 62, art. 8, p. 61, citing Thomas' lectures on Aristotle's Metaphysics and *De Anima*.
[11] J. Malderus, *De virtutibus theologicis et iustitia et religione*, Antwerp 1616, 4,7,1, p. 405.

and theologians that it was covered by the famous maxim "nobody is bound to the impossible" (*ad impossibile nemo obligatur*).[12]

The heart of the matter concerned moral impossibility. Difficulties in a situation of moral impossibility could arise from an existing situation of necessity (*necessitas*) or appear in the form of risk of future harm or damage (*periculum damni / detrimentum*) ensuing from repayment.[13] Furthermore, the scholastics differentiated between extreme, grave and common necessity. Extreme necessity (*necessitas extrema*) meant that a person was so destitute that he risked losing his life if nobody came to his aid, while grave necessity (*necessitas gravis*) indicated the state of a person who was living such a miserable life that he risked to fall gravely ill if no assistance was provided to him. Common necessity (*necessitas communis*) covered the state of persons suffering hardship and difficulties without end. It was the fate of the poor in the ordinary sense of the word.[14]

More than anything else, extension of payment (*dilatio*) was considered to be the right means to address a debtor's state of moral impossibility. Whether the right to postpone payments could eventually lead to debt relief in the strict sense of the word, that is cancellation of debt, was less certain. It depended, amongst other things, on whether the indigent was in a state of extreme or grave necessity, or if he would merely suffer harm by paying back his debt. Another element that influenced the opinions of the doctors was the condition of the creditor. The right of the indigent to extension of payment was often thought to vary according to the state of the creditor. If both debtor and creditor suffered from poverty, the question arose whose state of indigence should prevail. Equally important was the question whether the behaviour of the debtor had an impact on his right to benefit from extension of payment. If the debtor had contributed to his state of indigence through his own fault (*culpa*), opinions were divided on whether he could still enjoy extension of payment. The following paragraphs will analyze the scholastic debate on these topics, distinguishing between situations of moral impossibility due to necessity or difficulties, respectively.

[12] For the Roman and canon law origins of this maxim, which has found its way into modern legal systems, see Justinian's Digest (D. 50,17,185) and Pope Boniface VIII's rules of law (VI 5,13,6).
[13] See the excellent summary by Jean-Baptiste Bouvier (1783-1854), bishop of Le Mans and author of a widespread manual of moral theology which was indebted to the early modern scholastics, in *Institutiones theologicae*, Paris 1868[13], vol. 6: *Tractatus de iure, iniuria et restitutione*, ch. 5, p. 150-151.
[14] Malderus, *De virtutibus theologicis et iustitia et religione*, 32,6*pr*., p. 224: "Communis necessitas est quam patiuntur communiter pauperes."

2.2 Necessity and the suspension of contractual debt

According to a well-known principle of medieval canon law and scholastic philosophy, extreme necessity suspends the regime of private property and reintroduces the natural state in which all things are common (*omnia sunt communia*).[15] Early modern scholastics such as Dr Navarrus and Lessius were anxious to specify that this did not mean that ownership (*dominium*) was transferred in cases of extreme necessity, but that goods became common as far as the right to use of those goods (*ius utendi*) was concerned.[16] Therefore, the extremely indigent were allowed to vindicate the right to use the goods belonging to other people in order to provide for the conservation of their own life and that of their family and neighbours. Even if there was no doubt that these principles fully covered cases of extreme necessity, there was a continuing debate as to whether they equally applied to a situation of grave necessity. Against authorities such as Cajetan and Soto, Lessius held that grave necessity granted the same rights to the indigent as extreme necessity, considering amongst other arguments that one could easily slip from one state into the other.[17] The consequences of this theory of necessity on the debate about debt relief were obvious. Nobody doubted that a debtor in a state of extreme or grave necessity should be granted temporary relief from his debts. If extreme necessity allowed people to steal, then it certainly allowed poor debtors to postpone payment.

The crux of the debate, however, concerned the question whether a debtor should repay his debt as soon as he recovered from his miserable situation.[18] Generally speaking, the early modern scholastics agreed that contractual debts were merely suspended by a period of extreme necessity. "An obligation created by contract remains," Lessius stated.[19] "By

[15] V. Mäkinen, "Rights and Duties in Late Scholastic Discussion on Extreme Necessity", in V. Mäkinen and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse*, Dordrecht: Springer, 2006, 37-62.

[16] Lessius, *De iustitia et iure*, Antwerp 1621, 2,12,12,67, p. 145: "Dico primo, quemvis in extrema necessitate constitutum posse accipere rem alienam, qua extreme indiget ad vitae suae conservationem. Est communis sententia doctorum. Probatur, quia in extrema necessitate, omnia sunt communia, ut habet receptum axioma, non quod per illam statim transferatur dominium (ut recte probat Navarrus cap. 17, num. 61), sed quia quod ius utendi communia sunt, ita ut licite quivis illis angustiis pressus, possit occupare, sibique vindicare rem quamlibet adeo sibi necessariam et ex eius usu sibi et proximo opitulari."; Cf. Lessius, *De iustitia et iure*, 2,16,1,2 and 8, p. 186.

[17] Lessius, *De iustitia et iure*, 2,12,12,71, p. 146.

[18] J. Medina, *De poenitentia, restitutione et contractibus*, Ingolstadt 1581, Codex *De rebus restituendis*, 3, in principio, p. 20: "Quod non quaeritur, quandiu inopia durat, quia pro tunc non dubium obligationem restituendi dormire, sicut actio creditoris, de qua dicitur: inanis est actio, quam inopia debitoris excludit. Sed quaeritur, pro tempore, quo inops ad pinguem fortunam venerit, an tenebitur tunc ea restituere, quae, cum aliena essent, in extrema necessitate consumpsit."

[19] Lessius, *De iustitia et iure*, 2,16,1,4, p. 186: "Manet ergo obligatio per contractum inducta."

contracting debt, the debtor grants a personal action to the creditor", Bouvier sharply noted,[20] "and that kind of action is not extinguished by supervening necessity". Taking the example of a loan for consumption (*mutuum*), Lugo explained that the money lent had to be returned once the period of extreme necessity was over.[21] Following Pedro de Navarra and Lessius, Lugo reasoned that a loan for consumption transferred the ownership (*dominium*) of the money to the debtor. Hence, the debtor did actually consume his own property during the time of extreme necessity, not that of the creditor. In extreme necessity, you were excused from using the property of another person without necessarily having to make restitution for that use afterwards. But in this case the money had become yours.[22] This rather sophisticated argument explains at the same time why Lugo, following Navarra and Lessius, claimed that, as a rule, in contracts such as loans for use (*commodatum*), pledge (*pignus*) or lease (*conductio*), no restitution had to be made after the end of necessity. In those contracts, the creditor remained the owner of the goods, the debtor had a right to consume them, and the creditor carried the risk when they were lost.[23] However, in a loan for consumption ownership was transferred. Consequently, the debtor always had to pay back the money lent once the state of extreme necessity was over. For the sake of clarity, Lessius recalled that this was also true in the case of a state of grave necessity: in contractual debts in which ownership has been transferred to the debtor, repayment is merely suspended during the time of grave necessity.[24]

2.3 Temporary relief for risk of damage

Controversy surrounded the question of how much weight could be given to difficulties ensuing from payment in granting poor debtors extension of payment, or even discharging them from any form of restitution altogether. Generally speaking, repayment could be made more difficult because of the risk of damage to different kinds of goods: life (*vita*), the soul

[20] Bouvier, *Tractatus de iure, iniuria et restitutione*, p. 153: "Si ante extremam necessitatem debitum contraxerit, et restitutionem legitime distulerit propter extremam necessitatem, ea transacta ad restitutionem adhuc tenetur; debitum enim contrahendo, actionem personalem in se creditori dedit: haec autem actio per supervenientem necessitatem non exstinguitur."

[21] Lugo, *De iustitia et iure*, 1,21,1,1, p. 606: "Si mutuum v.g. acceperas ante illam necessitatem, ob quam excusaris a restitutione, transacta necessitate, debes solvere mutuum."

[22] Lugo, *De iustitia et iure*, 1,21,1,1, p. 606: "Ratio est, quia per mutuum praecedens translatum est in te dominium pecuniae mutuo acceptae. Ergo in necessitate non eguisti pecunia, sed per illam iam tuam necessitati occurristi. Non est ergo, unde excuseris, cum non acceperis alienum ad necessitatem fugiendam, sed rebus tui tibi consulueris."

[23] Lessius, *De iustitia et iure*, 2,16,1,5, p. 186: "Si tamen per contractum non sit translatum dominium, ut in commodato, precario, conducto et in extrema necessitate rem consumpseris, probabile est, te non teneri, nisi re vel spe seu facultate propinqua dives sis. Ita Petrus Navarra (…). Ratio est, quia non teneris ratione rei (…), neque ratione acceptionis, cum eam iure tuo consumpseris, neque ratione contractus, quia isti contractus non obligant re pereunte, nisi culpa tua perierit."

[24] Lessius, *De iustitia et iure*, 2,16,1,15-18, p. 187.

(*anima*), property (*bona externa* / *res familiaris*), reputation (*fama* / *honor*), and social status (*status*). Some scholars, such as Francesco de Toledo and Johannes Malderus expressly discussed yet another, inestimable good: freedom (*libertas*), arguing that nobody should be forced to sell himself into debt-slavery.[25] The remainder of this chapter will concentrate on the issues that were most debated, namely spiritual damage, the risk of material losses and the danger of social status degradation.

2.3.1 Spiritual perils

Spiritual damage or the salvation of the soul was of greatest concern to all, because it is the supreme good for all Christians, more so than status or riches. Indeed, following Antonine of Florence, Lessius quite realistically acknowledged that daughters of poor debtors might be forced into prostitution, or their sons into robbery and crime. Also, the debtor might lose hope and patience and find himself in a situation of despair (*desperatio*).[26] In all of these situations, urging the debtor to pay might force him or his family into sinful behavior and therefore imperil his soul. Hence, theologians and canon lawyers generally agreed that this spiritual threat excused poor debtors from payment. According to Dr Navarrus, "nobody is held to make immediate restitution of another persons' goods of a lower, if this means losing one's own goods of a superior order". Or, as Lessius put it more concretely, "everybody must care for the salvation of his soul and that of his family rather than pay debts".[27] Pedro de Navarra and Malderus qualified this view in the sense that a creditor only had to grant extension of payment for risk of spiritual damage if this risk was real because of the ordinary weakness (*fragilitas* / *infirmitas*) of man, but not if the debtor risked to imperil his soul because of his wickedness.[28]

2.3.2 Material losses

Even if material goods and family property were classified as lower goods in comparison with spiritual salvation, they gave rise to far more extended treatment. A typical case which scholastics adduced to illustrate the difficulties which debtors may face when they do not

[25] Malderus, *De virtutibus theologicis et iustitia et religione*, 4,7,1, p. 406: "Non tenetur debitor sese in servum vendere ut debita restituat. Ita ex communi Toletus lib. 5 cap. 27. Libertas enim est bonum inaestimabile."
[26] Lessius, *De iustitia et iure*, 2,16,1,21, p. 188.
[27] Dr Navarrus, *Enchiridion sive manuale confessariorum et poenitentium*, Antwerp 1575, 17,57, p. 301: "multo minus tenetur ad aliena inferioris ordinis et qualitatis cum amissione propriorum alitoris ordinis statim restituenda"; Lessius, *De iustitia et iure*, 2,16,1,21, p. 188: "Ratio est, quia quisque magis tenetur saluti animae suae et suorum consulere quam debita solvere."
[28] P. Navarra, *De ablatorum restitutione*, Lyons 1593, 2,4,4,38, p. 443; Malderus, *De virtutibus theologicis et iustitia et religione*, 4,7,1, p. 407.

obtain extension of payment concerned the sale of real estate. Under pressure to meet a debt repayment deadline, a debtor may be forced to sell his own house or family property at a fraction of its normal value.[29] Most canon lawyers and theologians considered such forced sale as a major loss that should be prevented by granting debtors a right to postpone payment.

A major impulse to the debate was given by Duns Scotus. The *doctor subtilis* required the creditor to want (*debet velle*) that the debtor be prevented from incurring serious harm rather than that he, the creditor, would suffer minor damage or even no damage at all through the extension of payment.[30] According to Scotus, if a creditor prefers to receive direct payment instead of preventing major harm to his neighbour, then his will is wicked and disproportionate (*male et inordinate volens*).[31] In the early seventeenth century, Lessius further elaborated upon Scotus' viewpoint and argued that under those circumstances the creditor was bound by right reason (*recta ratio*) to assent to extension of payment.[32] If not, the creditor sinned against equity (*aequitas*) and charity (*charitas*). "If my state of affairs is such that I am unable to pay my debts immediately without a big loss to the remainder of my property", Lessius affirmed[33], "then it is licit for me to postpone payment on the grounds of some kind of equity which is deriving from natural law." Drawing on Lessius, Lugo submitted that if the risk of huge patrimonial loss persisted, the debtor could even be discharged from restitution altogether.[34]

Lessius' adherence to Scotus' argumentation is all the more remarkable since Dominican theologians such as Cajetan and Soto had expressly rejected it. Soto affirmed that the risk of serious damage for the debtor did not legally (*iure*) constrain the creditor to postpone payment.[35] The theologian from Salamanca remained unconvinced by Scotus' opinion, arguing instead that the creditor should never be bound to cede his own right in order to

[29] E.g. Dr Navarrus, *Enchiridion*, 17,57, p. 301.
[30] Scotus, *In quartum*, dist. 15, q. 2, nr. 33 (ed. Wadding-Vivès), p. 340: "Consimiliter debet magis velle quod vitetur magnum incommodum proximi restituentis quam modicum incommodum suum vel nullum in illa modica dilatione restituentis."
[31] Scotus, *In quartum*, dist. 15, q. 2, nr. 34 (ed. Wadding-Vivès), p. 340.
[32] Lessius, *De iustitia et iure*, 2,16,1,21, p. 188: "Ratio est, quia in hisce casibus creditor secundum rectam rationem tenetur consentire in dilationem. Contra enim aequitatem et charitatem faceret, si vellet sibi cum tanto alterius incommodo statim satisfieri."
[33] Lessius, *De iustitia et iure*, 2,16,1,22, p. 188: "Quando is est rerum mearum status, ut non possim debitum praestare statim sine magna aliarum rerum mearum iactura, licitum est mihi ex quadam aequitate iuris naturalis differre (…)."
[34] Lugo, *De iustitia et iure*, 1,21,1,20, p. 611: "Ego iuxta supradicta puto, si debita non sint ex delicto, posse quidem detrimentum illud debitoris perseverans excusare in perpetuum a restitutione."
[35] D. Soto, *De iustitia et iure*, Lyons 1582, 4,7,4, p. 135v: "Grave debitoris detrimentum non iure stringit creditorem solutionem expectare."

prevent the debtor from incurring damage, unless in exceptional circumstances of necessity or legitimate poverty – that is poverty not induced by the debtor's own fault. In taking that view, Soto followed Cajetan's earlier criticism of Scotus. Drawing on Roman law,[36] Cajetan argued that nobody could be said to harm another person by exercising or by willing to exercise his own right.[37] He did acknowledge, however, just as Soto, that *impotentia* could excuse the debtor from not paying back immediately.[38] The rejection of Scotus, then, was primarily theoretical in nature. It concerned the rational ground for allowing the debtor temporal relief from payment in case of a risk of damage.

Lessius forged a compromise between the Scotist and Dominican argumentations. He did not maintain that granting relief to the debtor was legitimate by virtue of justice in the strict sense of the word. Rather, he argued that the debtor deserved extension of payment on account of "some form of natural law equity". In modern terminology, Lessius reasoned in terms of "abuse of right". Even though he would have agreed with Cajetan and Soto that a creditor has a legal right not to cede his own right in favor of an ailing debtor, he nevertheless warned against "abuse of right" by appealing to larger moral categories such as right reason, equity and charity. Furthermore, Lessius did not grant the right to payment extension unreservedly.For example, if there was a danger that delay would not lead to payment in the future, then no extension could be granted to the debtor, no matter the cost for the latter.[39] The interests of the creditor, then, could not simply be ignored.

In connection with material damage, a last question that was raised concerned opportunity costs: could forgone chances to make money (*lucrum cessans*) be considered as tantamount to damage? Navarra argued that it could, at least if the future profits were not destined to serve the debtor but the creditors in general.[40] Lessius argued that the interests of several creditors prevailed over the interests of one creditor in particular. Therefore, for the sake of the other

[36] In fact, Cajetan creatively combined two famous maxims from the rules of law in Justinian's Digest: D. 50,17,55 (*Nullus videtur dolo facere qui suo iure utitur*) and D. 50,17,151 (*Nemo damnum facit, nisi qui id fecit, quod facere ius non habet*).

[37] Cajetan, *Commentarii ad IIamIIae D. Thomae*, ad q. 62, art. 8, p. 60: "Sicut nullus damnum alteri facit qui utitur iure suo (…), ita nullus damnum alteri vult qui vult uti iure suo."

[38] Which is rather strange, if risk of damages in payment is seen – as it was by most scholastics – as one form of *impotentia*, namely of moral impossibility.

[39] Lessius, *De iustitia et iure*, 2,16,1,23, p. 188: "Secus est quando tales sunt circumstantiae, ut nisi modo restitutio fiat, numquam sit futura."

[40] Navarra, *De ablatorum restitutione*, 2,4,4,52, p. 447: "Si faceret , ut paulatim multis creditoribus solveret, quibus nequit simul solvere, sine aliquo ex iustis inconvenientibus dictis, ut solutionem differendo lucretur, quo omnibus solvat, bene facere potest."

creditors, a particular creditor had to grant an extension if immediate payment involved an opportunity cost (*lucrum cessans*). If the debtor would lack the opportunity to make profits by restituting the money immediately, then charity (*charitas*) dictated that he be granted extension of payment in the interest of the other creditors. For eventually they will all benefit from the increase in wealth of the debtor.[41]

2.3.3 Status diminishment

The prospect of falling down the social class ladder filled many an aristocrat in early modern Europe with fear, especially in Spain, where more than anywhere else rights and privileges are said to have been stratified along the lines of class dignity, honor and social status.[42] It is small wonder, then, that the risk of damage to honor or social status was considered by the majority of the scholastics as sufficient ground for obtaining temporary or partial debt relief. Drawing on late medieval sources, Dr Navarrus affirmed that a sincere and honorable man was not bound to pay back at once if that meant becoming unable "to live decently according to the dignity of his status".[43] Lessius contemplated the case of a nobleman forced to deprive himself of all his retinue, including slaves and horses – forced also to stay away from his peers; or the case of a member of the high society obliged to take on a laborer's job for which he had received absolutely no training.[44] Those men of status, Lessius thought, should be allowed to postpone payment until they were capable of honoring their debts without endangering their social rank. Using Scotus' vocabulary, Pedro de Navarra insisted that a creditor should not want (*non velle debet*) a nobleman or any man of honour to suddenly become a beggar or earn his living as a manual labourer.[45]

One of the major dissonant voices, however, was Juan de Medina. While admitting that his solution could sound harsh and inhumane, he was convinced that according to the rigor of

[41] Lessius, *De iustitia et iure*, 2,16,1,24, p. 188: "Tunc enim charitas postulat ut creditor permittat dilationem, si commode possit. Quia contra rationem est, ut velis tibi statim restitui cum tanto aliorum creditorum incommodo, quod dilata solutione posset vitari."

[42] For a nuanced historical account, see S.K. Taylor, *Honor and Violence in Golden Age Spain*, New Haven, Yale UP, 2008.

[43] Dr Navarrus, *Enchiridion*, 17,63, p. 304: "Sexto, principaliter infertur, eum qui totum statim restituendo non posset decenter pro dignitate sui status vivere, ad illud non teneri, quamvis id facere, perfectionis esset, ut ait S. Antoninus (…), modo ei sit animus restituendi illud, quamprimum poterit et modo curet ne quid in alios usus quam necessarios et decentes impendat, quo reliquare aliquid et paulatim restituere possit."

[44] Lessius, *De iustitia et iure*, 2,16,1,25, p. 188: "Infertur secundo, si vir nobilis non posset statim solvere nisi privet se omni obsequio famulorum et equorum, cogaturque abstinere a consortio sui similium, et si civis primarius non possit statim, nisi ita se privet, ut cogatur obire artem mechanicam sibi insuetam, posse differre restitutionem, donec absque iactura status sui possint restituere."

[45] Navarra, *De ablatorum restitutione*, 2,4,4,45, p. 445: "Non enim velle debet nobilem aut bonae aestimationis hominem turpiter et subito mendicare aut manibus victum laborando quaerere."

conscience (*rigor conscientiae*) a nobleman could not be safe in conscience if he did not make restitution of all his debts for fear of being reduced to the state of mendicity.[46] By way of consolation, he added that the debtor deserves great merit in the eyes of God if he patiently tolerates that state of mendicity. Another dissonant opinion was held by Luis de Molina. Contrary to Medina, he did acknowledge the special status of noblemen, but he argued that a noblemen's right to extension of payment out of fear for status diminishment could not be universalised. Their relative immunity to the dire consequences of indebtedness was merely the result of specific privileges accorded to noblemen (*hidalgos*) by positive law. Consequently, as a general rule, debtors were obliged to pay their debts instantly and without remorse even at the expense of falling from status and being reduced to poverty.[47] Molina painstakingly tried to defend the prevailing interests of the creditor:[48] "It should not readily be allowed against the creditor's will that the debtor postpones payment, even if it would be necessary for the debtor to fall off his social status, certainly if he is to blame because he got into financial trouble by committing injustice."

2.4 Moral blame, misfortune and the limits of moralising

Should the debtors' own fault in bringing about his state of insolvency have any effect on his right to postpone payment? Especially with regards to the case of status diminishment, the early modern Catholic natural lawyers went on to debate this thorny question. As a matter of fact, it was not uncommon for the nobility, in particular, to run up huge debts and spend beyond their means.[49] It is not entirely clear whether he rejected those practices as such, but just as other scholastics he left no doubt about the wickedness of those squandering their fortunes by indulging in games, gambling and other superfluous things. For those folks, no mercy was shown. "You have to blame yourself," Lessius fulminated[50], "that you are now no longer capable of paying without losing your social status." If a nobleman found himself in

[46] Medina, *De restitutione*, Codex *De rebus restituendis*, 5, p. 60: "In qua videbor quibusdam inhumane respondisse, compellendo nobilem prefatum ad integre restituendum, nec permittendo inde deduci ne egeat (…). Fateor duram esse sententiam, sed loquendo secundum rigorem conscientiae, non video aliter ad quaestionem respondisse esse."

[47] Molina, *De iustitia et iure*, 2,754, col. 1671: "Perperam, inquam, aliquos ex his iuribus ac privilegiis colligere, fas esse universim propter debita differre solutionem, quando, si debitor integre statim solveret, necesse ili esset decidere a suo statu ac mendicare."

[48] Molina, *De iustitia et iure*, 2,754, col. 1670: "Non facile contra creditoris voluntatem est permittendum, debitorem restitutionem differre, esto necesse sit eum a suo statu cadere, praesertim quando ipse fuit in culpa, quod per iniustitiam ad eas deveniret angustias."

[49] Lessius, *De iustitia et iure*, 2,16,1,28, p. 189: "Quod est notandum pro quibusdam nobilibus, qui debita sine fine contrahunt, ut supra conditionem sui status expendant."

[50] Lessius, *De iustitia et iure*, 2,16,1,28, p. 188-189: "Tibi enim imputare debes, quod iam sine status amissione non possis satisfacere."

dire straits and evidence showed that his state of insolvency was attributable to his own fault (*sua culpa*), then he should pay even at the cost of being reduced to a life of poverty.[51] Juan de Medina was known for his particularly tough attitude towards debtors who became bankrupt through their own fault. He adamantly claimed that "regardless of the permanent state of indigence in which the nobleman falls upon integral restitution, he must render all his debts to the owner."[52]

But what if misfortune rather than wickedness was to blame for the debtor's insolvency? According to Molina it was not improbable that misfortune did not excuse from paying debts back immediately. Misfortune is a fact of life, just as fortune is. "Men can acquire riches and through fortune climb from a lower to a higher status", Molina found,[53] "but when fortune turns her wheel, they have to suffer a fall from a higher to a lower status." "On the basis of the nature of things and having regard to the human condition", Molina went on, "superior status is no more due to one man than to another."

Having regard to the whimsical nature of fortune, precisely, Juan de Medina allowed creditors not to grant extension of payment to debtors who risked falling into poverty. "Fortune is variable," he observed,[54] "those who are exalted by fortune today are depressed and humiliated by fortune tomorrow." Therefore, creditors were allowed to fear for their own misfortune, guard themselves against bad times ahead, and exact money from their debtors without delay, even if that meant a debtor could not avoid falling into a state of indigence.

Contrary to Medina and Molina, Lessius found that it was more equitable and true (*aequius et verius*) to grant extension of payment to a debtor struck by sudden misfortune.[55] He abhorred the inhuman consequences of Medina's analysis. The concept of "rigor of conscience" was a contradiction in terms.

[51] E.g. Molina, *De iustitia et iure*, 2,754, cols. 1669-1670.
[52] Medina, *De restitutione*, Codex *De rebus restituendis*, 5, p. 57: "Non obstante egestate, in qua nobilis, facta integra restitutione, permaneret, teneatur omnia, quae debet, suo domino reddere." It must be noted that the context of Medina's harsh diatribe against indebted noblemen is not exactly one of contractual debts but rather of duties to make restitution of stolen goods. His viewpoints were nevertheless taken to have a more general scope by the scholastics themselves.
[53] Molina, *De iustitia et iure*, 2,754, col. 1670: "Sicut homines divitias acquirendo per fortunam ab inferiori statu conscendunt ad superiorem, sic reflante fortuna pati debent descensum ad inferiorem statum; quandoquidem ex natura rei, spectataque conditione humana, non magis uni quam alii sit debitus superior status."
[54] Medina, *De restitutione*, Codex *De rebus restituendis*, 5, p. 57: "Fortuna enim varia est, et quod hodie exaltat, cras deprimit et humiliat (…). Igitur in casu praesenti creditor, etsi ad praesens dives sit, potest idem quod Salomon sibiipsi timere."
[55] Lessius, *De iustitia et iure*, 2,16,1,26 and 28, p. 188 and p. 189.

Importantly, Juan de Lugo was inspired by Lessius to take a fresh perspective on the confused relationship between moral blame, misfortune and debtors' plight. Lugo observed a profound conflict between the speculative principles of Medina and Molina, on the one hand, and the reality of debtors' indigence, on the other. Rejecting their viewpoint as too rigid (*nimis rigida*), Lugo proposed to come up with a solution that was useful in practice – a solution which "did not condemn debtors or throw them in the abyss of desperation (*baratrum desperationis*)."[56]

While acknowledging that the law of the land and human courts had legitimate reasons to apply the rules of debt and credit in the strictest of ways – mostly because of moral hazard –[57] Lugo submitted that a Christian creditor with knowledge of the debtor's despair should act according to truth and conscience by granting extension of payment.[58] In the external court, it is allowed to exact 100 guilders from a debtor even if that means that he is coerced to sell his family property worth 100 000 guilders at a minimal fraction of its normal value and suffer a huge loss. The laws of the land should be enforced strictly so as to deter debtors from living a prodigal life and squandering money at the expense of their creditors.[59] In the court of man, the creditor is allowed to literally "suffocate" his debtor and not cede an inch. A Christian, however, should take the court of God (*Dei forum*) as the ultimate yardstick for his decisions and postpone the deadline for payment instead of being too rigid. Supreme courts, too, should attend to higher principles of natural equity and order extension of payment to avoid debtors from falling into misery and despair.[60]

[56] Lugo, *De iustitia et iure*, 1,21,1,10, p. 609: "Haec sententia [sc. Molinae] licet speculative sustineri possit, in praxi tamen est nimis rigida, nec poterit debitoribus persuaderi, maxime stante praxi contraria in foro interno. Quare quaerenda est ratio ad sustinendam praxim, et non condemnandos debitores, nec eos in baratrum desperationis deiiciendos."

[57] Lugo, *De iustitia et iure*, 1,21,1,11, p. 609: "Debemus ergo fateri, forum externum propter iustas causas non attendere ad has excusationes relinquendo illarum veritatem conscientiis debitoris et creditoris. Quia nimirum si hae excusationes admitterentur, abiret in longum debitorum solutio et passim eiusmodi causae adducerentur ad non restituendum."

[58] Lugo, *De iustitia et iure*, 1,21,1,11, p. 609: "Quando tamen creditori constaret de veritate causae ipse deberet ad eam attendere: nam licet in foro humano externo iuste videretur procedere ille qui a conservo suo exigebat debitum 100 denatiorum et tenens suffocabat eum, nec inducias commodae solutionis rogatus concedere volebat, quando debitor integram solutionem promittebat, si paulisper expectaret, dum diceret, patientiam habe in me et omnia reddam tibi, in for tamen Regis prudentissimi, quod Dei forum figurabat, damnatus est creditor tamquam nimis rigidus et irrationabilis exactor."

[59] Lugo, *De iustitia et iure*, 1,21,1,11, p. 609: "Denique non mirum est, quod in foro externo rigor ille adversus debitorem observetur ad deterrendos alios, ne expensis creditorum prodige et laute vivant cum videamus aliquando poenam capitis in decoctores statui."

[60] Lugo, *De iustitia et iure*, 1,21,1,11, p. 609: "Gubernator tamen supremus seu senatus regius frequenter solet ad aequitatis naturalis regulas recurrere et praecipere dilationem commodam ut sine his angustiis possint debitores sua debita solvere."

Lugo, then, acknowledged the tension between the realities of life and the desirability of a more human treatment of indigent debtors, certainly in a Christian society. While trying to prevent debtors from collapsing into what he called the "abyss of despair", he also recognized the legitimate interest of creditors. He was not naïve either. In order to avoid fraud, lawsuits and bad incentives for debtors, he deemd that the courts of men should apply the law strictly. As a matter of fact, he even urged supreme courts to see to it that property of debtors benefitting from extension of payment is entrusted to a public administrative authority to protect the interests of the creditors. For experience (*experientia*) shows that junk debt does not easily improve in quality while payment is being deferred. Bad debt deteriorates from day to day, as the bankrupt generally pile up new debt.[61]

Lugo's innovative take on the matter is all the more compelling since he is remembered, too, for having defended the principles of legal security and security of agreements (*securitas contractuum*) long before these ideas became the pinnacles of modern private law.[62] In fact, Lugo put centuries-old discussions among canon lawyers and scholastics about whether changed circumstances could liberate contracting parties from honoring their promises to a halt by insisting upon the sole principle that all agreements are binding (*pacta sunt servanda*). For the sake of the smoothness of business and security of contracts, Lugo rejected the appeal to "changed circumstances".[63] Yet, his fierce insistence on *pacta sunt servanda* notwithstanding, Lugo pleaded for a realistic approach to overindebtedness. He even recommended debt relief for those who had actually become bankrupt thought their own fault. Lugo wanted practical experience to inform the application of legal and moral rules. At a certain point, preventing people from falling into the "abyss of despair" is more useful than delivering moral lectures.

The idea that Supreme Courts have a special duty to protect equity and the soul of the law rather than apply the strict rules of the law was a basic feature of (Christian) legal systems in the *ancien régime*. Accordingly, they enjoyed large discretionary power; see M. Meccarelli, *Arbitrium. Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune*, Milan, Giuffrè, 1998.

[61] Lugo, *De iustitia et iure*, 1,21,1,11, p. 609: "Oportet tamen tunc bona debitoris auctoritate publica administrari, ut creditorum indemnitati consulatur, quae multum periclitatur dilatione debitori concessa, cum experientia constet, eiusmodi mala debitorum nomina dilatione non meliorari sed auctis novis debitis deteriorari in dies."

[62] W. Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune*, Leiden/Boston, Brill/Nijhoff, 2013, p. 321.

[63] Decock, *Theologians and Contract Law*, passim (tacit condition, changed circumstances, frustration).

2.5 Equal indigence and the stronger condition of the creditor

The early modern Catholic natural lawyers were not content to take into account the sole destitute state of debtors in deciding whether somebody could benefit from extension of payment. Occasionally, the creditor could be equally vulnerable to damages as the debtor, suffering from an equally dire state of indigence. There was a general tendency among the authors to consider that the condition of the creditor was the stronger if both contracting parties suffered from the same degree of loss (*in causa paris damni potior est conditio creditoris*).[64] For example, a debtor could not claim a right to debt extension if the creditor equally risked to fall off his social status.

Drawing on Duns Scotus and Silvester Mazzolini da Prierio (1456-1523),[65] many theologians were of the view that the condition of the creditor was also the stronger in case of equal state of necessity (*in pari necessitate potior est conditio creditoris*). Lessius, however, did not endorse that proposition, arguing instead that in a state of extreme or grave necessity, the position of the possessor is the stronger (*melior conditio possidentis*) [66]: in a state of necessity you have the right to occupy what belongs to other people, and you retain that right even if subsequently the original owner suffers from necessity.[67] In a state of equal necessity, then, Lessius protected the debtor against the creditor. But he did not express the majority position.

3 THE RIGHT TO REMISSION OF DEBT (*REMISSIO DEBITI*)

3.1 Terms of the debate

For theologians and canon lawyers steeped in the Judeo-Christian tradition – with its emphasis on remission of sins – it would only seem natural to integrate ideas of debt forgiveness into the analysis of debtor-creditor relationships. As a matter of fact, the early modern scholastics readily recognized debt remission or forgiveness (*remissio/condonatio debiti*) as a legitimate ground for granting a debtor total or partial relief from his liabilities. In the end, however, the issue of debt forgiveness left less traces in the canonical and moral theological works of the 16th and 17th centuries than the analysis of any other of the legal titles

[64] E.g. Lessius, *De iustitia et iure*, 2,16,1,31, p. 189.
[65] Silvester, *Summa silvestrina*, Antwerp 1578, vol. 2, s.v. *restitutio* 5,2.
[66] Decock, *Theologians and Contract Law*, 77-78.
[67] Lessius, *De iustitia et iure*, 2,16,1,20, p. 188.

for relieving the burden of debt. The scholastics spent more time debating the conditions for debt relief in the case of bankrupts taking monastic vows to escape from their creditors than to unravel the implications of the Lord's Prayer for settling disputes between creditors and debtors. Employing the language of law instead, they analyzed debt forgiveness as a gift (*donatio*). For example, Lessius argued that a creditor could yield (*remittere*) to the debtor his right to performance by that debtor just as he could make a donation (*donare*) of that right to any other person.[68]

3.2 Voluntary consent

From the structural parallel between gift and debt remission Lessius inferred, just as Molina did, that the general conditions of voluntary consent in contracts, particularly of donation, applied to debt forgiveness.[69] Consequently, the cancellation of debt had to be entirely voluntary. Moreover, debt forgiveness must not be affected by vices of the will such as duress and fraud.[70] Otherwise the remission of debt could be invalidated at the choice of the creditor. In other words, Lessius did not say that a debt remission affected by duress or fraud was automatically invalid. Other scholastics, such as Molina, had argued that duress resulted in automatic invalidity, so that the creditor could not ratify a remission of debt affected by duress.[71] But drawing on his sophisticated general theory of contractual consent – which introduced a general regime of revokability as the sanction on mistake and duress[72] – Lessius argued that it pertained to the creditor to decide whether he wanted his remission to be declared void or not upon discovering that he had been the victim of fraud or duress. Consequently, the intention of the debtor was irrelevant.[73] As long as the creditor was motivated by a true *animus donandi*, the remission of debt was valid, even if the debtor had never shown a sincere intention of paying off his debt.[74]

[68] Lessius, *De iustitia et iure*, 2,16,2,34, p. 189: "Ratio est, quia sicut creditor potest ius suum, quod habet in debitorem, alteri donare, ita etiam ipsi debitori, quod est remittere, quia remissio est quaedam donatio."
[69] This level of sophistication of the legal framework had not yet been reached in the work of earlier theologians such as Domingo de Soto. The latter simply required that the "debt remission be truly free" without being the product of either extreme freedom or coercion: "Remissio sit vere libera. Itaque neque requiritur, ut sit liberrima, neque sufficit si sit coacta. Cavendum ergo est ne vis intersit aut fraus," cf. Soto, *De iustitia et iure*, 4,7,4 p. 136r.
[70] Lessius, *De iustitia et iure*, 2,16,2,35, p. 189: "Prima [conditio] est, ut haec remissio sit omnino libera, id est, non extorta metu vel fraude, iuxa ea quae dicenda sunt c. 17, dub. 5 et 6. Tunc enim etsi forte aliquo modo sit valida, tamen ad arbitrium donantis est revocabilis."
[71] Molina, *De iustitia et iure*, 2,757,1, cols. 1680-1681.
[72] Decock, *Theologians and Contract Law*, p. 268-272.
[73] Compare Medina, *De restitutione*, p. 25, letter C: "Sequitur non esse necessarium debitorem esse parati animi ad restituendum ad hoc, ut a debito restituendi liberetur."
[74] Lessius, *De iustitia et iure*, 2,16,2,35, p. 189: "Nec refert, etiamsi debitor non haberet animum restituendi, quia etsi peccet, tamen debitum extinguitur, si alter libere remittat."

3.3 Simulation of poverty and abuse of power

A recurring example of fraud in obtaining debt forgiveness was the simulation of poverty. For example, Soto warned that a gift could not be considered free if the debtor pretended to be much more destitute than he really was.[75] This caution is reminiscent of the overall scholastic rejection of the false and undeserving poor, which Soto did not expressly refer to in this context but which was part and parcel of the canon law tradition at least since the time of Gratian.[76] In any event, Soto was particularly familiar with that distinction as is obvious from his diatribe against the undeserving poor in his *Deliberatio in causa pauperum*. Lessius, too, expressed contempt at those who behaved as if they were poorer than they were in reality.[77] On the other hand, he acknowledged that importunate begging and flattery did not necessarily make the remission of debt involuntary.[78] Only if the creditor started to prefer losing his money rather than continue suffering from unreasonable vexation could the cancellation of debt ensuing from importunate pressure be considered invalid in conscience.

Another standard example adduced by early modern scholastics to doubt the validity of debt relief concerned the situation in which the debtor was notably more powerful than the creditor. Under those circumstances there was a serious risk that the debtor was in a position to threaten the creditor into accepting a partial or full cancellation of his liabilities. "Occasionally this occurs", Lessius warned,[79] "when the powerful owe money to crafts- or businessmen". Coercion could be exercised in more subtle and indirect ways, too, as Lessius pointed out: for instance by making it extremely burdensome for the creditor to obtain payment, by repeatdly not showing up at the date of payment, making the creditor wait for a long time, etc.[80] Soto admonished magnates, in particular, to be careful not to commit this

[75] Soto, *De iustitia et iure*, 4,7,4, p. 136r: "Si enim creditorem decipis aut persuades (…) maiori te multo egestate comprimi quam premeris, donatio non est libera."
[76] B. Tierney, *Medieval Poor Law. A Sketch of Canonical Theory and Its Application in England*, Berkeley and Los Angeles, University of California Press, 1959, p. 55. The author wishes to thank Dr Jonathan Robinson for bringing this book to his attention.
[77] Lessius, *De iustitia et iure*, 2,16,2,35, p. 189: "*Fraus esset*, si fingeret se longe pauperiorem quam revera sit. Blanditiae autem et preces non obsunt, quia non reddunt condonationem involuntariam, nisi forte praeter modum essent importunae, ita ut quis mallet sua pecunia privari, quam tanta importunitate sollicitari. Tunc enim remissio non valeret in conscientia, quia causa redimendae iniustae vexationis fieret."
[78] On the effect of importunate begging and flattery on contractual consent, see Decock, *Theologians and Contract Law*, p. 246-250 and p. 268.
[79] Lessius, *De iustitia et iure*, 2,16,2,35, p. 189: "Metu extorta censeretur, si expresse vel implicite debitor minaretur creditori, nisi integre vel ex parte remittat. Quod interdum fit, quando potentes debent mechanicis aut mercatoribus."
[80] Lessius, *De iustitia et iure*, 2,16,2,35, p. 189: "Similiter si cogeret eum subire multas molestias in solicitando, saepe venire frustra, diu expectare, etc."

kind of injustice against their subjects.[81] Molina wisely added that even if debtors did not exert the pressure themselves, they had to abstain from employing third parties or straw-men in order to coerce the creditor into debt remission.[82]

3.4 Present money changes the mind

Of particular concern to medieval scholastics had been the question whether, before he even asked for debt relief, the poor debtor was required to make actual restitution of the amount due. For example, if a poor man took out a loan of one hundred guilders, should his request for debt relief be conditional upon first paying back that amount to the creditor? While Antonine of Florence (1389-1459) had answered this question affirmatively, the early modern theologians and canonists denied that debt forgiveness was dependent upon the restitution of money due. Following the lead of Cajetan, they considered such "cerimony" to be both undesirable and unrealistic. Apart from the fact that it is rare to find debtors who are capable of coughing up immediately the money which they owe, when put in front of him, gold fascinates the eye of the creditor and suddenly makes him change his mind.[83]

Therefore, the poor were recommended not to beg for debt relief in their own person, but through the medium of a third person – a possibility which Thomas Aquinas had already foreseen.[84] Dr Navarrus later confirmed the usefulness of this strategy with learned citations from Roman law.[85] Neither Cajetan nor Dr Navarrus considered the appeal to a third person and the absence of the amount due as way of proceeding which *per se* posed an obstacle to the voluntary character of the creditor's donation. Rather, they argued, this was the best guarantee

[81] Soto, *De iustitia et iure*, 4,7,4, p. 136r: "Idque cavere quam maxime debent magnates a subditis remissionem petentes."
[82] Molina, *De iustitia et iure*, 2,757,1, col. 1681
[83] Soto, *De iustitia et iure*, 4,7,4, p. 136r: "Nam praeterquam quod raro accidat, ut debitor eam habeat, ut bene adnotavit Caietanus, praesens aurum et oculos fascinare solet et animas subinde mutare."
[84] Cajetan, *Summula peccatorum*, Antwerp 1575 (mistakingly referred to as the Venice 1575 edition in the catalogue of the Bayerische Staatsbibliothek), s.v. restitutio, p. 485 (sic; correct page number: 484): "Et scito quod quando pauper obligatur ad restituendum diviti, expedit non offerre diviti rem restituendam, sed rogare et interponere intercessores ad remittendum, ne affectus ex praesentia rei durior sit ad remittendum, facilius enim remittimus non habita quam possessa."
[85] Dr. Navarrus, *Enchiridion*, 17,46, p. 297-298: "(…) ne rei debitae praesentia difficilior efficiatur ad condonandum, cum multo facilius, quod non habemus, quam quod possidemus remittamus et condonemus, l. cum hi, ff. de Transact. facit [= D. 2,15,8*pr*.], et l. Sed si ego, ff. ad Velleian. [= D. 16,1,4*pr*.]."
The passages quoted by Dr. Navarrus confirm that it is wise to appeal to a third person to beg for debt relief. The latter passage from Roman law (D. 16,1,4*pr*.), for instance, concerns an exception to the privilege granted to women by virtue of the SC Velleianum stipulating that women are not liable for debt sureties. Women did no longer benefit from this protective measure, however, if the other party was from the beginning ignorant about the person for whom the woman wished the surety. Dr Navarrus might take this passage to mean that if a privileged person appears in person, she is likely to lose her privileged position.

against "the temptation of inhumanity" or "the temptation of illiberality" on the part of the creditor.[86] However, as soon as there were clear indications that the creditor had not freely consented to the debt remission because of the use of strategems, the debtor could not consider himself to be freed from his obligation to make restitution in conscience.[87]

3.5 Gifts are not to be presumed

Early modern scholastics were careful not to recognize remission of debt too easily. Just as any other contract of donation, debt forgiveness must meet strict criteria of voluntary consent in order to be acknowledged as a legitimate title for partial or total debt relief. Fraud, coercion and importunate pressure should be entirely absent so as to guarantee the freedom of the creditor, certainly if the latter is confronted with a sovereign debtor or a false poor. In fact, this reluctant attitude towards debt forgiveness is perfectly in line with early modern scholastics' general wariness of the logic of gift in contractual relationships: a gift is not to be presumed (*donatio non praesumitur*).[88] In the sphere of contracts and business, particular evidence must be provided to warrant charitable behavior on the grounds of a just cause, for instance blood ties or friendship. If not, donations between debtors and creditors are suspect. More often than not they are the product of fraud, duress and abuse of power.

4 CONCLUSION

No easy answers can be derived from the sophisticated debate on debt relief in the early modern Catholic natural law tradition. In the manner of judges, the canonists and theologians carefully weighed the competing rights of creditors and debtors, avoiding to chose sides with one party unqualifiedly. To be sure, they were guided by general principles such as "all agreements are binding", "in case of necessity all things become common" or "in case of equal harm the right of the creditor is the stronger". But they were not convinced that simple rules were sufficient to find an adequate solution to practical problems. Moreover, they recognized that, for good reasons, the law of the land and decisions by external courts did not always coincide with the demands of natural equity and conscience.

[86] Cajetan, *Summula peccatorum*, p. 485: "Sed hoc non obstat libertati remissionis, sed prodest ad tollendam tentationem inhumanitatis."; Dr. Navarrus, *Enchiridion*, 17,46, p. 298: "Neque id obstat condonandi liberalitati, sed ad illiberalitatis tentationem reprimendam valet."
[87] Lessius, *De iustitia et iure*, 2,16,2,35, p. 189: "Quandocumque tamen creditor ex signis praesumitur non libere condonasse, debitor non liberatur."
[88] Decock, *Theologians and Contract Law*, p. 558-559.

One conclusion can be reached with certainty from the above exposition: rather than advocating debt relief in the sense of debt cancellation, the early modern Catholic natural lawyers urged parties to seek an arrangement by extending payment deadlines. Generally speaking, they granted debtors a right to debt relief in the sense of deferral of payment in one of the following instances: 1) extreme necessity (e.g. threat to the debtor's life); 2) grave risk of damage to spiritual goods, family property, and social status. Difficulties to save spiritual goods included situations in which the debtor fell prey to despair or to the need of driving his children into burglary and prostitution. Many authors also acknowledged the right to extension of payment in case of grave necessity (e.g. when the debtor's health was at stake). Some even argued that this right remained untouched by equal necessity or difficulties on the part of the creditor, according to the maxim that "in equal case the condition of the possessor is the stronger".

Even if debt forgiveness constitutes the spiritual core of the Christian belief system, the early modern theologians and canonists refrained from promoting debt remission. Granted, they did recognize that a creditor could decide to remit the liabilities of his debtor wholly or partially. But realism prevented them from considering this as a normal course of action: gifts are not to be presumed in contractual relationships. They insisted that cancellation of debt, when practiced, should be the product of an entirely voluntary decision by the creditor. Simulating poverty, then, to obtain debt remission was tantamount to fraud. Abuse of a dominant position, too, could not lead to a valid form of debt forgiveness (e.g. magnates bullying merchants into cancellation of debt).

Balancing conflicting interest remained necessary. Also due to the influence of the Franciscan theologian Duns Scotus, there was a strong current among the early modern Catholic natural lawyers to urge creditors to cede the rights from which they benefitted by virtue of the law in the strict sense of the word out of respect for higher principles such as right reason (*recta ratio*), charity (*charitas*) and a kind of "natural law equity" (*aequitas iuris naturalis*). Modern jurists will recognize a plea against "abuse of right" in many authors' moral appeal to a more humane treatment of indigent debtors. While early modern Catholic natural lawyers fully admitted that courts had reason to apply the law strictly, not in the least to prevent moral hazard, on the grounds of "natural law equity" they urged Christian creditors to make an

effort to prevent the poor and broke from collapsing into the "abyss of despair" (*baratrum desperationis*) – regardless of the debtor's moral wickedness.