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EUROPEAN UNIVERSITY INSTITUTE  
Department of Social and Political Sciences

**KEEPING FAITH**  
**A Study of Grotius' Doctrine of Natural Law**

*Leonard F.M. Besselink*

Thesis submitted with a view to obtaining the  
doctorate of the European University Institute

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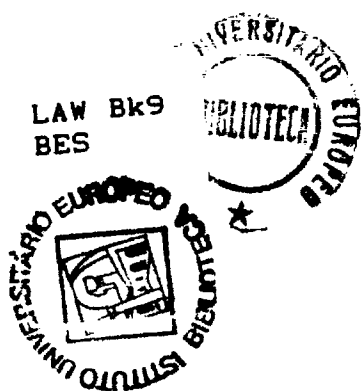
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**Aan mijn ouders**  
**To Alison**





## PREFACE

I submit the present study with a view to obtaining the doctorate of the European University Institute. The relevant rules for submitting a doctoral dissertation offer the possibility to adhere to 'national', in my case Dutch, traditions. Depending on the manner in which they are adhered to, some traditions are less obviously meaningful than others. To the former class belongs, no doubt, the first tradition I wish to uphold, which is the now near oddity of appending at least six theses which have no bearing on the subject of the dissertation. The second tradition I adhere to is more obviously good custom. As it is the last degree of formal academic education in my country of provenance, I preface my doctoral dissertation with acknowledgements which are extended to all who have contributed to my reaching this point.

From the first phase of legal studies which I spent at the Free University, Amsterdam, I wish to mention the courses in Jurisprudence by the late Professor Van Eikema Hommes, with many of whose interpretations (especially of Grotius) I have come to disagree, but to whom I owe my first introduction to the history of legal and political theory. Through these courses also, I became acquainted with H. Dooyeweerd's philosophy of "the cosmonomic idea" or "idea legis". Dooyeweerd's terminological derivation of this philosophical "idea legis" from equivalent concepts such as "lex naturalis, lex aeterna, harmonia praestabilita, etc." [cf. *A New Critique of Theoretical Thought*, vol. I, pp. 93 ff.] is at the thematic horizon of the present study.

The studies for my degree at the Law Faculty of the University of Leiden confronted me with one aspect of Grotius' work, i.e. his contribution to what we now conceive of as the body of public international law. I gratefully appreciate the liberty and support I there received to study also theoretical aspects of that branch of law, especially from Professor P.H. Kooymans, and also from Chris de Cooker and Pieter Jan Kuyper, who have both left academia but made me aware of the kindness of friendship and the love of scholarly pursuits.

The intellectual stimulus issuing from the postgraduate years at the Bologna Center of the School of Advanced International Studies, Johns Hopkins University, and at the European University Institute, Florence, will remain of great importance to me. In the latter the political philosophy seminars, organized by Maurice Cranston (till his departure from Florence) and Athanasios Moulakis, opening with the impressive cycle of lectures by Eric Voegelin, and the student-initiated Jurisprudence seminars have been decisive for the character of my thesis. I received stimulating and encouraging criticisms on what in retrospect was a pilot study of the present work and on drafts of parts of the latter from my supervisor A. Moulakis and from M. Cranston (EUI/London School of Economics), Lea Campos-Boralevi (Florence University), Joseph Weiler (Ann Arbor, Michigan), Patrick Masterson (University College, Dublin), Anthony Pagden (Cambridge), Quentin Skinner (Cambridge), Richard Tuck (Cambridge), Shirley Letwin (Cambridge), Theodore Molnar (State University, N.Y.), J.P.A. Coopmans (Tilburg) and R. Feenstra (Leiden). My academic education could not have been completed without the preparation by and support of the education my parents gave me, and without the help my wife gave me, which extended far beyond the language correction she did of this study. To them I dedicate this work.



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### LIST OF QUOTED LITERATURE

## Introduction

In the philosophical tradition, natural law has served as one designation of the borderline between human and divine.

This tradition is associated with a complex of ideas which has been traced back as far as Heraclitus' fragment according to which "all human laws are nourished by one which is divine"<sup>1</sup>. In line with this, Aristotle's definition of the right by nature as a *kineton*<sup>2</sup> suggested that the right by nature is something ultimately moved by the prime unmoved Mover, the *akineton*<sup>3</sup>. Something of the Heraclitan fragment is echoed in Augustine's affirmation that "men derive all that is just and lawful in temporal law from eternal law"<sup>4</sup>. Against the background of parts of various Greek, Stoic, Roman and Christian traditions the language of eternal, divine and human laws along with that of natural law and justice developed. It found a powerful synthesis in Thomas Aquinas' *Summa Theologiae* in which natural law is conceived of as

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<sup>1</sup> Diels, fragm. B 114.

<sup>2</sup> *Magna moralia* I, 33; 1194 b 30ff; *Nicomachean Ethics* V, vii, 3; 1134 b 27ff..

<sup>3</sup> *Metaphysics*, book XII; also 1011 a 1-2, 1012 b 31-32. An argument for this interpretation is that in the famous passus on the right by nature Aristotle himself associates the *akineton* with the divine when he remarks that perhaps it is not true at all that with the gods there is change to be seen in the things which are just. The interpretation intended in our text is developed by E. Voegelin, 'Das Rechte von Natur', *Anamnesis*, 1968, who extends this line of interpretation to *phronesis* and for which he finds support in Aristotle's treatment of the *eutyche* (*Eud. Eth.* 1248 a ff.). Obviously this interpretation of the Aristotelian *physei dikaion* raises a number of important questions concerning Aristotle's distinction of and the relation between metaphysics and ethics, *bios theoretikos* and *bios praktikos* or *politikos*, between the God in the kosmos and the God in us - questions which ultimately concern the relation between Plato and Aristotle; and here opinions, as will be obvious, greatly differ. Voegelin's position in the present context is that "manches an Platonischen Voraussetzungen jedoch impliziert [ist], das wegen der Dominanz kosmologischen Denkens nicht explizit werden kann. [...] Auch die Aristotelische [wie die Platonische, L.B.] Phronesis ist eine Existentialtugend, aber ihr Charakter als solche wird im kosmologischen Denkklima nicht hinreichend deutlich, weil ihre Aktivierung durch eine Transzendenz Erfahrung nicht zur Sprache kommt. [...] Das Platonische Erbe der Transzendenz Erfahrung macht sich geltend und zwingt zur Anerkennung der Philia genannten Tugend, die als poetische Liebe sowohl die Gottesliebe umspannt wie auch die Liebe zum Göttlichen im Selbst und im Nebenmenschen", (*Anamnesis* pp. 128-129). Much more fully (and therefore more critically) the questions are dealt with in E. Voegelin, *Order and History*, vol. III 'Plato and Aristotle', chapters 7 and 8, pp. 279-315. For a thorough discussion of these matters from the assumption "dass Aristoteles sich zumeist antithetisch zu Platon verhält, dass er jedenfalls in den [...] interessanten Punkten zumeist etwas anderes gelehrt hat als dieser" (Bien, p.15), see G. Bien, *Die Grundlegung der politischen Philosophie bei Aristoteles*, 1980, especially pp. 103-195.

<sup>4</sup> *De libero arbitrio* I, 6

a participation of the eternal law, and as the source of human law. Of course, many things happened to the meaning of the concepts used, which I cannot here go into. Here I merely wish to point to the core of a tradition in which natural law stood as a philosophical symbol of the relation between God and man.

The actual connotation of natural law as something which is in between divine and human is recognizable in much of the criticism applied to Grotius for his handling of the concept of natural law. This criticism tends to treat Grotius concept of natural law either as an early modern, secularized and juridical notion of enlightened rationalist stamp or as one of the last of late medieval conceptualisations of an essentially scholastic idea.

Symptomatic is the need which some authors find to assert that "to begin with, Grotius was and remained a theologian; he had no intention of divorcing the natural law from theology, still less of constructing an atheistic or agnostic ethic"<sup>5</sup> - whereas others equally emphatically claim that he "emancipated natural law from its christian theological foundation"<sup>6</sup>. And similarly it has been stated that "Grozio non era un filosofo e meno ancora uno di quei pensatori che amano esprimere in poche linee tutta la sostanza di un sistema; era un giurista"<sup>7</sup>; "Grotius lui-même n'était rien moins que philosophe du droit mais par excellence un juriste"<sup>8</sup>. These characterizations are unsatisfactory inasmuch as they conveniently pass over the fact that Grotius was also philologist, poet, tragedian, historiographer, diplomat and politician. The gist of these generalizations can be countered with Grotius' equally general statement:

".. I love Jurisprudence [*jurisprudentia*] which is wedded to Philosophy, and mostly that which is wedded to Christian Philosophy."<sup>9</sup>

Already less than a generation after Grotius the central target of a more focussed criticism was the "impious and absurd"<sup>10</sup> hypothesis which says that natural law would be what it is even if there were no God or human affairs were of no concern to him. With varying degrees of sophistication this hypothesis was often (and at times still is) taken

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<sup>5</sup> Crowe, 1977, p. 224.

<sup>6</sup> E.g. T.J. Veen, 1977, p. 81; G.H. Sabine, pp. 386, 390; for Roscoe Pound, who holds the same view, see E. Dumbauld, p. 63, note 1.

<sup>7</sup> Labrousse, p. 13.

<sup>8</sup> Villey, 1966, p. 330.

<sup>9</sup> Epistola quotquot reperiri potuerunt, TMD 1210, no. 1699, p. 734, 12-11-1644 to Joannes Corvinus: "Enchiridion tuum multum legi gaudeo, amo enim Jurisprudentiam conjunctam cum Philosophia, maxime vero cum Philosophia Cristiana."

<sup>10</sup> The words are Pufendorf's, *infra* p. 94, note 2.



if not as the definite sign of Grotius' otherwise well-concealed atheism, at least as the hallmark of a secularized concept of natural law. Others have recognized that similar hypotheses occurred in late medieval scholastic works and have made a somewhat forced attempt to associate Grotius with Scholasticism or at least with the medieval debates in which the scholastics were involved<sup>11,12</sup>. As a corollary a number of other arguments have been debated, such as Grotius' alleged voluntarism or intellectualism<sup>13</sup>, or quite different issues are raised, such as his alleged divorce of morality from natural law or - on the contrary - the moralism of his concept of natural law<sup>14</sup>.

At the background of most interpretations of Grotius' work the central issue remained whether Grotius with his concept of natural law does still adhere to the older philosophical tradition or whether he turned

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<sup>11</sup> E.g. Chroust, 1943 & St. Leger, 1962, vide infra chapter 3; and Ambrosetti, 1955, who constructs Grotius' work as the attempt to rescue post-reformation moral theory from the devastations of the voluntarism which ensued from the via moderna through the recovery of scholastic insights.

<sup>12</sup> But this in turn led others again to recoil from what G. Belzer (1952, p. 3-9) saw not as "the dependence on greater or lesser predecessors, but [as] the lapse into a papist, obsolescent intellectual worldview which can be held against Grotius; although the author is no full-blown schoolman, the magic boundaries of papist thought are never transgressed". "Searching for an ideal, we found a warning", Belzer says (p. 2). Firstly, he found a warning in Scott's introduction to the Carnegie edition of De iure belli, where he writes: "If we recall that Gentilis was Italian, we may say that international law is of Latin origin, as well as of Catholic origin." The second warning he finds in Grotius' "secularized vanity" of "courteous bows for the schoolmen", against which Belzer quotes Montaigne: "J'en cognoy, à qui je demande ce qu'il scait, il me demande un livre pour me le montrer: et n'oserait me dire qu'il a le derriere galeux, s'il ne va sur le champ estudier en son lexicon, que c'est que galeux, et que c'est derriere". Thirdly, Belzer felt warned when he discovered that Grotius "belongs in the gallery of the men of compromise, the grand equivocators who have incessantly tried to reconcile the irreconcilable. [...] Thus Grotius belongs in terms of cultural history to the 'lukewarm' who will be spewed out at the last judgment." 'Grotius papizans' was a standard viewpoint in most of the calvinist literature since Laurentius published his anti-Grotian book under this title, a book which still in the 19th century received a reprint.

<sup>13</sup> Infra, chapter 3.

<sup>14</sup> Midgley, p. 147: "Grotius excludes from the sphere of law the conclusions of a well-tempered judgment on a variety of moral questions"; Leclercq, p. 18-19: "La réaction qui se produit au XVIIe siècle contre les idées du moyen âge et la philosophie scholastique, amène une tentative de scission entre le droit naturel et la morale. L'honneur ou la responsabilité de cette initiative est généralement attribuée à Grotius, qualifié pour cette raison de père du droit naturel [...] sa seule originalité, si c'en est une, est d'avoir rendu vague une doctrine qui était précise au moyen âge, parceque fondée sur un système métaphysique cohérent."; to the contrary M. Villey, 1966, argues on the basis of a strict reading of Barbeyrac's free translation of par. 8 of the Prolegomena to De iure belli that Grotius has come to moralise all law.

natural law into a purely secularized, juridical concept which broke with the philosophical tradition.

It is unfortunate that this question has so often been articulated in terms of Grotius' relation to the scholastics, particularly those of the school of Salamanca. Thus the discussion often derailed into a search for Grotius' sources and the attempt to identify him with one of these sources. To date these attempts have remained fairly fruitless and perhaps had to remain so; for Grotius' scholarly and political life was for the greater part devoted to overcoming what he saw as the consequences of an excessive need to confess oneself to any particular ideology. To try to enlist Grotius into the ranks either of an almost ideologically conceived Aristotelianism or Stoicism, Lutheranism, Calvinism, Catholicism or even Arminianism - let alone a transition from any of these to any other - would also conflict entirely with the cultural and historical origins<sup>15</sup> of Grotius' works, as Fiorella De Michelis has convincingly argued.

Hence the question whether with his concept of natural law Grotius kept faith with philosophico-theological tradition ought to remain in the general and at the same time acute form we stated it: is there still a positive connection with the philosophical tradition mentioned above, or is natural law a secularized concept which ushered in the age of enlightened rationalism?

I propose to study this question not via a reading of Grotius' scholastic predecessors or rationalist successors as has happened too often but by concentrating on a close reading and interpretation of Grotius' texts themselves. I will focus on four more specific aspects which have a direct bearing on the problem just described problem. To each I each devote a chapter.

The first treats the meaning of *fides* in Grotius' work. I will try to answer the question whether the concept of *fides* reflects any specific religious meaning or has acquired a purely secularized, juridical meaning.

In the next chapter I turn to the concept of natural law itself and study the manner in which Grotius distinguished natural law from other kinds of law.

Almost inevitably the chapter after is devoted to the vexed question of the meaning of the hypothesis that natural law would have a degree of validity "even if we were to concede that there be no God or were not to concern himself with human affairs".

Finally, the question is raised whether Grotius' insistence on the immutability of natural law constitutes a break with a truly philosophical concept of natural law and reveals an affinity with the later rationalist concept of natural law inspired by a fundamental conservatism.

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<sup>15</sup> F. De Michelis, Le origini; C. van Vollenhoven, Verspreide Geschriften, vol. I, p. 582: "This [i.e. Grotius'] philosophy was of the Aristotelian stamp." M. Fortuin (1946) p. 17 claims the dominance of the Stoa over Aristotle in Grotius' ethics: "Voor ethiek, recht, voor de sociale ethiek, is het de Stoa en niet Aristoteles, die grooten invloed heeft uitgeoefend." M. Berljak, 1979, p. 84 speaks erroneously of "Lutero, al cui movimento protestante apparteneva anche Ugo Grozio"; Fassò, Storia II, p. 97 of the influence of the "calvinismo ortodosso in seno al quale egli era cresciuto". The catholic strands in Grotius' work are stressed by P. Polman, 'Hugo de Groot in dienst van de verdediging der moederkerk' & P.H. Winkelman, Remonstranten en katholieken and are further studied by K. Repgen, 'Grotius papizans'.

## CHAPTER I

# "FAITH, THE FOUNDATION OF JUSTICE"



## I. " .. Faith, the foundation of justice... "

In any study of the relation between the human and divine the concepts of religion and faith will occur.

To the concept of *religio* (which Grotius in his only very recently published tract *Meletius* (1611), in fact, defined as something which is between God and man<sup>1</sup>) I shall return in a different context.

Although its importance is regularly asserted, the concept of *fides* as it occurs in Grotius' works has received various interpretations by recent authors. In the interpretations the issue of the secularization tendency versus the scholasticist tendency is again to be found. Thus Roelofsen remarks: "Grotius not only removed the principle of good faith from the controversy between Protestants and Roman Catholics, he also made it a non-religious concept, ..., since he clearly recognized the binding force of treaties between Christians and non-Christians."<sup>2</sup> Vermeulen responds to this by stating: "That treaties with non-Christians are binding upon Christians .. must have been borrowed from scholastic writers."<sup>3</sup>

A quite different approach is taken by Fikentscher in his study of the chapter *De fide et perfidia* in Grotius' *Parallela rerumpublicarum* (1601/1602). Fikentscher contrasts the central importance which *fides* has in Grotius' works with the similar rôle which natural law plays in the works of Spanish late-scholasticism. He associates the concept of *fides* with the concept of personal autonomy and in connection with Grotius' protestant background Fikentscher suggests that the particular use to which Grotius puts *fides*, a use which is "philosophically no further founded", is of Reformed-Christian origin<sup>4</sup>.

These interpretations are not very satisfactory.

The claim that Grotius secularized the concept of *bona fides* by assuming the bindingness of pacts with non-Christians is as unconvincing as the claim that Grotius owed this tenet entirely to the Scholastics (to whom he indeed refers); the same idea can be found already in

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<sup>1</sup> *Meletius*, paragraph 19: "... religio inter hominem Deumque intercedat".

<sup>2</sup> C.G. Roelofsen, *Grotius and International Law*, p. 18.

<sup>3</sup> B.P. Vermeulen, 1985, p. 85.

<sup>4</sup> Fikentscher, 1979, pp. 59-61; p. 51: "Fides wird beschrieben und gefordert, aber philosophisch nicht begründet. Trotzdem ist es von Bedeutung diesen Zusammenhang von personaler Autonomie und Treuegedanken by Grotius zu sehen. Bisher hat man immer nur auf den Zusammenhang von Autonomie und Versprechensbindung geachtet. Demgegenüber ist der Zusammenhang von Autonomie der Person und Treuegedanken noch wichtiger, ja schlechthin grundlegend." cf. also p. 63: "Für Vasquius, Molina, Vitoria und die andern brauchte fides noch kein Thema zu sein und war es folglich auch nicht."

Ambrosius' *De officiis*, which is quoted in *De iure belli* in this context<sup>5</sup> and which goes back directly to Cicero's claim in the latter's *De officiis* that treaties with enemies ought to be kept<sup>6</sup>. Fikentscher's interpretation suffers from the disadvantage that the place of Grotius in the spectrum of Protestantism, that of the anti-predestinarian party of the remonstrants (or Arminians), would suggest precisely that *fides* can *not* play the same rôle as in the mainstream Calvinist (or even Lutheran) reformation and would therefore not seem likely to stem from his protestant background, at least not in the ideological, confessional manner which Fikentscher suggests.

Instead, I propose that *fides* as it is used by Grotius in a politico-juridical context goes back to the Roman usage.

The presence of a vocabulary clearly reminiscent of the Roman one can be established in a brief analysis of *De fide et perfidia*, which we will presently undertake.

The recognition that the vocabulary of which Grotius makes use cannot be neatly classified according to a scheme based on too exclusive a choice between scholasticism and secularization, makes it possible to take a fresh look at the particular rôle *fides* plays in his juridical works. I do so in a next section, where its meaning with regard to the doctrine of promising as the constitutive act of obligation is examined. I conclude that promising is to be understood not only as the basis but as a *modus* of *fides*. The consequences of this view with regard to Grotius' doctrine of the 'social contract' is discussed.

Next I discuss the meaning which *fides* has in the relation between God and man.

In conclusion I compare the results of the analyses.

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<sup>5</sup> II, XV, x, 2.

<sup>6</sup> Also quoted in *De iure belli* II, XV, ix, 3.



## De fide et perfidia

Although present-day philologists do not agree on all its semantic aspects, the term *fides* implied in a number of its more important linguistic uses, a certain degree of mutuality<sup>7</sup>. Thus a reciprocal relation is assumed in expressions like *fidem alicui habere*, to place trust in somebody, and *in fidem alicui esse*, to be in the care of somebody - expressions central to the highly important institutions of Roman society, such as *amicitia*, *hospitium* and *clientela* relations such as existed between the freedman and his patron, the forensic rhetorician and his client, the people of Rome and its colonies, subjected people etcetera. *Fides* presided over these relationships which were constituted by the *beneficium* of one person towards the other who in return came in the *fides* of the former, which usually implied the mutual *officia* of *obsequium*, *reverentia* and protection.

Even in the rhetorical context, where *fides* takes on the meaning of 'belief', an expression like *fidem facere orationi, rei dubiae*, or *alicui* still presupposes an interactive framework<sup>8</sup>. *Fidem servare* can then be understood to refer to the continued integrity or validity of the relationship established between the person who tries to 'create' *fides* and the one 'accepting' it. Hence, the core of this relationship can be described in Cicero's celebrated definition of *fides* as

*"dictorum conventorumque constantia et veritas"*<sup>9</sup>,

which stresses the aspect of *fides* as a virtue.

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<sup>7</sup> The 'Doppelseitigkeit' and 'active' meaning is stressed by R. Heinze, pp. 140-166, who argues that E. Fraenkel's definition of *fides* - "alles, worauf man sich verlassen kann, Garantie im weitesten Sinne" (Fraenkel 1916, p. 187 and the lemma *fides* in the *Thesaurus Linguae Latinae*, col. 663, 60 ff.) - "der Eigentümlichkeit des römischen Begriffs nicht gerecht wird und somit das nicht gebührend ins Licht stellt, was uns das Wort und seine Anwendung über römisches Wesen lehrt" (p. 141).

<sup>8</sup> Heinze understands *fidem facere* as "bewirken dass ein Vertrauensverhältnis entsteht" and argues that *fides* "keine Eigenschaft [ist], die objektive dem 'Vertrauenswürdigen' zugesprochen würde, sondern schliesst in sich Glauben oder Vertrauen des anderen" (p. 142). He says: "Ciceros Definition *dictorum conventorumque constantia et veritas* ist, der Denkweise seiner Zeit und dem Zusammenhag der Stelle gemäss, zu abstrakt, zu eigenschaftsmässig gefasst, um dem ursprünglichen Begriff zu genügen. Der alte Römer würde aber wohl dem Satze zugestimmt haben: *fide data ita confirmantur dicta promissa pacta, ut boni viri sit utique eis stare alique recte eis confidant*" (p. 149). The difference between the *fides* as belief and *fides* as the trust vested in somebody else is pointed out by Grotius e.g. in his annotation to Matth. vi, 30, Op. Th. II-1, p. 86 b 15 ff.: "*oligopistoi, modicae fidei* [...] Vox autem [fides], quam exprimit vox *pisteos*, praesertim in usu Hellenistarum, non semper significat persuasionem qua credimus vera esse quae dicuntur, sed saepe fiduciam quam in alicujus bonitate ac potentia ponimus, etiam si verba nulla intercesserint."

<sup>9</sup> *De officiis*, I, 7, 23.

As a philologist of rank, Grotius must have been aware of these semantic aspects of *fides*, with on the one hand a two-sidedness which gave it a socio-political potential and on the other a more predicative and one-sided moral connotation, when he used this term and gave it an important place in his legal works. These aspects can be retraced in an early work which is not of juridical nature, the chapter *De fide et perfidia* in the *Parallelon rerumpublicarum liber tertius* - the only extant book - which Grotius gave the title: *De moribus ingenioque populorum Atheniensium, Romanorum, Batavorum*<sup>10</sup>.

Semantically, it is the aspect of *fides* as a virtue which is the starting-point for *De fide et perfidia*. Grotius sets out the comparison of the genius and mores of the peoples concerned, which is entirely aimed at demonstrating of the moral superiority of the Dutch (whom he identifies with the ancient tribe of the Batavians), as a treatment of their respective achievements with regard to each of the virtues. The virtues are arranged according to the Ramist method of subdividing the subject-matter into successively smaller units to which Grotius then each devotes a chapter. First he gives a brief description of the object, subject and quality of the matter under discussion (chapters 1 - 3). Then the virtues are divided into those concerning man (chapters 1 - 25) and those concerning God (chapter 26, "de religione et pietate"). The human virtues are next divided into those *circa voluntatem* (chapters 4 - 18) and those *circa intellectum* (chapters 18 - 25). The virtues of the will are subdivided into *fortitudo*, *iustitia* and *moderatio*, while the intellectual virtues are subdivided into those *circa agendum*, those *circa faciendum* and those *circa sciendum*. According to this plan, set out in the *breviarium* preceding the book, the several topics are discussed chapter by chapter: *de fortitudine et magnanimitate*, *de humanitate et ferocia*; *de fide et perfidia*; *de venere*, *de ebrietate*, *de lusionibus*, *de constantia*; *de re militaria*, *de re maritima*; *de opificiis*; *de lingua* etc.<sup>11</sup>. The topic of *fides* and its contrary are discussed

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<sup>10</sup> In the epilogue of Grotius' first published poetry, *Secra in quibus Adamus Exul* (1601), *Dichtwerken I*, 1 a, p. 279, Grotius announces as one of the works "partim perfecta, partim affecta" the *Parallela*, which he refers to as a work of comparative political science: "Ad Civilem scientiam spectant, nostratis Reipublicae cum aliis olim nobilibus, successuumque inter se comparatio". W.J.M. Van Eysinga, 1941, described *De fide et perfidia* as the first of Grotius' works on international law, though - given its nature and purpose - it can in reality be no more than an anticipation of topics which recur in later legal works. Given the absence of a discussion of legal rules and institutions as such, it is difficult to see why Fikentscher speaks repeatedly not only of "eine kultur-" but also of a "rechtsvergleichende Abhandlung", 1979, pp. 3, 7 and 26.

<sup>11</sup> Fikentscher must have overlooked the *breviarium* in which the structure and composition of the book is clearly described. Cf. Fikentscher, pp. 40-41: "Der Inhalt des 6. Kapitels ist locker gefügt, Topos reiht sich an Topos. Insofern spiegelt das Gefüge des 6. Kapitels die topische Struktur der 26 Kapitel des Gesamtwerks wider. Systematischer Duktus findet sich erst in den späteren Werken de Groot's. [...] Petrus Ramus war noch keine 30 Jahre tot"; id., p. 50: "In seinen Staatsparallelen hat Grotius daher die neuen systematischen Geschichtstheorien von Petrus Ramus und Bodinus noch nicht berücksichtigt." The sys-

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under the heading of the virtue of justice, "cuius fundamentum est fides" - as Grotius says in the *breviarium*, alluding to Cicero<sup>12</sup>. Notwithstanding the treatment of *fides* as a virtue, the social background in which it functioned in Roman times is still present, perhaps because most of the historical frame of reference in the chapter on *fides* concerns the Romans. In fact, if the etymological connection which Varro had made between *fides* and *ius fetiale* is not the reason, the important rôle of *fides* in the practice of the *ius fetiale* may well explain why Grotius (given also the dedication of the *Parallela* to the fatherland which had been at war for more than a generation) devotes much attention to *fides* and warfare in *De fide et perfidia*<sup>13</sup>. But this is certainly not the only feature in which the social context of *fides* becomes visible. The interactive and 'intersubjective' basis of *fides* comes into focus several times.

Thus, immediately at the opening of the chapter, Grotius speaks of the war command and the money for making war which were entrusted to the Athenians by other cities for the sake of their safety; a trust ultimately betrayed, which Grotius contrasts with the Romans into whose care any amount of money could be placed - an oath would suffice for them to keep their duty (*officium retinere*)<sup>14</sup>. The act of entrusting oneself to the care of another also comes to the fore in the description of the necessity of *fides* in and after victory, which refers to the Roman practice of *deditio*:

"*Fides* is necessary in and after victory in war. It was Cicero's affirmation, befitting a Roman, that one ought to care for those who have been conquered with armed force, as one ought to accept those who have laid down their arms and take refuge to the *fides* of the commander, even if the ram has already battered the wall. [...] The Romans have rightly established that those who have

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tem of dichotomies which became popular with Ramus, was used frequently by Grotius. Best known are the tables in which Grotius digested the *Inleidinge tot de Hollandsche rechtsgeleerdheid* and which were added to the (first) publication of 1631. Also for *De iure belli* there exist synoptic tables, some of which are ascribed to Grotius himself, cf. In Hugonis Grotii *Jus belli et pacis, ad illustrissimum Baronem Baineburgium Commentatio Jo. Boecleri* (1663), TMD 6771, pp. 63-7. For an example concerning the various meanings of *ius naturale* taken from Grotius' correspondence, *infra* p. 58 note 75.

<sup>12</sup> *De officiis*, I, 7, 23.

<sup>13</sup> Cf. Pauly-Wissowa, vol. 6, s.v. *Fides*, cols. 2283 ll. 11-34. In *De fide et perfidia* reference to the norms regulating warfare is referred to both by the name of *ius fetiale* and *ius gentium*, cf. Fikentscher, p. 94, 124, 142. For convenience I refer to the page numbers of the reprint of *De fide et perfidia* in Fikentscher's book.

<sup>14</sup> Fikentscher, p. 90-92.

received conquered cities and peoples in their *fides*, are their patrons *more maiorum*." <sup>15</sup>

Similarly Grotius speaks of the emperors who "committed their life and safety to the *fides*" of their 'Batavian' guards <sup>16</sup>.

Most interestingly, Grotius extends the relevance of *fides* to all the different degrees of *societas* that can be distinguished. He mentions not only the *fides* towards foreign *principes*, but as a first and highest of the *gradus societatis* the relationship of a people towards its own king <sup>17</sup>. Here Grotius briefly refers to the abjuration of the king of Spain by the United Provinces, which had always been defended as something which was no infidelity on the part of the provinces but a consequence of the king's betrayal of the trust placed in him; but Grotius does not further expand on what he considers to be common knowledge <sup>18</sup>.

Next in grade come the allies, *socii*. Between these there ought to exist in return for the defence and vindication of one another as a mutual duty [*mutuo officio*] the right to be protected and defended against injustice <sup>19</sup>. As a contemporary example Grotius mentions the *arctissima societas* of Holland with the other provinces and cities of the con-

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<sup>15</sup> Fikentscher, p. 106: "Necessaria est etiam in Victoria & post Victoriam belli Fides. Ciceronis est digna Nomine Romano sententia, cum iis quos vi diviceris consulendum esse, tum eos qui armis positis ad Imperatorum fidem confugiunt, quamvis murum aries percusserit, recipiendos. [...] Unde recte apud Romanos constitutum, ut ii qui civitates quae nationes devictas bello in fidem receperant, earum patroni essent more maiorum."

<sup>16</sup> Id., p. 108: "Majorum igitur nostrorum Fidem, cum hac in parte patriis Annalibus nihil adjuvemur, certius demonstrari posse non video, quam si ostendam, Romanorum Imperatores, quibus omnis Orbis patebat dilectui, Batavos reliquo Humano generi praetulisse ad corporis sui custodiam, ut eorum spectatissimae Fidei atque tutelae vitam salutemque suam concrediderent." The *cohors amicorum* itself was an elite force of friends and clients, and was therefore itself also in the *fides* of the commander or emperor.

<sup>17</sup> Id., p. 116: "Quod si erga externos Principes satis certa est gentis nostrae ab illis usque temporibus fides, minus certe laborandum est, ut qualis ea erga suos fuerit, proluxa rerum narratione demonstrem."

<sup>18</sup> Id., p. 116: "Ab ipso Hispaniae Rege, post toleratum diuturnae Tyrannidis furorem, & extrema Libertatis pericula, tam sero descivimus quam potuit fieri rebus salvis, & serius fortasse quam par erat: nec necesse multis exponi, quorum tam recens memoria."

<sup>19</sup> Id., p. 116: "Ut igitur ad Socios referamus gradum, qui proximum a Principibus cuiusque Civitatis ordinem obtinent: comitum nostrorum agnati atque affines aut defensores nos habuere semper, aut vindices. [...] Quemadmodum vero elucescit ita maxime colorum differentia, si inter se adversa contendas: sic etiam nostra virtus eorum vitio, quibuscum nobis res fuit, efficitur commendatio. Imperatores enim, quibus nos tam benigne semper auxilio fuimus, cum mutuo officio nos nostraque ab omni injuria tutari & defendere debuerint, non id modo non fecerunt, sed hostes etiam in nos undequaque conciverunt."

federation, which share the same liberty and authority and even pay a lesser contribution<sup>20</sup>.

A different *gradus societatis* is that constituted by the bonds of close friendship and a common enemy, such as with France and Britain, which are at the basis of the mutual support and gratefulness between these countries<sup>21</sup>.

Again a different relation exists with neutral '*socii*' in an armed conflict, towards whom it is a requirement of *fides* that they do not suffer under the conflicts that exist between others<sup>22</sup>.

Finally, Grotius discusses the *fides* towards the enemy, the *fides bellica*, which, it is suggested, is identified with "id quod inter hostes residuum manet communionis Humanae"<sup>23</sup>. Under this heading Grotius discusses the treatment of captives, treaties and terms of surrender and peace negotiations. It is not so much the specific topics discussed which interest us, as the foundation which Grotius obviously considers them to have in *fides*. This *fides* itself is here assimilated to the bonds of society holding mankind together. This assimilation also occurred when earlier in *De fide* he discussed the *fides* which the Romans showed towards their enemies, he explained this by their belief that "we have something in common even with our enemy, and war does not dissolve this fellowship [*societas*] which nature has instilled in mankind"<sup>24</sup>. This intimate nexus between *fides* and *societas* is most evident when Grotius says

".. the assertion that faith must not be kept with heretics, I judge fit to dissolve every tie of human fellowship"<sup>25</sup>.

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<sup>20</sup> Id., p. 122: "Ad nostra tandem tempora veniamus. Arcissima nobis est societas cum aliis Belgicae regionibus & Civitatibus, quae aut suo motu aut impulsu nostro exuerunt crudelissimam servitutem. Eae itaque omnes non Libertatem modo nobiscum, sed & imperium aequale habent, onera vero etiam minora; nulla nobis dominatus cupido; nulla seorsim commodi cura: in commune consulitur."

<sup>21</sup> Id.: "Hic unus societatis gradus est; in altero eos colloco, quibuscum foederum necessitudo est & communis adversarius. Ita nos amicitiam coluimus cum Galliae & Britanniae Rege, Regina. In Galliam etiam rebus hic satis angustis missa auxilia, missa pecunia est, dubia Regni fortuna. Britanniae autem Regina, optime de nobis merita, gratitudinem & fidem non semel experta est."

<sup>22</sup> Id., p. 124: "Socios etiam illos dicere possumus, qui cum circa arma habitent, nullam tamen belli causam habent, sed extra partes otii commodis fruuntur, erga quos vel maxime necessaria est Fides, ne quid detrimenti patiantur ex alienis dissensionibus."

<sup>23</sup> Id., p. 130.

<sup>24</sup> Id., p. 94: "Sed quid ego illorum in legatos Fidem refero, quorum tanta etiam in Hostes fuit? Vere enim censuit ferax ille virtutum populus, esse nobis Gentium jure quaedam etiam cum Hoste communia, nec exul bello societatem illam, quam Natura Humano Geni indixit."

<sup>25</sup> Id., p. 128: "Quod enim per Deum immortalem scelus excogitari potest majus aut tur-  
(footnote continued)

In this approach Grotius turns *fides*, so to say, into the form and essence of society. The different degrees of human fellowship all call for the respect of *fides*; without *fides* there can be no society; to break faith is to disrupt human fellowship. Under the baroque flourishes of rhetoric this is one most fundamental conclusion one must draw from *De fide et perfidia*.

As I will try to show in an analysis of *De iure belli ac pacis libri tres* (first published in 1625), this socio-political side of *fides* remains of importance in the juridical works.

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pius, quam, quae amicis sancte promiseris, ea violare: praesertim hic, ubi ne illa quidem sententia allegari potuit, quam ego iudico natam dissolvendae omni humanae societati, Haereticis non esse servandam fidem?"



## Fides and obligation

A first inspection of *De iure belli* suggests that in this work fides is used much more directly in the sense of *dictorum conventorumque constantia et veritas*. The titles of chapters indicate that fides is the theme of the last seven chapters of book III (19 - 25). This third book is concerned with "what is allowed to what extent and in what manner during a war, which is discussed absolutely [*nude*] and in relation to a previous promise"<sup>26</sup>. The permissibility of acts of war absolutely, i.e. *iure naturae et gentium*, is discussed in chapters 1 - 18; that in relation to a previous promise in chapters 19 - 25. Hence, the fides in the chapter titles will refer to the bindingness of promises and takes on the meaning of *constantia et veritas*.

This, however, reveals only part of the meaning of fides in relation to promises. For promises share the same 'social' structure of fides. The perfect promise is defined by Grotius as a determination of the will concerning the future with sufficient indication of the necessity to persevere in it and to which is added a sign of the intent to transfer one's own right to another. Not only must there be the manifest will to bind oneself to another, also the acceptance of a promise is necessary to make it binding. The mere assertion of a present intention concerning the future, even if accompanied by the manifest will to abide by this assertion so as to create a moral necessity on the part of the speaker, does not create a social obligation<sup>27</sup>. Prerequisite for binding oneself to another, *obligare*, is the establishment of precisely the same degree of mutuality characteristic of the fides relationship<sup>28</sup>.

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<sup>26</sup> *De iure belli* III, I, 1: "Sequitur expendamus, quid quantumque in bello liceat, et modis, quod aut nude spectatur, aut ex promisso antecedente."

<sup>27</sup> *De iure belli* II, XI, i, 6: "Distinguendi sunt diligenter tres gradus loquendi de rebus futuris quae nostrae sunt potestatis, aut fore putantur. [ii] Primus gradus est assertio explicans de futuro animum qui nunc est: et ad hanc, ut vitio careat, requiritur veritas cogitationes pro tempore praesenti non autem ut in ea cogitatione perseveretur. Habet enim animus humanus non tantum naturalem potentiam mutandi consilium, sed et ius. [... iii] Secundus gradus est, cum voluntas se ipsam pro futuro tempore determinat, cum signo sufficiente ad indicandam perseverandi necessitatem. Et haec pollicitatio dici potest, quae seposita lege civili obligat quidem, aut absolute, aut sub conditione, sed ius proprium alteri non dat. [... iv, 1] Tertius gradus est, ubi ad determinationem talem accedit signum volendi ius proprium alteri conferre: quae perfecta promissio est, similem habens effectum qualem alienatio domini. Est enim aut via ad alienationem rei, aut alienatio particulae cuiusdam nostrae libertatis. [... iv, 2] imo et quod deliberato fit, sed non eo animo, ut ius proprium concedat alteri, ex eo negamus ius exigendi cuiquam naturaliter dari, quanquam non solum hinc honestatem, sed et necessitatem quandam moralem nasci agnoscimus. [... xiv] Ut autem promissio ius transferat, acceptatio hic non minus quam in domini translatione requiritur."

<sup>28</sup> The mutuality intended with regard to the fides-relationships and to the promise is  
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*Fides* is the natural foundation of a promise's binding power. Grotius says that this naturalness of the promise's binding power does not only flow "from the properties of created nature", but is more fundamental because "it flows from that which all rational nature has in common"; that is to say, also non-created rational nature - viz. God - is bound by his promises, as Scripture confirms<sup>31</sup>. In a letter Grotius wrote nine years before *De iure belli* appeared - a letter which forms an almost perfect parallel to the general treatment of promises in the latter - he referred especially to the Epistle to the Hebrews where Paul

"is not afraid to say that God would be unjust if he would not stand by his promises (Hebr. VI, 10); and not much later he says 'Fidelis est qui promisit'. From which it is plain that this *ius* by which we are bound to fulfil our promises proceeds from an eternal law, that is from God's own nature, after whose image man has been created."<sup>32</sup>

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If we are right on the points so far highlighted - *fides* as the basis of *societas*, the naturalness of *fides* and the very close connection between *fides* and promises which is caused by the fact that *fides* is the basis of the binding force of promises - this will be of consequence for the meaning of the 'social contract' of which Grotius speaks as the basis of the state. This 'social contract theory' - like Grotius' doctrine on contracts is general<sup>33</sup> - has been interpreted as ultimately being a brand

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tiam vocant aletheian, quod fidelitatem transtulit Apuleius: ac Simonides iustitia defini-  
ebat, non modo acceptum reddere, sed et verum dicere."

<sup>31</sup> Briefw. I, p. 500: "Quin si subtilius aliquanto rem lubet intueri non ex sola proprietate creaturae rationalis, sed ex eo quod omni naturae rationalis commune est, nascitur vinculum promissionis." De iure belli II, XI, iv, 1: "Eius quod dicimus insigne nobis argumentum praebent divina oracula, quae nos docent Deum ipsum, qui nulla constituta lege obstringi potest, contra naturam suam facturum nisi promissa praestaret. [...] Unde sequitur ut promissa praestentur venire ex natura immutabilis iustitiae, quae Deo et omnibus his qui ratione utuntur, suo modo communis est."

<sup>32</sup> Briefw. I, to Willem Grotius, 18 Febr. 1618, p. 500: "Itaque non veretur ad Hebraeos Apostolus dicere iniustum fore Deum nisi promissa praestaret, hebr. VI, 10. Et non multo post X, 3: 'Fidelis est', inquit, 'qui promisit'. Unde apparet ius hoc quo ad implenda promissa obstringimur ex aeterna lege, hoc est ipsius Dei natura, proficisci, ad cuius imaginem homo est conditus."

<sup>33</sup> Thus on Grotius' legal doctrine of contract in general G. Augé, 'Le contrat et l'évolution du consensualisme chez Grotius', 1968, who amongst other things concludes: "Le droit se confond avec la morale, une morale unilatérale dont le juge deviendra le simple gendarme, sanctionnant des clauses uniquement parce qu'elles ont été consenties, sans souci de leur justesse. On tient sa promesse parce que c'est la morale qui le commande, et le contractualisme s'étend au motif qu'il n'y a d'autres réalités que des volontés libres et individuelles"; and M. Diesselhorst, Die Lehre des Hugo Grotius vom Versprechen, 1959, p.

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of voluntarist consensualism. Thus Del Vecchio said that Grotius' social contract (unlike Rousseau's) is of empirical nature, devoid of any intrinsically rational content, and based on the external principle of *stare pactis* which appears as *deus ex machina* in Grotius' foundation of this contract<sup>34</sup>. This view takes insufficient account of the rôle and nature of *fides* at the basis of contracting. That *fides* is in fact also at the background of the social pact, can be established from the context in which it occurs in *De iure praedae*.

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41: "Grotius [lässt] in seinem Vertragsrecht diese letzte voluntaristische Komponente seines zunächst rein rational erscheinenden Rechtsentwurfes beherrschend hervortreten."

<sup>34</sup> Del Vecchio, 'Sulla teoria del contratto sociale', Contributi, especially pp. 234-246.

## The social contract

The second chapter of *De iure praedae commentarius* (finished in 1604 but not published until 1868) contains *prolegomena* in which Grotius formulates a number of laws and rules that together make up the *dogmatica* on which he bases his elaborate defence of the lawfulness of the Dutch East Indian Company's taking booty from enemy ships. The *passus* in which Grotius describes the state, finds its starting point in the sixth law: '*Benefacta repensanda*', the counterpart of the fifth law: '*Malefacta corrigenda*'. These laws are at the basis of two kinds of obligation, "which the philosophers call *hekousion kai akousion*<sup>35</sup> voluntary or involuntary, the jurists *ex contractu et delicto*". After having treated of punishment, Grotius continues his discussion of the sixth law by granting the natural equity of the duty to recompense good deeds and the natural iniquity to enrich oneself at the expense of another or to let someone suffer damage from his beneficence. "But", Grotius says,

"as the exchange of good deeds [*bonorum commutatio*] is voluntary, the measure of this duty is the will of the creditor. For the good *simpliciter* is one thing; what is a good to someone another".

This view Grotius bases on man being created *autexousion*, *liberum suique juris*, so that each man is the master of his own actions; this is his natural liberty<sup>36</sup>. But even if the will is changeable, this may never be *in fraudem alterius*; that is to say, one may never profit, either in utility or pleasure, from the credulity of another, even if no damage will result for the other person (as will usually be the case).

"Hence the *regula fidei*: 'That which anybody has signified to be his will, is law to him'<sup>37</sup>."

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<sup>35</sup> *De iure praedae*, [Hamaker ed.] p. 15.

<sup>36</sup> *De iure praedae*, p. 17-18: "Lex autem altera de benefactis compensandis non minus manifestam habet aequitatem. [...] Et jurisconsulti ad remunerandum naturalem esse volunt obligationem et natura iniquum esse, ut locupletetur quisquam aliena jactura et suum alicui beneficium damnosum sit. [...] Sed cum bonorum commutatio, ut diximus, sit voluntaria, mensura hujus crediti est creditoris voluntas. Bonum enim alius simpliciter dicitur, aliud quod alicui bonum est. [...] Fecit enim Deus hominem *autexousion*, liberum siueque juis, ita ut actiones uniuscujusque et rerum suarum usus ipsius, non alieno arbitrio subjacerent, idem que 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." Although a 'synnalagmatic' aspect is contained in the starting point which Grotius takes in his sixth law, the gist of this passage contains *in nuce* already the criticism of Connan which Grotius formulated in *De iure belli* and in the letter to his brother Willem quoted above.

<sup>37</sup> *Id.*, p. 18: "Potest autem mutari voluntas, sed non in fraudem alterius, ne scilicet  
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Having adduced the authority of jurists, Cicero, Simonides and the Platonists, which we also found in other places, Grotius states that this *regula* is the origin of *pacta*, after which he describes the formation of the state, which began when

"small societies began to assemble men in one place, not in order to remove the society which binds all men together, but in order to reinforce it with a more certain protection; and also to more easily provide the many things which daily life requires through the distinct works of many. [...] This smaller society, formed through some kind of contract concluded for the sake of the common good, i.e. a multitude which is sufficiently large to provide mutual protection and the things necessary for life, is called *res-publica* and the individuals therein *cives*."<sup>38</sup>

The gathering together in states is according to the philosophers sanctioned by God, in conformity with his will, and almost all states have consented to this institution. As Grotius puts it:

"To the common judgment of human nature the will of individuals has acceded, either in the beginning through the conclusion of an agreement, or tacitly when later each joined the already constituted body of a republic."<sup>39</sup>

The way along which Grotius proceeds, starts from the law concerning good deeds via volition and liberty to the rule of fides which is at the basis of *pacta*, and thence Grotius constructs the state. The prominence of the free will is quite clear in the whole matter. In *De iure belli* Grotius will draw the consequences of this prominence for the form a state can have: it may at will be a pure monarchy in which no others possess any sovereign powers but the king, or a democracy or anything in between these extremes (though in fact one kind of government could be better for a certain people than another)<sup>40</sup>. The order of treatment

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credulitatem cuiusquam lucremur, quae nobis utilis aut jucunda, ipsi fere damnosa sit. Nam etiamsi aliud non adsit incommodum, tamen opinione falli malum est. [...] Hujus autem mali justus nemo alteri causam dabit. Hinc illa fidei regula, 'Quod se quisque velle significaverit, id in eum jus est.'"

<sup>38</sup> Id., p. 19: "Minores igitur societates unum in locum homines colligere coeperunt, non quo illam, quae cunctis hominibus intercedit, tollerent, sed ut eam certiori praesidio immunirent: simul etiam, ut multa, quae humanae vitae usus postulat, distincta multorum opera commodius conferrentur. [...] Haec igitur minor societas consensu quodam contracta boni communis gratia, i.e. ad se tuendam mutua ope et acquirenda pariter ea, quae ad vivendum necessaria sunt sufficiens multitudo, respublica dicitur et singuli in ea cives."

<sup>39</sup> Id., p. 20: "Accessit communi naturae humanae iudicio singulorum voluntas, quae aut pactis conventis ut initio, aut tacita significatione ut postea demonstrata es, nimirum cum se quisque ad corpus jam constitutae reipublicae aggregaret."

<sup>40</sup> De iure belli I, III, vii ff..

in *De iure praedae*, however, also makes clear that the act of volition which is bound up with man's natural liberty finds a place only within the sphere of good deeds, if it is to have any valid consequences. The personal autonomy exists to will and do the good, though it clearly is able to do evil precisely because it is free.

We meet here with an anthropology<sup>41</sup> which Grotius articulated more fully in his tragedy *Adamus Exul* (1601) - a work which Grotius said combined "piety, the pursuit of divine and human wisdom and poetry" and in which "many Philosophical things occur, especially Metaphysics concerning God, the Angels and souls; even some Physics concerning the things of Creation; Ethics throughout the work; and some Geography and Astrology."<sup>42</sup>

The theodicean argument of the *liberum arbitrium* as the cause of evil occurs in the first act when Satan is considering the means of making him turn away from God. Such a means is the free will of man:

"Tangi, nec ulla passus est carpi manu,  
Scientiamque tam malorum, quam boni  
Poenam severus statuit, et sanxit minis:  
Nam Mancipatus nunc homo virtutibus  
Ignorat omne crimen; in medio tamen  
Utriusque positus, cum volet, flectet viam.  
Quocunque vento flante poterit libera  
Pelli voluntas: parte dimidia nocens,

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<sup>41</sup> Fikentscher tries to derive the emphasis to be laid on personal autonomy from what he calls "der Kernsatz" in *De fide et perfidia* which runs: "Agnoscat omnis Terrarum orbis, eorundem animorum esse tutari Libertatem & Fidem" (Fik., p. 114). However, to connect this sentence with liberty in the sense of personal autonomy - an idea which Fikentscher derives from Diesselhorsts study (Fik., p. 51) - is inappropriate. The liberty which is the main theme of the *Parallela*, this chapter, and this very sentence more in particular is not the personal liberty of an individual but the political liberty of the Dutch republic. The sentence preceding the "Kernsatz" is quite obviously concerned with the liberty to shake off the yoke of foreign tyranny, to protect religion and to wage a war for the protection of the republic: "Quanto enim maiora sunt Tyrannis propulsata, defensa Religio, susceptum pro Republica bellum, excussum Austriacae potentiae iugum!" (Fik., p. 114) It would, moreover, seem to be out of place to consider the first mentioned sentence "der Kernsatz" of *De fide*. Its central importance was probably suggested to Fikentscher by A. Stempels' edition of 1945 (TMD 751), through which Fikentscher became acquainted with *De fide* and which he used for reference, cf. Fikentscher, p. 3 and passim. Stempels' edition, however, was occasioned by the end of the occupation in 1945, in which context the said sentence may acquire great importance. But in the composition of *De fide* and the *Parallela* it simply does not stand out as much as in Stempels' edition.

<sup>42</sup> *Dichtw.* IA, p. 25: "Philosophica occurrunt plurima, praesertim Metaphysica, de Deo, Angelis, & animis; Physica etiam de rerum creatione; Ethica passim ut apud omnes; Geographica, & Astrologica nonnunquam, quae omnia a Scena non esse aliena Euripidis, Epicharmi, & Enni me docuit exemplum. Ita eisdem horis & pietatem exercui, & divinae humanaeque Sapientiae studium, & Poësin." To the *Adamus* Grotius added an "Index quo praecipua aut Theologiam, aut Philosophiam, aut alias scientias spectantia adjecto paginae numero monstrantur", *Dichtw.* IA, pp. 184-187.

Qui velle potuit, esse coepit."

["But God forbade to touch or pick them; in his severity he has attached the knowledge of good and evil as threat and punishment to this. For enslaved by the virtues man knows of no crime; but placed in between [good and evil] he will follow the way he wills. By whatever wind blows the free will shall be carried away. Whoever is merely capable of doing it, is already halfway to being bad."<sup>43</sup>]

The free will is in this passage described not as some neutral volition but as a possibility of good or evil; the ethical context is dominant. In the second act God is described as the ultimate source of all good things. God is the *Fons boni*, who enjoys the plenitude of the good, wills the good and causes it, and all the good things depend on His mind:

"Non corpus illum claudit, aut servat locus:  
Sed ubique vivit, omnis expers termini:  
Origo veri, Fons boni, Sapiencia  
Regina mundi, quae potest quidquid cupit.  
.... perfecto modo  
Deus ipse novit, seque dum capit, & cupit  
Pleno, quod aliis dividit, fruitur bono.  
.... Quod verum est videt  
Etiam ante, quam sit: vult bonum, causa est boni.  
...  
Non vera scimus integre, non omnia,  
Nihil futuri. Nostra rebus de bonis  
Pendet voluntas: Mente ab illius bonum."<sup>44</sup>

So although man has *liberum arbitrium* and may determine by his volition a good action, Grotius carefully avoids the Pelagian heresy that the good depends on man's own power - a point which needed to be put with even more force when as of the second decade of the century Grotius became involved with the anti-predestinarian party<sup>45</sup>.

This, then, brings us back to another thing that the order of treatment shows ultimately leading up to Grotius' treatment of the state in *De iure praedae*: the free act of volition acquires its binding power from the utterly natural rule of *fides*. This is also how the paragraphs in the prolegomena to *De iure belli* ought to be understood, in which Grotius speaks of the subjection to state in terms of a *pactum* with the (express or implied) promise to obey its decisions. In the fourteenth paragraph he had been speaking of the kinship among men which was instituted by nature, and next continues his discussion by saying that civil laws

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<sup>43</sup> Id., p. 47, vss. 19 ff..

<sup>44</sup> Id., vss. 366-369; 386-388; 391-393; 405-407; cf. also *Psalmus Quinquagesimus primus*, Dichtw. I A, p. 245, vs.1: "Cumulosae bonitatis Deus author".

<sup>45</sup> Cf. for instance *Disquisitio de dogmatibus pelagianis*, Op. Th. III, pp. 359 ff..



derive from the natural principle of *stare pactis*, the only manner for men of obligating themselves one to another.

"For those who had joined themselves in a group or had subjected to a man or to men, had either expressly promised, or from the nature of the affair must be understood to have tacitly promised, that they would follow that which the majority, or the ones upon whom power was conferred, would establish."<sup>46</sup>

Together with the very large range of legitimate types of government which Grotius recognizes in *De iure belli*, one must conclude that his social contract allows for the enormous variety of states in empirical reality; and in that sense one may well call it an 'empirical' social contract.

But it is not devoid of every inherent rationality in so far as the social contract is based on the rationality of *fides*, which is the most fundamental category expressing the bindingness of the promises which make up an agreement<sup>47</sup>.

This rationality of *fides*, based as it is on the presumption of the liberty *quae obligandi radix est*<sup>48</sup>, is bound up with an anthropological view of the free will of the human agent who is to realize a good which ultimately is to be considered of divine origin. Fikentscher's assertion that the rôle of *fides* lacks philosophical foundation, even if it is intended to refer only to the time the *Parallela* were written, is as inappropriate as Del Vecchio's assertion that, had Grotius set himself to examine the "intrinseco fondamento" of the validity of the social contract, this would have signalled the dissolution of "suo mal saldo sistema"<sup>49</sup>.

What is indeed absent is a development of 'objective' elements which ought to be part of the social contracts and to which legitimate types of government ought to conform, elements which would serve as criteria for determining the legitimacy of certain types of government and the validity of the social contracts by which they are established. The actual differences of circumstances, histories, cultures, and the

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<sup>46</sup> *De iure belli*, prol. par. 16: "Deinde vero cum iuris naturae sit *stare pactis*, (necessarius enim erat inter homines aliquis se obligandi modus, neque vero alius modus naturalis fingi potest,) ab hoc ipso fonte iura civilia fluxerunt. Nam qui se coetui alicui aggregaverant, aut homini hominibusve subiecerant, hi aut expresse promiserant, aut ex negotii natura tacite promississe debebant intelligi; secuturos se id quod aut coetus pars maior, aut hi quibus delata potestas erat constituissent."

<sup>47</sup> Grotius speaks in par. 15 of the prolegomena not of *fides* but of *stare pactis*. However, the *stare pactis* of par. 15 must be identical to the *promissorum implendorum obligatio* of par. 8, which, together with the duty of abstinence from another's goods, the reparation of *damni culpa dati*, and the desert of punishment, forms the natural law in a strict sense.

<sup>48</sup> *Briefw.* I, p. 501.

<sup>49</sup> Del Vecchio, 1963, p. 236-237.

multifarious forms of states lead Grotius to refrain from developing an archetype of government which would serve as a 'model' to be applied in all states<sup>50</sup>. Hence, it is possible for Grotius to consider regicide forbidden and illegitimate in some states<sup>51</sup>, whereas in others he considers it actually legitimate<sup>52</sup>; hence also, Grotius says that there is no absolute right to revolt against a monarch who abuses his power<sup>53</sup>. In fact, were one to develop such a 'model' the question would arise of why it would have this normative and in some sense binding status; why would states be bound to follow the 'ideal'? The only reason would be its naturalness, or in other words that natural law would prescribe such a form of government. But in the face of the sheer variety of cultures, Grotius cannot accept the existence of such a naturally given society. As only alternative he instead had to ground the existence of legitimate states in liberty, in the (at least originally) free establishment of the state.

This stance is reflected in Grotius' polemic against Connan with which he opens his discussion of the validity of promises. It may at first sight perhaps be somewhat surprising to see that in *De iure belli* Grotius takes Connan to task for basing the bindingness of a promise not on the fides of a free willing agent, but on *synallagma*. This is not meant, though, to deny the two-sidedness necessary for establishing an obligation - Grotius, after all, also requires the acceptance of a promise for it to have binding force. The criticism applied to Connan is aimed at the fact that the *synallagma* is conceived of as an institution which is dependent on civil law, and that therefore words bind not from their own nature but only on the presumption of a formal validity in terms of positive law<sup>54</sup>. Connan presupposes the validity of the specific

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<sup>50</sup> Cf. the opening words of the *Parallela*, Heerman ed. [TMD 750], vol. 1, p. 13: "In perpetuo hoc rerum animorumque motu, qui nihil habet varietate pervivacius, & tanta hominum diversitate, quae nunquam sui desinit esse dissimilis, si quis personae cujusque collectis affectivus & actionum cumulo, commune nomen accuratius inquireret: nae aut ego admodum animi fallor, aut illum simul & rerum finis & propria reus verba deficient."

<sup>51</sup> *De iure belli* I, IV, vii, 6.

<sup>52</sup> *Id.*, I, IV, viii.

<sup>53</sup> *Id.* I, IV, ii ['Bellum in superiores, qua tales, ordinarie licitum non esse, iure naturae'] ff.. Cf., however, *id.*, II, IV, vii, 2: "Haec autem lex [sc. de non resistendo] de qua agimus pendere videtur a voluntate eorum, qui se primum in societatem civilem consociant, a quibus ius porro ad imperantes manat. Hi vero si interrogarentur an velint omnibus hoc onus imponere, ut mori praeoptent, quam ullo casu vim superiorum armis arcere, nescio an velle se sint responsuri, nisi forte cum hoc additamento, si resisti nequeat, nisi cum maxima reipublicae perturbatione, aut exitio plurimorum innocentium. Quod enim tali circumstantia caritas commendaret, id in legem quoque humanam deduci posse non dubito."

<sup>54</sup> This aim of Grotius' criticism appears most clearly in *Briefw.* I, p. 500: "Quod au-  
(footnote continued)

institutions of a society before the validity of acts of individuals can be established. But for Grotius the validity of such social institutions, like political society as such, can only be understood in terms of their being accepted, i.e. on consensual legitimacy. In Grotius' words civil laws are *leges quae quasi pactum commune sunt populi*.

Only if the basis which the institution of civil law has in the free volition is kept in view, can it be understood why Roman law can require different formalities for the validity of an agreement than the law of other countries. The prescription of such different formalities cannot be a command of natural law *stricto sensu*, for then these formalities would exist everywhere. The bindingness of such civil law prescriptions is therefore not to be sought in the content of the prescriptions themselves. These formal prescriptions ought not to be understood as the natural but as the free limitation by civil law of the otherwise plenary liberty of individual citizens to engage into binding agreements<sup>55</sup>. And the reason why civil laws are binding lies in the binding mode of the 'contract' which is at the basis of civil law. Identically, the validity of the social contract itself is not based on the content but on the manner in which citizens subject themselves to the state. This *modus* can be summed up under the terms of *libertas* and *fides*.

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(footnote continued)

tem prima Thesi praesupponis, nempe quasvis verborum conventiones ex natura, hoc est, ex ipsa rationalis creaturae conditione ac proinde etiam ex Gentium Iure primario, non positivo, vim obligandi habuisse, id quanquam a Connano magno vi oppugnatur est tamen verissimum."

<sup>55</sup> Briefw. I, p. 501: "Omne enim debere praerequirit licere, obligatio libertatem, alienatio plenum dominium. Potest autem lex potestatem naturalem hominis restringere non repugnante imo et suadente iure naturali, sive ut ipsi, sive ut bono publico consulatur. [...] Hoc ergo cum statuit lex civilis nihil statuit contra ius naturale. Non enim efficit ut qui promiserat id quod promittendi ius habebat, id ipsum praestare non teneatur; sed ius promittendi aufert, et consequenter ex ipso iure naturae ius obligandi. Non obligatur enim qui promisit quod promittere non potuit."

## The fides of man and the fides of God

So far we have looked at the highly important rôle of fides in the secular affairs of law and society. We had to conclude that fides, precisely because of its relation to liberty, does not derive its meaning from the specific contents of the things over which she presides, except for their generic goodness; fides is at the basis of all civil laws and civil societies notwithstanding the great material differences between them. We ought now to see whether fides is of a similar meaning and importance regarding things divine, or whether the concept - as it bears no strict relation to any particular content - is emptied out too much to be able to be of any importance in this sphere. What we in fact see is that the gamut of meanings we have so far met with in the socio-political sphere, we find again when Grotius speaks of the relation of man to God. A first aspect of the fides governing the relationship of God and man is found in the *Adamus exul*. The 'social' aspect of fides comes to the fore in the second scene of the second act, where Satan tries to establish a relationship of friendship, *amicitia*, with Adam by saying (immediately before he addresses Adam): "Simuletur fides." The sign by which Satan tries then to establish this relationship is by the stretching of the right hand, the Roman symbol for the seat of fides<sup>56</sup>:

" .... Supplicem dextram vide  
Securum amoris pignus, aeternum mihi  
Promitte foedus. ..."

This offer is of course refused to the "perfidious rebel against God"<sup>57</sup>. The mirror image of the non-relationship and non-fides between Adam and Satan is the relationship between Adam and God. Grotius describes it in terms of a *cliens/patronus* relationship, the Roman fides relationship par excellence:

"Quod Terra Scepbris paret & Pontus meis  
Donum est Tonantis, mutua qui me fide  
Sibi obligavit: non ego illius cliens  
Alios clientes quaero ...."

["That the world and sea obey my sceptre is a gift of the Thundergod who obliged me to him by mutual faith; being his client, I seek no other clients ..."]<sup>58</sup>

These fragments from the *Adamus* also touch incidentally upon another aspect of fides, that which relates to *obligare* through promises. This

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<sup>56</sup> Pauly-Wissowa, *Real-Enzyklopedie*, vol. 6, cols. 2282 ll. 32 ff. and col. 2284 ll. 21-25; cf. Livy I,21,4, "sedemque eius (fidei) etiam in dexteris sacratam esse". The verse in Grotius echoes directly Livy I,1,8: "Dextra data fidem futurae amicitiae sanxisse."

<sup>57</sup> *Adamus Exul* vs 875-877; vs. 878: "Ad. Deo rebellis, perfide, execrabilis".

<sup>58</sup> *Id.*, vs 929-932.

aspect is present in Grotius' description of the relation between man and God in the same manner as in the legal and political context. Just as *fides* in the secular sphere refers to what makes the bond binding rather than to the contents of the bond, so it is in the relationship between God and man. Thus we have above already mentioned that God must from the very nature of his being as revealed in Scripture, be understood to be bound by his promises. This Grotius bases on eight places in Scripture, which he adduces: Neh. ix, 8 ("Thou hast fulfilled thy words because thou art just"); Hebr. vi, 18 ("It is impossible for God to lie") and x, 23 ("He is faithful that hath promised"); I Cor. i, 9 ("God is faithful") and x, 13 ("God is faithful"); I Thess. v, 24 ("Faithful is he that calleth you"); 2 Thess. iii, 3 ("But God is faithful"); 2 Tim. ii, 13 ("He continueth faithful; he cannot deny himself").<sup>59</sup>

The two-sidedness implicit in the divine promises is developed at several points.

One of them is in Grotius' annotation to the first gospel, where he remarks on the word *diatheke*, *testamentum* in the heading. Almost two folio-sized pages are concerned to point out the various overlapping meanings of *sponsio*, *lex* and *testamentum*, which are the three manners in which men can bind themselves and to relate this to the meaning of the word *diatheke*. Thus Grotius remarks that "Aristotle and after him Demosthenes defined *lex* by the name *syntheke*, *conventio*, which Papinianus translated as *sponsio*; and concluded agreements are called *leges*, like the will of the testator is called *lex*, as the proper origin of the verbal form of testament is *legare*."<sup>60</sup> The question why the Septuagint translates the Hebrew word for *pactum* not with *syntheke* but with *diatheke* Grotius answers by saying that *diatheke* is the wider term comprising also *syntheke*, while the Septuagint has wanted to use one word each time the same Hebrew word for *pactum* occurred, in which case *diatheke* as more flexible than *syntheke* was chosen as translation.<sup>61</sup> The Latin Christians in turn, used *testamentum* instead of *foedus*, because this is how the epistle to the Hebrews refers to the bond (Hebr. ix, 17), and

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<sup>59</sup> De iure belli II, XI, iv, 1, vide supra note 31.

<sup>60</sup> Annotationes in Libros Evangeliorum, Op. Th., tom. II - vol. I, p. 1 a 1 ff.: "Tribus modis homines hominibus obligantur, Lege, Sponsione, Testament; quae ita inter se distinctae sunt ut tamen communitate juris cohaereant: unde & Legem syntheke, conventionis, nomine definivit Aristoteles ex Sophista Lycophrone, & post eum Demosthenes, quod Papinianus sponsionem transtulit: & pacta contractuum leges vocantur, & testatoris voluntas lex dicitur, natumque hic verbum testamentis proprium legare. [...] Apud Graecos verbum est quod tria ista complectitur, disponere, quod de legibus usurpat Plato, de sponsione Aristophanes, de testamento Isocrates, alique. Cui consequens est nomen diatheke aequale late patens; nam & testamentum frequentissime designat, & pro sponsione ponitur apud eum quem dixi Aristophanem, & pro legibus usurpatum est ab Orphicis & Pythagoristis. nam hi praescriptas suo gregi vivendi normas diathekas vocabant."

<sup>61</sup> Id., 1 b 1-48.

"because the testament, pre-eminently when someone is made heir conditionally, or when something is committed to his faith, approaches quite closely the nature of a *foedus* or *pactum*." <sup>62</sup>

What it is very important to understand in relation to the question why Grotius the anti-predestinarian Remonstrant can attach such importance to *fides* is the further development of what we just quoted: God's promise of forgiveness of sins and the eternal life was indeed, according to Grotius, conditional, *viz.* conditional upon the performance of and perseverance in good works; hence, Grotius speaks of the remonstrants as "those who teach conditional predestination" <sup>63</sup>.

This conditionality is a main assertion in the short tract in the form of annotations to three epistles *De fide et operibus* <sup>64</sup>, in which he attacks the opinion that if the works are not upright, but faith is, salvation is not in peril - "a view which gained a new life in this unhappy age, and that even under the name of repurified doctrine" <sup>65</sup>.

The comment on James II, 14 - which together with that on James II, 21 the centrepiece of the tract - states that James' question "Shall that faith [i.e. faith without works] save him?" most forcefully denies that it does <sup>66</sup>. And why does the faith of those who live after receiving it, not suffice unto salvation?

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<sup>62</sup> Id., 2 a38 ff.: "Quanquam autem diatheke, ut diximus, ubi de doctrina Christiana agitur, federis potissimum habeat significationem, cum tamen Graeca vox usitate admodum testamentum denotet, non mirum est ad hunc quoque vocis usum alludi a scriptore epistolae ad Hebraeos ix, 17. praesertim cum Testamentum, imprimis ubi heres sub conditione instituitur, aut fidei ejus aliquid committitur, ad federum aut pactionum naturam quam proxime accedat."

<sup>63</sup> Verantwoordingh van de Wettelijkcke Regieringh van Hollandt end West-Vrieslant, 1622 (1623?) [TMD 874], p. 4: "Het getal der gener, die de geconditioneerde Predestinatie, de algemene Genade, de wederstandelicke wercking ende sekerheyt vande Volharding niet sonder conditie en leeren ..."

<sup>64</sup> Explicatio trium utilissimorum locorum N. Testamenti [...] in quibus agitur de fide et operibus, first published in 1640; for convenience, I quote from the *Opera Theologica Omnia*, vol. III, pp. 515-532, though it misses out part of the commentary on Eph. i, 7.

<sup>65</sup> Ann. in epistolam Jacobi II, 14, Op. Th. II-II, 1080 b 8 ff.: "'Opera quidem mea non recta sunt, sed fides recta est, ac propterea de salute non periclitor'. Haec opinio olim valde fuit frequens apud Iudaeos [...] Renata est hoc infelici seculo ea sententia, & quidem sub nomine repurgatae doctrinae, cui omnes qui pietatem & salutem proximi amant, se debent opponere."

<sup>66</sup> De fide et operibus, Op. Th. III, 521 b 18 -20: "Interrogatio haec efficacissime negat."

"The reason is that the dispensation granted to the believers<sup>67</sup> carries with itself the condition that, given time and occasion, pious works are to follow. For those things which are given under condition of a future event, do not last if the condition is not fulfilled. Sons are said to be the masters of their father's goods; yet they can be disinherited for grave reasons. For similar reasons gifts and liberties can be revoked, and for sales one is wont to require delivery, while it is in the nature itself of a fealty. Tacitly legacies are supposed to be undone after enmities have arisen. Thus Kings grant to many dispensation, but if a certain rule was not fulfilled, what was granted will lapse."<sup>68</sup>

These works which are to be performed are not just the pious invisible works, such as prayer, but the visible and numerous works in time which the Greek Christians, especially Chrysostomus called *politeian*<sup>69</sup>. Again Grotius is careful not to attract the criticism of adhering to Pelagianism. When the Church Fathers say that the promise be fulfilled as a reward for our desert, this 'desert', just like 'reward' is to be understood as it appears in Scripture: "Not from the equality between works and retribution, which equality is totally absent here [...], but from the most free and liberal of promises which grants our labouring a

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<sup>67</sup> That the divine promises are actually a dispensation from a previous rule Grotius argued extensively in his Defensio fidei contra Faustum Socinum; cf. infra p. 168 ff..

<sup>68</sup> Id., 522 a 23 ff.: "Cur ergo ista fides quae sine operibus salutem parere potuit [i.e. with those who die upon receiving faith], non etiam diutius viventes perducit ad salutem? Causa haec est, quod indulgentia Dei data sic credentibus habet in se conditionem, dummodo dato tempore & occasione pia opera sequantur. Quae autem sub conditione futuri temporis dantur, ea non permanent, si non praestetur conditio. Filii domini dicuntur rerum paternarum: tamen exhaereditari gravius ex causis possunt. Ex causis similibus revocantur donationes, revocantur libertates, & venditionibus adjici solet lex commissoria, & feudis suapte inest natura. Tacite quoque adempta censentur legata, ortis post inimicitias. Sic Reges multis dant criminum indulgentiam, sed sub certa lege, quam nisi impleverint, cadant impetratis, ut Solomo Semei." Earlier in the same tract, in the annotation to Eph. 1, 5, Qui praedestinavit nos in adoptionem filiorum per Iesum Christum in ipsum, Grotius had warned that the condition is often tacitly implied, id., 516 b 19 ff.: "Paulus ad Apostolicum munus Deo sepositus, Galat. i, 15, sed nimirum ita, si non inobediens esset coelesti viso. Actor. xxvi, 19. Eidem & comitibus promissa in summo maris periculo salus Actor. xxvii, 24. si & ipsi scilicet, quod in ipsis erat facerent, nautas in navi retinerent, xxvii, 31. alimentis uterentur, 34. jactum facerent, 38. natarent, 43, 44. Ita hic dicit ante constitutum a Deo, ut illos vocatos non tantum ex inimicis amicos faciat, sed & sibi [...] filios adoptet, pro filiis habeat tractetque per & propter Christum, nempe si vocationi, ut debent, obdiant. Ita passim conditiones tum ex rei qualitate, tum ex locis aliis plurimis & clarissimis, tacitae pro expressis haberi debent."

<sup>69</sup> Id., 525 a 8-16: "Talis autem fides, quam statim mors subsequitur, sine operibus esse dicitur, non quod non pias cogitationes sibi comites habeat, saepe & dicta aut facta aliqua pia, sed quod tractum seriemque factorum conspicuorum (id enim ta erga, opera, pluraliter dicta significant, quod politeian vocant Graeci Christiani scriptores saepe, saepissime autem Chrysostomus) tempore interclusa non ediderit."

right in such manner, that this affair comes closer to a gift under condition, than to a labour contract to which the words 'reward & desert' are more akin"; "the act of faith which is not natural nor owed to Him but which is freely conceded by God, one is to abide by [*servare*]; from this act one is cut off unless the prescribed condition of works following upon faith is fulfilled"<sup>70</sup>. Hence also Grotius says: "For the modesty and humility with which we act towards God is impressed upon us, that we may know that not *ek synallagmatis* or by an equal covenant, but through Gods mercy and condonement of sins, even grave sins, we are led to the hope of eternal life [...] Paul denies that God owes the need of any reason for his decisions, as the *opifex* who has a *jus herile* in us, and that he does not owe eternal life and the celestial felicity to man *ex suapte natura*"<sup>71</sup>.

The question of faith and works cannot therefore be a matter of choosing between either faith or works, but between works with faith or works without - as is the other major assertion of *De fide et operibus*<sup>72</sup>.

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<sup>70</sup> *Id.* 523 b 14 ff.: "Cyprianus de praeceptis Ecclesiae, 'Praeceptis ejus & monitis obtemperandum est, ut accipiant merita nostra mercedem'. Quo in loco, & veterum aliis, vox meriti sic sumenda est, sicut vox mercedis non apud ipsos tantum, sed & in Sacris Literis, Matth. v, 12; x, 42; Luc. vi, 35; I Cor. iii, 14. nimirum non ex aequalitate operis & retributionis, quae hic certe nulla est, Rom. viii, 18 [...]; sed ex liberalissima promissione, quae laborantibus nobis jus dat; ita ut hoc negotium ad donationem sub conditione, quam ad proprie dictam locationem & conductionem, cui contractui agnae mercedis & merendi voces, propius accedat"; *id.*, 524 b 38-41: "Actus non quidem naturalis fidei, neque ei debitus, sed a Deo liberaliter concessus, est servare [Grotius' italics]: eo actu destituitur nisi conditio operum post fidem praescripta impleatur".

<sup>71</sup> *Id.*, 526 a 55 ff.: "Nam modestiam ac submissionem animi ubi cum Deo agendum est, eo nobis maxime imprimi, quod sciamus non ek synallagmatis sive aequo federe, sed per Dei misericordiam & peccatorum etiam gravium condonationem nos ad spem vitae aeternae perducere. [b 40 ff.] Paulus negat Deum consilii sui cuiquam debere rationem, cum & ut opifex in nos herile jus habeat, & vita aeterna coelestisque felicitas homini ex suapte natura non debeatur." Also anti-pelagian in original intent was it to conceive of the "divine natural seeds sown in every man" as general prevenient grace, cf. *Briefw.* I, p. 434 ff..

<sup>72</sup> *Id.*, 525 b 21: "Opponit enim Paulus fidei, non opera quae ex fide procedunt, ac saepe etiam sub ipso fidei nomine, sensu quodam extensiore, comprehenduntur; sed ea quae sine fide, sive ex nativis hominum viribus & humana tantum institutione praestari possunt."



## Conclusion

Having analyzed the rôle of *fides* both in secular relations and in the relation between God and man, we must conclude that in both contexts *fides* is a crucial concept for understanding Grotius' thought, a concept, moreover, which in both spheres appears to have quite a similar meaning.

Thus we saw that in the early work Grotius describes the relationships between nations and people in terms of *fides* (*Parallela*), just as the relationship between man and God is described in terms of the *fides* relationship of patron and client (*Adamus Exul*). In doing so Grotius made use of the vocabulary and ideas of *amicitia*, *clientela* and *fides* as had been developed in Roman antiquity (- though it should be pointed out that a fundamentally related vocabulary had never been absent in the feudal ages and was used in the defence of the Dutch revolt against Spain and by the monarchomachs). Hence, neither Protestantism nor Scholasticism can be considered the source of this usage of *fides*.

In the somewhat later juridical works Grotius further develops the meaning of *fides* for promising. The bindingness of promises flows from the natural rule of *fides* which as such does not pose many material conditions concerning the content of the promise; the nude promise, given and accepted, suffices to engage the *fides* of the subjects concerned.

The centrality of this view for Grotius' conception of the state and his explanation of the validity of civil law might tempt one into thinking that it is this secular concept of *fides* which dominates over the theological concept of *fides*, particularly as Grotius describes the bindingness of God's own promises in one and the same breath (& manner) as the bindingness of human promises - a procedure facilitated by the very unrelatedness of this bindingness to any specific content of the promise.

Against this view the objection must be raised that for Grotius the bindingness of God's promises is grounded in His nature, not in the way His attributes are ascertained in natural theology, but in His nature as it is revealed in Scripture. And as a matter of fact, from this nature thus revealed Grotius deduces that "*fidem servare*" flows from the indelible and eternal law of all rational being in so far as they participate of it, "*venire ex natura immutabilis iustitiae, quae Deo et omnibus his qui ratione utuntur, suo modo communis est*"<sup>73</sup>. So, much rather than saying that the 'theological' *fides* is subservient to a dominant secular concept of *fides*, can one conclude from Grotius' texts that the human and secular *fides* mirrors the order of divine justice and *fides*. There are other striking parallels between the secular and the divine *fides*.

The first is the sphere of liberty to which both the human and the divine *fides* pertain. Liberty is prerequisite for promising among men, just as the divine promises are based on the entirely free will of God.

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<sup>73</sup> *Supra* note 31.

Both the human and divine liberty are bound, though, to the condition of a generic goodness - it concerns free and at the same time good deeds. For the human fides we concluded this from the order of exposition which Grotius followed in *De iure praedae*. For God's fides we can infer the divine goodness from the Scriptural passages adduced by Grotius when asserting God's justice and faithfulness<sup>74</sup>.

From what we have learnt about God's promise being conditional on the good works which are to follow upon the acceptance of faith, we may derive another argument for saying that according to Grotius the free will ought to be willing the good, that the free will ought to be the good will. For precisely because of the way that faith and works are related in the condition added to God's promise, *fidem servare* means to perform and to persevere in performing good works, which works are not to be understood to refer exclusively to prayer and private oblations but concern *ta erga politeian*.

The contrast which Grotius makes with (in his interpretation) Paul between these works connected with and inspired by faith and the works without faith, carries the consequence that for the Christian the performance of good works, which certainly includes the compliance with natural law, must all flow from the primacy of the faith in God. Herein, then, is another argument for saying that both the human fides towards God - which faith itself Grotius conceives of as a free though conditional gift from God - together with the subsequent good works which concern the duties towards fellow men, and the human fides towards fellow men which is included in those duties, ultimately derive from the divine; so that one can legitimately conclude that the theological perspective dominates over the secular.

I do not think that this conclusion is weakened by the fact that biographically speaking, Grotius began developing his theological views of faith, works and grace only when he had a strong political motive for it, viz. when in the second decade of the 17th century the conflict which arose over the issue of predestination and the anti-predestinarian Remonstrance acquired political dimensions in which Grotius became implicated as statesman (siding on the eventually losing party of anti-predestinarians, which led to a sentence of life-imprisonment from which he later escaped abroad). The theological views developed must be understood as a further articulation of more general theological and anthropological views which he held before he was either statesman or implicated in the predestinarian controversy. Nowhere in Grotius' works is there a break to be noticed in the things he writes concerning fides and the related topics. In this respect the conclusion we drew above must stand.

The conclusion with regard to fides, however, cannot suffice as a full answer to the broader question which is the object of the present study. In Grotius' words, "the concept of fides, which we have discussed so far, is somewhat too narrow to cover all the duties which

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<sup>74</sup> Below I will further argue that according to Grotius God's cannot but will the good; cf. *infra* p. 128 ff..

originate in justice" <sup>75</sup>. In *De iure belli*, the rule of faith is only one of the four elements which make up natural law in the strict sense. So if we accept the conclusion that *fides* is not a concept of a secularized nature but originates in a theory of the relation between man and God, then this would still not be a full answer to the more general question whether natural law as such is still based on a theory concerning man and God. More in particular there arises the question whether our conclusion, which concerns the *fides* which governs volitional matters such as the state and civil law and which at least partly rests on the asserted natural justice of *fides*, does not conflict with the sharp distinction which Grotius draws between natural law and volitional law, which distinction itself has been interpreted as a secularizing feature of Grotius' doctrine of natural law, because the divine law is largely arranged under the heading of volitional law. It is this question which I discuss in the next chapter.

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<sup>75</sup> Parallelia, Meerman ed. [TMD 750], vol. I, p. 102: "Omne quod honestum est, id quatuor partium ex aliqua oriri Cicero tradidit, post Panaetium, ut arbitror: aut enim id in perspicientia veri solertiaque versari; aut in hominum societate tuenda, tribuendoque suum cuique, & rerum contractorum fide; aut ... [...] Ejus, quae hic ordine secunda est, parum restat: nam Fidei, de qua locuti sumus hactenus, vocabulum aliquanto angustius est, quam ut ad omne officium, quod ex Justitia nascitur, possit extendi. Pertexendum igitur si quid residuum est."



## CHAPTER II

"THE BEST DIVISION OF LAW ..."



## II. "The best division of law ..."

A perusal of the *Inleidinge tot de Hollandsche Rechts-geleerdheid* (book I, parts I and II), *De iure belli ac Pacis* (especially the prolegomena and book I, chapter I) and some other works, yields as the major distinction of laws - in Grotius' words "iuris optima partitio" - that between natural and volitional law<sup>1</sup>, while within the latter being there is the further distinction between human and divine volitional law.

This division of laws has been interpreted as diverging on two major points from previous philosophical thought - scholastic thought in particular.

The first point was formulated by Dufour, who said that Grotius "abandonne la tripartition scolastique traditionnelle des lois en Loi éternelle, Loi naturelle et Loi humaine, pour lui substituer comme 'summa divisio' la bipartition aristotélécienne en Droit naturelle et Droit positif."<sup>2</sup>

Todescan has articulated this point further in his study of secularization in relation to Grotius' work on natural law. His conclusions are as follows:

"Con Grozio si assiste al dissolversi della nozione di *lex aeterna*. Questa nozione aveva già subito una sorta di emarginazione, e quasi di erosione interiore, nel pensiero della seconda Scholastica. Ora, con il distacco dalla matrice teologica, si assiste alla recisione del cordone ombelicale. La 'scomparsa' della legge eterna rappresenta il punto terminale della parabola della secularizzazione della scienza giuridica nell'Autore olandese. [...] La *lex naturalis* di Grozio non è più il riflesso di quella legge eterna immutabile, che governa l'universo, non è più il riflesso di quella legge eterna tomistica, che Dio stesso ha scolpito nel cuore dell'uomo. Essa diventa l'architrave dell'uomo dell'età antropocentrica che pretende, in virtù della *ratio*, di pervenire ad una conoscenza esaustiva del bene e del vero: con l'obliterazione della legge eterna Grozio svincola definitivamente il diritto naturale dalla matrice teologica e la rende

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<sup>1</sup> In the *Inleidinge* they are termed *aangeboren wet* and *gegeven wet* respectively (I, 2, 4), which in the margin Grotius translated with *lex naturalis* and *lex positiva*; in the *Defensio fidei de satisfactione Christi adversus Faustum Socinam Senensem* (1618), he speaks of the *notissimum* distinction between *ius naturale* and *ius positivum* (Op.Th. III, p. 308 a 4 ff); in the *Annotationes in Libros Evangeliorum*, ad Matthaeum V, 17, he writes: "Primum igitur notissimum est, ius aliud esse Naturale, perpetuum, commune omnibus, aliud constitutum, quod plerumque solet esse peculiare ac mutabile" (first published 1641; Op. Th. II-1, 34 a 45 ff); the variegated vocabulary is completed in *De iure belli ac pacis* I, I, ix, 2: "Iuris ite accepti [i.e. "significatio iuris quae idem valet quod lex" (I, I, ix, 1), L.B.] optima partitio est quae apud Aristotelem exstat, ut sit aliud ius naturale, aliud voluntarium, quod ille legitimum vocat, legis vocabulo strictius posito; interdum et *to en taxei*, constitutum."

<sup>2</sup> A. Dufour, 'Grotius et le Droit naturel du dix-septième siècle', p. 36.

perfettamente autonomo e concluso in se stesso"<sup>3</sup>.

The second point concerns another implication of the distinction of natural from positive law. It is asserted in the literature that with this distinction Grotius brought about a neat separation of divine law from natural law. To quote Dufour once again:

"Que Grotius ait cependant ici [ça veut dire avec la bipartition en droit naturel et droit positif, L.B.] à l'esprit au premier chef la différenciation de l'ordre de la nature humaine par rapport à l'ordre des décrets divins plutôt qu'à celui des lois humaines, c'est ce qui ressort d'abord avec évidence de la disproportion entre le maigre paragraphe consacré au Droit humain et les amples développements des trois paragraphes au Droit divin. Et c'est ce qui ressort ensuite aussi nettement de l'élaboration très poussée des notions de Droit naturel et Droit divin positif l'une par rapport à l'autre."<sup>4</sup>

Tuck has maintained that the distinction of God's positive law from natural law constituted a radical divergence from previous natural law theory:

"So clear-headed was Grotius about this [distinction], that he abandoned vast areas of traditional theology. First, the Decalogue could not be an account of natural law. None of his scholastic predecessors could have gone so far, but Grotius was prepared to assert in *De iure belli ac pacis* that the Ten Commandments were given by God solely to the Jews and that they did not differ in any formal respect from the mass of Mosaic ceremonial and judicial law. Only an independent comparison of the Decalogue with the law of nature as elucidated by Grotius could show which of its precepts were natural. [...] Second, even a belief in a Judaeo-Christian God was not entailed by the law of nature. The only propositions about God to which all men would assent, and whose denial was fundamentally incompatible with life, were 'that there is a deity [...] and that this deity has the care of human affairs'. [...] Christians believed more than this, and were justified in acting on their beliefs, but they could not claim that their Christianity was founded on the law of nature - that was a local error once again. They might claim that it was founded on some positive law of God given to a particular community (as had been the posi-

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<sup>3</sup> Franco Todescan, Le radici teologiche del giusnaturalismo laico: I. Il problema della secolarizzazione nel pensiero giuridico di Ugo Grozio, 1983, p. 111, 115. Perhaps Guido Fassò was the first to suggest that Grotius' natural law "non deriva affatto da una 'lex aeterna' per mezzo della quale Dio abbia ideato, abbia creato e governi ogni cosa [...]; L'espressione 'lex aeterna' in Grozio non si incontra mai", Vico e Grozio, Napoli 1971, pp. 24 and 23.

<sup>4</sup> A. Dufour, op.cit., p. 36.



tive law of the Jews), but nothing more."<sup>5</sup>

If these interpretations are correct, natural law would indeed seem to have become disengaged from things divine. If the point of distinguishing natural law from positive or, as Grotius would have it, 'volitional' law is to mark off the sphere of necessary agreement and truth (a sphere which Tuck considers to be of so small size as to speak *passim* of a 'minimalist' moral theory) from the sphere of disputability and opinion, whilst the divine law is placed in the second category - as is the thrust of Tuck's argument<sup>6</sup> - then no necessary nexus exists any longer between God's law and natural law. When the Eternal law has been eclipsed, no more than a philosophically shallow, or at least only a secularized concept of natural law can remain. It will be hard to maintain that natural law is any longer the expression of an actual truth concerning God and man; no longer will it be possible to say that "all laws", either natural or volitional, "are nourished by one, which is divine".

In so far as this conclusion is based on the distinctions Grotius made between different kinds of law it will be necessary to study the definitions Grotius gave of the various kinds of volitional and natural law and see how these concepts relate to each other.

I proceed according to the following order. First I give the descriptions of the concept of volitional law as divided in human and divine respectively. Next I discuss Grotius' description of natural law. In doing this, I shall on the whole keep to the chronological order of the various descriptions in Grotius' works, which means that I first discuss *De iure praedae*, next the *Inleidinge* and then *De iure belli*.

After this largely expository account of how the kinds of law are distinguished one from another, follows a discussion of how volitional and natural law relate to each other. This discussion takes its departure from an examination of the meaning and importance of Grotius saying that some things are improperly considered part of natural law.

Having established the relation there exists for Grotius between natural and volitional law, I next come to the relation between the Divine and natural law. I do so in a section in which I discuss the alleged eclipse of the eternal law.

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<sup>5</sup> R. Tuck, 'Grotius, Carneades and Hobbes', in *Grotiana*, 1983, pp. 56-57.

<sup>6</sup> Tuck, *op. cit.*, p. 58: "His intention was not so much to provide a particular philosophical account of the epistemological status of the law of nature, as to make a strong distinction between God's natural and positive laws, and to place in the second category much of what traditional theology had rather loosely left in the first. Anything which the sceptic might question about religion or God's will was positive law, to be defended on the avowedly low-level basis of history or authority (...); only the unquestionable was the law of nature."

## Ius voluntarium humanum: civile & gentium

### - De iure praedae

In *De iure praedae* (1603-1606), chapter II a general treatment of law is presented in such a manner that - unlike with the *Inleidinge* (1619-1621) and *De iure belli* (1625) - the distinctions between different kinds of law cannot be easily digested into a system of Ramist dichotomies. Different kinds of law are attributed to different sources of will-acts: natural law to God's will; the law of nations (*ius gentium*) to the will of all mankind; contract to the will of the individual; civil law (*ius civile*) to the will of the republic, etcetera. The order of presentation combined with the central rôle of the will in relation to the sources of law, makes it hard to reconstruct the distinctions between natural and volitional law in the manner Grotius would do in later works. Also the further division of volitional (or positive) law into human and divine is not presented as a major distinction.

However, the *ius civile* and *ius gentium* - which are the major kinds of *human volitional* law Grotius distinguished in later works - do both occur. But due to the absence of a clear distinction of natural and volitional law or of a clearly presented insight into the importance of this distinction, with regard to the meaning of *ius civile* and *ius gentium* a terminological obfuscation results which, I argue, Grotius was to avoid in later works. In order to show this I will first discuss the meaning of *ius civile* and then that of *ius gentium* in *De iure praedae*.

The term *ius civile* occurs in *De iure praedae* for the first time when Grotius has formulated the rule that "whatever the commonwealth has declared to be its will, that is law in regard to the whole body of citizens"<sup>7</sup>. Grotius points out that "this rule is at the origin of the law which the philosophers call *thetikon*, *nomikon* or even *idion*, and the lawyers call *civile*":

"This [*ius civile*] is not law in itself [*ius per se*] but by virtue of something else [*ex alio*]. Thus, in the case of the exchange of an ox for a sheep, they are not in themselves [*per se*] equal, but equal because the contracting parties have been pleased to make them so."<sup>8</sup>

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<sup>7</sup> *De iure praedae*, Cap. II, p. 23; Regula IV: "Quidquid respublica se velle significavit, id in cives universos jus est."

<sup>8</sup> *De iure praedae*, loc. cit.: "Hinc oritur jus illud quod *thetikon* sive *nomikon* aut etiam *idion* philosophi, juris auctores *civile* vocant: quod non est jus per se, sed ex alio. Quemadmodum se bos cum ove permutetur, non sunt quidem haec per se aequalia, sed quia contrahentibus ita placuit. Nihil ergo mirum est, quod alioquin illicitum non foret hac ratione illicitum fieri, aut cum jura naturalia, ut quae causam habeant perpetuam, ipsa etiam perpetuo durent, ista jura mutari cum sua causa, hoc est cum hominum voluntate, aut alia alibi esse, quia scilicet bona rerumpublicarum sunt diversa."

In the margin Grotius refers to Aristotle, *Nicomachean Ethics* 1134 b 18, which is the place where Aristotle distinguishes a *dikaion nomikon* from *dikaion physikon*. This very same reference Grotius makes again in *De iure belli ac pacis*, when Grotius says that

"the best division of law [...] is found in Aristotle, i.e. into natural law and volitional law which he calls 'legitimate' in the more strict sense of the word; sometimes he calls it *to en taxei*, established."<sup>9</sup>

In itself the identification of what Aristotle called the *nomikon* with *civile* is true to Aristotle's conception of law as essentially a *politikon*. A terminological problem arises for Grotius, however, when *ius civile* is used as the name for, and becomes therefore identified with, *all* law which is not natural law. Grotius seems to be doing precisely this in *De iure praedae*.

This identification is problematical because the term *ius civile* was used by previous authors, and in fact also by Grotius, for the law which is particular to a specific state. If *ius civile* is then used as the term for the law which is not *per se* but *ex alio*, it seems as if only the national law of a particular state can be such *ius ex alio*. But this conclusion Grotius cannot have intended, because in one of the following *regulae* he recognizes a kind of law which transcends the boundaries of particular states and which is not a *ius per se* (i.e. natural law or *ius gentium primum*) either: the *ius gentium secundarium*. This *ius gentium secundarium* is based on rule VIII: "What all states have indicated to be their will, that is law in regard to all of them"<sup>10</sup>. An example of this kind of law - which shows that also this law is a *ius ex alio* dependent on the volition of the states involved and not a *ius per se* as for instance the *ius gentium primum* (based on the "consensus of all men") is - we find in the eighth chapter of *De iure praedae*.

There Grotius discusses the consequences of the conclusion that "citizens who have no reasonable grounds to doubt the justice of the war they fight, can with equal justice take and keep booty when they are so ordered". The question, in particular, is whether this conclusion also entails for citizens on both sides in the war "the irrevocable right of property" with regard to the booty they took. Grotius answers that this could not be maintained "on the basis of the *ius gentium primum*, which flows from nature", because by nature we are under the obligation to return to the proprietor what we hold from him, and subjective opinion does not suffice to take away property rights against the will of the owner. Yet "the peoples seem to have decided that what is taken by each of both sides belongs to each of them, and for this a number of reasons can be given". The first of these reasons is the strictly utilitarian argument that citizens will defend their republic more diligently if they can lose their property in a war. Secondly, Grotius adduces a

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<sup>9</sup> See above note 1, p. 34.

<sup>10</sup> Idem, p. 26: "Quidquid omnes respublicae significarunt se velle, id in omnes jus est."

number of arguments of juridical nature. The most important of these shows that it is a rule based on tacit agreement that citizens acquire booty as property, from which by explicit agreement can be derogated. This argument is provided by the fact that restitution of property is, whenever it occurs, stipulated in peace-treaties, whereas restitution does not take place when stipulations are absent. Hence, it should be concluded that the rule that restitution does not need to take place is, by implication, a matter of tacit agreement between states<sup>11</sup>. It is quite clear that this rule, which is *ius ex alio*, is in principle binding on all states - i.e. what Grotius calls *ius gentium secundarium*. But, and this is significant, precisely in the context of this rule Grotius says that this kind of *ius gentium* is fundamentally *civile* [*'ius gentium secundarium, quod esse sui origine civile diximus'*]<sup>12</sup>. *Ius civile* can here no longer have the meaning of the law particular to a specific country. The only meaning *ius civile* can have is that of the *thetikon* of *nomikon* in the way it is distinguished from natural law in the Nicomachean Ethics<sup>13</sup>.

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<sup>11</sup> De iure praedae, p. 119: "Sicut igitur bellum, ita et depredatio rerumque captarum detentio subditorum respectu ex utraque parte juste datur: praecedente scilicet jussu, cui ratio probabilis non repugnet. An vero utrimque et dominium, hoc est jus illud irrevocabile, quaeratur, inquisitione indiget. Omnino ausim affirmare jure gentium primario, quod ex natura defluit, hoc ipsum non contingere. Neque enim opinio cujusquam eousque sufficit, ut domino nolenti dominium auferat. Et naturaliter obligamur ad restitutionem, non tantum iniqua acceptione rei alienae, sed qualicunque possessione: unde nec praescriptiones eo jure receptas verissima sententia est. Sed defendi potest jure gentium secundario, quod esse sui origine civile diximus, idem illud procedere. Videntur enim populi conscivisse, ut bello capta utrimque capientium fierunt, nec ejus rei deesse rationes. Diligentius enim rempublicam defendunt cives bellique onera promtiores sustinent rei privatae vinculo, cum spes quoddammodo praecisa est semel amissa recuperandi. [...] Magnum autem hujus rei argumentum est, quod facta pace, de quibus non expresse convenit ut redderentur, haec ut belli praemia penes possessores manent. Videtur igitur, cum pactione efficiendum sit ut recipiantur, jus commune in contrarium praecedere: hoc autem aliud esse non potest, quam ex tacito civitatum consensu."

<sup>12</sup> *ibidem*.

<sup>13</sup> Haggenmacher discusses and quotes the passage we have just discussed, calls it in Grotiana (vol. II, p. 61-62) "la partie déterminante pour nos considérations", but pays no attention to Grotius saying there that the ius gentium secundarium is "sui origine civile". Consequently, Haggenmacher overlooks that these words do in fact already indicate the conventional origin of the ius gentium secundarium. Although it does not detract from the correctness of his conclusions concerning the editorial stages of De iure praedae (infra note 18), Haggenmacher overstates that in the first stage of drafting De iure praedae Grotius was not clear that the basis of its validity was the agreement (tacit or not) of nations (1983, pp. 366-367; Grotiana p.56-57). After all, the clear order of regulae and leges of De iure praedae ranges from the things which are per se (things divine and natural, amongst which the two kinds of natural law find a place; the first two regulae and six leges) via a discussion of libertas and fides to things contingent such as pacta, communis pactio civitatis, respublica (De iure praedae, p. 94: "respublica vero non natura, (footnote continued)

As we said, the reason why the term can lead to misunderstanding is that *ius civile* also remains the term for the particular law of single states; there was simply no other term available for the latter. In later works this straightforward state of affairs led Grotius to abandon the term *civile* for the *thetikon* or *nomikon* and to use *positivum* or *voluntarium* for law which is not *per se*. The term *ius civile* was left to apply to what it had always applied to: the particular law of a specific republic.

The concept of *ius gentium* had been beset with problems of demarcation from natural law, international law and customary law at least since the Digest. In *De iure praedae* in the form in which we now know it, Grotius had come to a fragile synthesis of different concepts of *ius gentium*<sup>14</sup>.

Firstly, there is a sense of *ius gentium* which assimilates it to natural law. *Ius gentium* in this sense Grotius associates with "the consensus of all mankind"<sup>15</sup>, or the "consensus of nations" through which the remainders of the divine light of reason - so much overcast by sin - are made apparent; it is natural law for it is known to man through what he has in common with others:

"Most authors have called this consensus *jus naturae secundarium* or *ius gentium primum*."<sup>16</sup>

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(footnote continued)

sed ex conducto"); and the *Leges* VII - XI and *regulae* III - VIII belong to the latter, *regula* VIII being the basis of *ius gentium secundarium*.

<sup>14</sup> On the concept of *ius gentium* in *De iure praedae* there is now the elaborate study of P. Haggenmacher, *Grotius et la doctrine*, 1983, pp. 311-399. As a consequence of the fact that this study is primarily concerned with the just war doctrine, the purely conceptual analysis of *De iure praedae* offered by Haggenmacher is almost exclusively limited to the *ius gentium secundarium* and its distinction from what is improperly called so. Haggenmacher's work in this respect is summarized and on some points further elucidated in: P. Haggenmacher 'Genèse et signification', *Grotiana*, M. S. Vol. II, 1981, pp. 44-103.

<sup>15</sup> *De iure praedae*, p. 12, *regula* II: "Quod consensus hominum velle cuncto significaverit, id jus est."

<sup>16</sup> Ibidem: "Est quidem ista ratio nostro vitio obnubilata plurimum, non ita tamen, quin conspicua restent semina divinae lucis, quae in consensu gentium maxime apparent... Concordia universalis nisi ad bonum et verum esse non potest. Placuit autem plerisque hunc ipsum consensum *jus naturae secundarium*, seu *jus gentium primum* appellare; cujus legem Cicero nihil aliud esse ait, nisi rectam et a numine Deorum tractam rationem, qui et alibi: omni in re consensus omnium gentium *lex naturae* putanda est. Vidit hoc Heraclitus, qui cum duos poneret *logous*, *ton xynon kai ton idion*, *communem* scilicet *propriamque rationem*, sive *sensum*, illum esse vult *kriterion* et quasi *judicem*, *ta gar koinei phainomena pista*, fida enim esse quae communiter ita videntur." Cf. idem, p. 33: "Quod omnium gentium consensu universali approbatur, id omnibus inque omnes jus est. Est autem bellum ejus generis, quia quod jus et naturae idem est *jus gentium* necessario, accedente scilicet ratione."

Secondly, there is a *ius gentium secundarium* which, as we saw, is not a natural kind of law (in the vocabulary of *De iure praedae*: not a *ius per se*) but is dependent on the will of states and can change with a change in that will - it is in this sense a *ius civile* even though it concerns the "rerumpublicarum inter se bonum" which states have in common<sup>17</sup>.

Some authors previous to Grotius, however, counted certain institutions under this *ius gentium*, which according to Grotius do not rest on an agreement between nations, but are by chance common to nations. This led Grotius to distinguish in a famous *nova declaratio* - which he inserted into the manuscript of *De iure praedae* at an unknown later date - between on the one hand a *ius gentium secundarium* which is properly so called and is based on interstate agreement, and, on the other, a *ius gentium secundarium* which states introduced one imitating the other (*sigillatim*) without such agreement and which Grotius prefers to call mere custom (*consuetudine*). Such customs states can unilaterally abrogate<sup>18</sup>.

We may conclude from what we have seen above that this latter kind of *ius gentium secundarium* is a *ius gentium* only in an improper sense and, according to Grotius, really *ius civile* in the sense of municipal law.

The wavering between the different meanings of both *ius civile* and *ius gentium*, which was alleviated by the later distinction in the *nova declaratio*, can still be seen at the point where Grotius introduces the *ius gentium secundarium* in the proper sense. For he introduces this concept by saying that it is "quoddam ius mixtum ex iure gentium et civili"<sup>19</sup>. Here *ius gentium* means (secondary) natural law and *ius civile* most probably means volitional law (as Grotius later was to call it). It was certainly possible, given then current usage, to describe a type of law as being in between natural and volitional law. But already in *De iure praedae* such characterization could not always be maintained

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<sup>17</sup> Id., p. 26: "Ut enim commune bonum privatorum ea induxit, quae jam recitavimus, ita cum sit aliquod commune rerumpublicarum inter se bonum, eas inter gentes quae respublicas sibi constituerant de hoc etiam convenit."

<sup>18</sup> Idem, p. 27: "Sunt autem haec duorum generum. Alia enim pacti vim habent inter respublicas, ut quae modo diximus: Alia non habent, quae receptae potius consuetudinis nomine, quam juris appellaverim. Sed tamen et haec frequentur dicuntur, ut quae de servitute, de certis contractuum generibus et successionum ordine populi omnes aut plerique cum seorsim singulis ita expediret, in eandem formam imitatione aut fortuito statuerunt. Quare ab his institutis licet singulis recedere, quia nec communiter sed sigillatim introducta sunt." See on this *nova declaratio* and related redrafted passages P. Haggenmacher, Paris 1983, pp. 358-399 and *Grotiana*, 1981, pp. 51-89. Haggenmacher makes a strong case for considering the *nova declaratio* a result of thinking through the concept of *ius gentium secundarium* in its consequences for the *ius postliminii* and dates the *declaratio* to the third editing phase in the course of the actual writing of *De iure praedae*.

<sup>19</sup> Idem, p. 260.

analytically; a concrete rule of law is either a *ius per se* or it is not and the conceptual distinctions had to be geared to this.

- Inleidinge

In the *Inleidinge tot de Hollandsche Rechts-geleerdheid* the distinction of law by its effective cause ("uyt de maeckende oorsaeck"<sup>20</sup>) into natural and positive law ("aangeboren ofte gegeven wet"<sup>21</sup>) solves the problems besetting the distinctions which we discussed in relation to *De lure praedae*. For *ius civile* is no longer a term for positive law itself, but is clearly only a subcategory of positive law.

This is done as follows: after dividing law into natural and positive law, positive law is divided into divine and human law<sup>22</sup>. Human law is divided into the law of nations and civil law ("Volcker-wet" and "Burger-wet"<sup>23</sup>) - of which in the margin he gives the Latin equivalents *ius gentium* and *ius civile*.

The law of nations is defined as the law which

"is commonly accepted by all peoples for the preservation of the community of mankind."<sup>24</sup>

And civil law is defined as the law

"which has as its proximate cause the will of the government of a civil community."<sup>25</sup>

Neat as the distinctions in the *Inleidinge* are between natural law and law of nations and between law of nations and civil law, there are nevertheless some traits in each of the kinds of law distinguished which lead Grotius to remark that in those respects the various kinds of law bear resemblances. Thus he remarks on the law of nations, that

"although it does not absolutely and necessarily follow from natural law, yet it approaches it quite nearly; for this very reason and

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<sup>20</sup> *Inleidinge* 1,2,3.

<sup>21</sup> *Id.*, 1,2,4.

<sup>22</sup> *Id.*, 1,2, 7 and 8: "Gegeven wet is die hare naeste oorspronck heeft uyt de wille des instellers: ende is goddelick ofte menschelick."

<sup>23</sup> *Id.* 1, 2, 10: "Menschelicke wet is Volcker-wet ofte Burger-wet".

<sup>24</sup> *Id.*, 1,2, 11: "Volcker-wet is die gemeenlick by den volcken is aengenomen tot onderhouding van de gemeenschap des menschelijcken geslaches."

<sup>25</sup> *Idem*, 1, 2, 13: "Burger-wet noemen wy die tot haren naesten oorspronck heeft de wille van de overheid eens burgerlicke gemeenschaps."

because of its extensive and longstanding use, it can but be changed with very great difficulty."<sup>26</sup>

As to the relation between the law of nations and civil law, these do indeed differ in their scope, the former having the community of mankind in view, the latter the civil community, but historically they have a common origin, for they have become distinct "from the time that men multiplied to such numbers that they could not very well stand under one policy and therefore have had to divide themselves into several civil communities"<sup>27</sup>.

Another point of contact of civil law with the law of nations is that civil law is either proper to one nation, or common to all or nearly all nations. The law which one nation has in common with others is improperly called law of nations<sup>28</sup>. For this law is changeable "also without the concurrence of other nations, because it does not touch the mutual community of all men"<sup>29</sup>.

- De iure belli

Grotius sets off the various kinds of volitional human law against civil law:

"It is either civil, or broader in scope than that, or narrower in scope. Civil law is issued by the civil power. The civil power is the prevailing power of the state [*civitas*]. The state is a perfect union of free men, associated in order to enjoy their rights and for reason of the common interest. The law which is narrower in scope and does not come from the civil power, although subject thereto, is varied, and comprises the commands of fathers, masters and similar things. Broader in scope is the law of nations, that is the law which all or many nations by their will have accepted to have binding force. I have added 'many nations' because there is hardly any law to be found apart from the natural law - which one is wont to call 'law of nations' as well - which is common to all

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<sup>26</sup> Idem, I, 2, 12: "Deze, hoewel sy niet t'eenemael noodzakelick en volgt uit de aen-gheboren wet, komt nochtans de selve seer nae: ende zoo daerom als van weghe haer wijd-streckend' en langduirig gebruyck, werd zeer zwaerlick verandert."

<sup>27</sup> Idem, I, 2, 10: "Menschelicke wet is volcker-wet ofte burger-wet: welck onderscheid sijn oorspronck heeft ghehad ten tijde als de menschen zoo zeer sijn vermenigvuldigt ghe-worden, dat zy niet allegader bequamelick hebben konnen staen onder een beleid, ende over-sulcks haer in verscheiden burgerlicke gemeenschappen hebben moeten verdeelen."

<sup>28</sup> E.g. idem, II, 3, 14.

<sup>29</sup> Idem, I, 2, 14: "Deze [burger-wet] is of eens volcks eigen [...] ofte gemeen, 't zy met allen, 't zy met meest alle volcken: doch evenwel veranderlick, oock zonder bewillig-ing van ander volcken, als niet rakende de ghemeenschap aller menschen."



peoples. Often there is even a law of nations in one part of the world and not elsewhere."<sup>30</sup>

The distinctions made in this passage substantially agree with those made in the *Inleidinge*. Apart from the addition of a kind of law of narrower scope than civil law<sup>31</sup>, we find added in the context of a definition of the law of nations the remark that natural law is also often called *ius gentium*. This remark may be considered a remnant of the equivalence of *ius naturae secundarium* and *ius gentium primum* which we found in *De iure praedae*<sup>32</sup>. Neither of these terms *ius naturae secundarium* and *ius gentium primum* appear as such in the *Inleidinge* or in *De iure belli*<sup>33</sup> - most probably because of the dominance of the distinction of natural law from volitional law. The remark that natural law is often called law of nations can, then, best be understood as an expression of reverence for contemporary usage. Now I turn to the definition of the other kind of volitional law, the volitional *divine* law.

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<sup>30</sup> *De iure belli* I, I, xiv, 1: "Ab humano incipiemus, quia id pluribus innotuit. est ergo hoc vel civile, vel latius patens, vel arctius. Civile est quod a potestate civili proficiscitur. Potestas civilis est quae civitati praeest. Est autem Civitas coetus perfectus liberorum hominum, iuris fruendi et communis utilitatis causa sociatus. Ius arctius patens et ab ipsa potestate civili non veniens, quanquam ei subditum, varium est, praecepta patria, dominica; et si qua sunt similia in se continens. Latius autem patens est ius Gentium, id est quod gentium omnium aut multarum voluntate vim obligandi accepit. Multarum addidi, quia vix ullum ius reperitur extra ius naturale, quod ipsum quoque gentium dici solet, omnibus gentibus commune. Imo saepe in una parte orbis terrarum est ius gentium quod alibi non est, ut de captivitate ac postiminio suo loco dicemus."

<sup>31</sup> Cf. *Defensio fidei*, Opera theologica omnia, vol. III, p. 308 a 4-13: "Notissimum est duplex esse Ius, Naturale, aut Positivum.[...] At ius positivum est, quod ex libero voluntatis nascitur: qui est duplex, Contractus & Lex. Contractus est effectus ejus potestatis, quam quis habet in se & sua." Although contract is not necessarily within a scope narrower than civil law (e.g. in case of an international treaty), the *ius* created by a contract between private citizens will be of such narrower scope. Presumably Grotius intended the latter.

<sup>32</sup> *Supra*, p. 40.

<sup>33</sup> Grotius still adhered to the distinction of *ius gentium* into *ius gentium primum* and *ius gentium secundarium* in *De aequitate*, paragraph 29 (cf. *infra* chapter IV) and in a letter of 28 February 1618 to his brother Willem, *Briefw.* I, p. 500.

## Ius voluntarium divinum

### - De iure praedae

In *De iure praedae* the divine volitional law is not in so many words mentioned. Some authors have concluded that the divine volitional law is not yet distinguished from natural law, whereas others allege that this distinction is clearly implied in the statement with which Grotius introduces natural law in *De iure praedae*:

"The will of God does not only appear through oracles and extraordinary signs, but above all through the intention of the creator, wherefore we speak of the *law of nature*."<sup>34</sup>

I believe there is indeed an implied distinction between a divine volitional law *avant la lettre* and natural law in *De iure praedae*. Not only does this point of view rest on the passage just quoted but also on the method of demonstration which Grotius uses in chapters III and IV of *De iure praedae* to show that a war can be justly waged and booty justly taken.

Two kinds of demonstration are used there, which Grotius calls the *demonstratio artificialis* and the *demonstratio inartificialis* respectively. The first concerns the proof that something is just by natural law and by the primary law of nations<sup>35</sup>. The second kind of proof Grotius introduces with the words:

"Now we come to divine authority; which kind of proof is *atechnon* yet highly reliable. For God's will - which as we have been saying is the norm of justice - has been signified to us both by nature and in scripture."<sup>36</sup>

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<sup>34</sup> *De iure praedae*, p. 8: "Dei voluntas non oraculis tantum et extraordinariis significationibus, sed vel maxime ex creantis intentione apparet. Inde enim ius naturae est." M. Berljak, *Il diritto naturale e il suo rapporto con la divinità* in Ugo Grozio, Roma 1978, p. 119 says on this passage "il giurista olandese distingueva chiaramente questi due diritti [il diritto naturale e il diritto volontario divino, L.B.] già nel *De iure praedae commentarius*", whereas A. Dufour, *op. cit.*, p. 34, note 83 says "nous ne saurions voir ici [...] une première distinction entre Droit naturel et Droit divin positif."

<sup>35</sup> See e.g. the 'demonstratio artificialis I ad articulum II et III' in chapter III, p. 32-33 on natural law and the 'demonstratio artificialis II ad art. II et III' on the law of nations which he there describes as "quod omnes gentium consensu universali approbatur".

<sup>36</sup> *Id.*, p. 35: "Nunc ad divinas auctoritates veniamus: quod quidem genus probandi est atechnon, non ex arte proveniens, sed tamen longe certissimum. Ut enim per naturam, ita per scripturam Dei voluntas nobis significatur, quae est, uti diximus, iustitiae norma."

Then arguments directly based on Scripture are given. To this kind of proof also belong the arguments from practice and the opinions of authors, which Grotius calls not *demonstrationes* but *probationes*<sup>37</sup>. These two kinds of demonstration are based, then, on the distinction between natural arguments and arguments derived from mere 'authority', which coincides with the later distinction between natural law and volitional law. Within the category of arguments from 'authority' a distinction is made between divine and human authority, which in turn, coincides with the distinction Grotius later makes between divine and human volitional law. I therefore conclude that Grotius already when writing *De iure praedae* made a distinction between natural law and divine volitional law. The reason why this distinction is not as clearly reflected in *De iure praedae* as in other works may well be that Grotius had chosen the infelicitous term *ius civile* for what he later called volitional law. And it would not have been very suitable for Grotius to have called God's law as here intended a *ius civile*. Because - as we shall see presently - it was Grotius' conviction that, even if much in the Old Testament<sup>38</sup> should be regarded as the history and civil law of the Hebrews only, God addresses his law in some parts of the Old Testament and, of course, in the entirety of the New Testament not just to a limited number of *civitates* only but to all mankind.

#### - Inleidinge

We mentioned above that as of the *Inleidinge* Grotius divided volitional law into human and divine law<sup>39</sup>. Concerning this divine law Grotius added:

"Since the coming of our Lord Jesus Christ we know no other divine positive law than that which God the Father has revealed through our Lord Christ himself."<sup>40</sup>

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<sup>37</sup> Id., p. 40: "Sequuntur auctoritates humanae minus certae quidem illae, admodum tamen probabiles: sunt autem duplices, a factis dictisque." The same procedure as here described is also followed in chapter IV of *De iure praedae*, cf. id., p. 52-57.

<sup>38</sup> Id., p. 6: "Nec longe abit vulgatum illud, intellectus penuria eum laborare, qui legem quaerat ubi naturalis suppetat ratio. Aliunde igitur quam ex legum Romanarum corpore petenda est praestabilis illa scientia [...]. Melius aliquanto illi et certius, qui ex sacris litteris ista malunt disceptari, nisi quod nudas plerumque historias aut jus civile Hebraeorum pro jure divino obtendunt."

<sup>39</sup> Supra p. 42 note 22.

<sup>40</sup> *Inleidinge*, I, 2, 9: "Voor goddelicke gegeven wet kennen wy nae onzes Heers Jesus Christus komste gheen andere, als die ons God den Vader door den zelve onzen Heer Christus heeft geopenbaert."

In the *Inleidinge* the only mention of this law is in connection with the monogamous nature of marriage<sup>41</sup> and with the unpermissibility of the dissolution of marriage for other reason than the death of one of the partners or adultery<sup>42</sup>.

- *De iure belli*

*De iure belli*, which follows the same distinction of volitional law in divine and human as the *Inleidinge*, is much more elaborate in its description of divine volitional law.

"What divine volitional law is may well be understood from the sound of the words themselves: it is, of course, the law which has its origin in the divine will."<sup>43</sup>

Grotius differentiates the divine volitional law in time and with regard to addressee.

"This law was given either to mankind or to a single people. We find that a law was given by God to mankind three times: immediately after the creation of man, a second time in the renewal of mankind after the flood, and lastly in the more sublime renewal through Christ. These three bodies of law are beyond doubt binding upon all men in so far as they have come to be sufficiently known."<sup>44</sup>

Grotius pays relatively much attention to God's law given to one people only, which is the law given to the Jewish people<sup>45</sup>. On the basis of

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<sup>41</sup> Id., I, 5, 2: "Nae de oude Duitsche wetten, over-eenkomende als ghezeit is met de eerste instellinghe des huwelicks door Christus bekrachtigt, maf een man maer een wijf, ende een wijf een man, in huwelick hebben."

<sup>42</sup> Id., I, 5, 18: "Volghens Christus vermaninghe werd in deze landen geen scheidinghe des echts-bands toe-ghelaten, dan door de dood van een der echt-genoten, ofte door overspel: alle andere willige ofte rechtelicke scheidinge kunnen den echt-band nochte den rechten daer uit ontsaende niet verbreecken." A divorce not involving the dissolution of marriage was possible in case of maltreatment of the wife by the husband, see id., I, 5, 20.

<sup>43</sup> *De iure belli* I, I, xv, 1: "Ius voluntarium divinum quod sit, satis ex ipso vocum sono intelligimus: id nimirum quod ex voluntate divina ortum habet."

<sup>44</sup> Id., I, I, xv, 2: "Hoc autem ius aut datum est humano generi, aut populo uni. Humano generi ter ius datum a Deo reperimus: statim post hominem conditum, iterum in reparatione humani generis post diluvium, postremo in sublimiori reparatione per Christum. Tria haec iura haud dubie omnes homines obligant, ex quo, quantum satis est ad eorum notitiam pervenerunt."

<sup>45</sup> Id., I, I, xvi, 1: "Ex omnibus populis unus est, cui peculiariter Deus iura dare  
(footnote continued)

the premisses that "a law is not binding for those to whom it has not been given" and that "no indication can be found that God has wanted others than the Israelites to keep this law", Grotius concludes that "hence we are not bound by any part of the law of the Hebrews in so far it is their proper law, because outside the law of nature the obligation comes from the will of the legislator"<sup>46</sup>. As regards the non-Jews, the consequence of the point of view that the Hebrew law is not binding on them is that no proof is necessary that the Hebrew law has been abrogated with respect to them. As to the Jews themselves, Grotius states that the binding force of the ritual precepts has been lifted since the Gospel began to be promulgated, while the other rules have ceased to be binding since the destruction of Jerusalem and the dispersion of the Jewish people<sup>47</sup>.

(footnote continued)

dignatus est, populus scilicet Hebraeus." Cf. De imperio, Op. Th. III 212 a 19 ff.: "...ea vocantur juris Divini positivi, qualia sunt quaedam singulis praescripta, quaedam, populo, quaedam universitati humani generis; singulis, ut quae Abrahamo, Isaaco, iacobo, Mosi aliisque Dei servis mandata leguntur (Deut. IV, 8). Populorum omnium unus est Israëliticus, cui jura positiva Deus plurima praescripsit, tum quae ad sacra, tum quae ad res alias pertinent.

<sup>46</sup> De iure belli I, I, xvi, 2: "Neque enim eos obligat lex quibus data non est. At quibus data sit lex, ipsa loquitur: Audi Israël"; id., I, I, xvi, 7: "Deum autem voluisse, ut alii quam Israëlites ista lege tenerentur, nullo indicio potest deprehendi [...] Hinc colligimus nulla part legis hebraeae, qua lex est propriae, nos obligari, quia obligatio extrinsecus naturae venit ex voluntate legem ferentis" id., I, I, xvii, 1: "... ergo directam obligationem lex per Moysen data in nos inducere non possit ..." This insistence on the non-bindingness of Jewish law for non-Jews may seem to contrast with Grotius' position in a tract from his youth, De republica emendanda, where he states: "Quod si qua inveniri possit respublica quae verum Deum vere auctorem praeferret dubium non est quin eam omnes sibi imitandam et quam proxime exprimendam debeant proponere. [...] ad veterem hebraeorum rempublicam digitum me intendere puto", Grotiana n.s. vol. 5, p.66, I, 2, 17ff.. However, here Grotius did not want to suggest a direct bindingness of the Hebrew laws for Christians, but was only for heuristic reasons interested in the paradigmatic status of the Hebrew state. This heuristic value is also emphasised in De iure belli as we will see presently.

<sup>47</sup> De iure belli I, I, xvi, 7: "Non igitur, nos quod attinet, probanda est ulla legis abrogatio: nam nec abrogari potuit eorum respectu quos nunquam obstrinxit. Sed ab Israëlitis ablata est obligatio. quoad ritualia quidem, statim postquam lex Evangelii coepit promulgari; quod Apostolorum principi clare fuit revelatum, Act. X, 15. quoad caetera vero, postquam populus ille per excidium urbis et desolationem praecisam sine spe restitutionis populus esse desiit." In the Remonstrantie nopende de ordine dije in de landen van Hollandt ende Westvrieslandt dijent gestelt op de Joden, Amsterdam 1949 (TMD 816), an advisory opinion from 1615, Grotius nevertheless proposed a limited form of religious pluralism inspired by the concern for the "well-being of the Christian religion and the well-being of the Polity" (p. 115), which would have certain consequences in the legal sphere. Thus Jews would have to marry for the local magistrate, but on the other hand to the Jews (and to no others) divorce would be allowed according to Mosaic law (artt. 45 & 46, p. 121 and pp. 129-132); also they could retain their laws on the Sabbath, food and circumcision,

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It should be pointed out that the proof of the non-bindingness of the Jewish law is intended as a refutation of the *prava opinio* that outside the Jewish law there is no salvation<sup>48</sup>. But even if "the Mosaic law cannot impose any direct obligation on us", Grotius still considers it of value for Christians. Grotius makes three remarks concerning the use Jewish law can have for others. Firstly, the precepts contained therein and the full rights to do something granted thereby cannot be against natural law, "because natural law is perpetual and immutable, and God, who is nowise unjust, cannot have prescribed anything against this law"<sup>49</sup>. Secondly, as the Mosaic law contains nothing which is against natural law, those same things can be legislated on by Christian authorities unless the revelation of the Gospels and the law given by Christ has ordained differently concerning those things<sup>50</sup>. Thirdly, the virtues which Christ required of his disciples and were prescribed in the law of Moses are to be practised also by Christians and even more so:

"The foundation of this observation is that the virtues which are required from Christians, such as humility, patience and love, are required to a higher degree than was required under the Hebrew law; and deservedly so, because the heavenly promises are much more clearly propounded in the Gospel."<sup>51</sup>

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(footnote continued)

but although they cannot be forced to accept the Christian religion, they would have to be exposed to the teachings of the wisest and most discrete of Christians well-versed in Hebrew who were so licensed by the local magistrate.

<sup>48</sup> *De iure belli* I, I, xvi, 2: "Nec dubitandum, quin fallantur Iudaeorum illi [...] qui existimant etiam alienigenis, si salvi esse vellent, subeundum fuisse legis Hebraicae iugum"; id., I, I, xvi, 6: "...quanquam non negem posterioribus saeculis accessisse etiam in nonnullis pravam opinionem, quasi extra Iudaismum salus non esset." That the proof of the non-bindingness of Jewish law does not stem from an altogether negative attitude towards Jewish law follows from I, I, xvi, 8: "Nos vero alienigenae non id Christi adventu consecuti sumus, ut Mosis lege non teneremur, sed ut qui antea spem tantum satis obscuram in Dei bonitate positam habere poteramus, nunc diserto foedere fulciamur."

<sup>49</sup> Id., I, I, xvii, 1: "Primum ergo ostendit lex Hebraea, id quod ea lege praecipitur non esse contra ius naturae. Nam cum ius naturae, ut ante diximus, sit perpetuum atque immutabile, non potuit a Deo, qui iniustus numquam est, quicquam adversus id ius praecipere."

<sup>50</sup> Id., I, I, xvii, 3: "Huic primae observationi affinis est altera, licere nunc his qui imperium inter Christianos obtinent, leges ferre eius sensus cuius sunt leges per Moysen datae, nisi si quae sint leges, quarum tota substantia ad tempus Christi expectati et Evangelii nondum revelati pertineat, aut nisi Christus ipse contrarium aut in genere aut in specie constituerit."

<sup>51</sup> Id., I, I, xvii, 4: "Quicquid ad eas virtutes pertinens quas Christus a suis discipulis exigit, lege Mosis praeceptum est, id nunc etiam, si non et amplius, a Christianis praestandum. Fundamentum huius observationis est, quod quae virtutes a Christianis exi-

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- an intermediate conclusion

The mere exposition of Grotius' description of the human and divine volitional law can already lead to conclusions on some incidental points in the views of Dufour and Tuck mentioned in the opening section of this chapter.

Firstly, the disproportion Dufour had noted between the "maigre paragraphe" dedicated to human law and the "amples développements" of the paragraphs on divine law turns out to be a question of numbers only; at least, the number of words dedicated to different topics does not directly reflect the proportional concern with the basis of their *validity*. For most of the words Grotius devotes to divine law concern the law of which he wishes to establish that as a matter of fact it is *not* binding. The proof that the Jewish law is not binding simply required more of an explanation than the proof that the civil law of one country is not (as such) binding in another country. The latter is more obvious than the former because the Jewish law is largely contained in the canonic books of the Bible used by Christians, who might erroneously believe that they are bound by that law<sup>52</sup>. If we compare the size of the passages on the *binding* divine law with the size of that on the validity of human volitional law, the difference is less significant than Dufour suggests.

Secondly, it is incorrect to speak of a "local" error in attributing a natural cause to Christianity, if by "local error" is meant that in reality the divine law contained in the Gospel was given to a particular community (as had been the divine law of the Jews) and no more. Grotius makes quite clear that the New Testamentic divine law is addressed to mankind in general and hence is "beyond doubt binding upon all men in so far [it has] become sufficiently known to them"<sup>53</sup>.

In fact the reason why Grotius must be somewhat elaborate on the distinction of this divine law from natural law is their equally universal validity; as Grotius put it in *De Imperio, ante imperium humanum* actions are equally *definitae moraliter*, i.e. necessarily owed or illicit, when either they are so by nature or they are made so by an act of divine authority<sup>54</sup>. In other words, precisely because the Christian divine

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(footnote continued)

guntur, ut humilitas, patientia, dilectio, exiguntur in maiore gradu quam statu legis Hebraicae exigebantur: idque merito; quia etiam promissiones coelestes in Euangelio multo clarius proponuntur."

<sup>52</sup> That Grotius devotes the larger part of his treatment of volitional law to divine law because of the relative unfamiliarity with its legal status, is confirmed by *De iure belli* I, I, xiii, 1: "Ab humano incipiemus, quia id pluribus innotuit."

<sup>53</sup> *Supra* p. 47-48.

<sup>54</sup> *De imperio*, Op. Th. III, 211 b 41 ff.: "Alia partitio actionum est, quod antequam de iis humano imperio aliquid ordinetur, aut sunt definitae moraliter aut indefinitae. [...] Haec definitio ante humani imperii actum aut ex ipsa actionum natura oritur, [...] aut ex

(footnote continued)

law is as little a local phenomenon as natural law is, the difference between them becomes something which requires explanation. This difference, as we shall see, is not found in their degree of validity, but in the source of their validity.

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(footnote continued)

imperio Superioris [...]. Quare cum summa Potestate nullum sit majus imperium humanum (alioqui enim summa non foret) sequitur illi ea demum esse definita quae aut suapte natura sunt debita aut illicita, aut quae talia effecta sunt imperio divino." Here as elsewhere in De imperio, Grotius neatly distinguishes between natural law and divine positive law. It is therefore highly surprising to find that Haggenmacher, Grotius et la doctrine, p. 512 adduces precisely this passage to show that compared to De iure belli this distinction "n'est pas encore aussi nettement tranchée", which Haggenmacher considers a sign of Grotius' continued adherence to the 'voluntarism' allegedly expounded in De iure praedae.



## Ius naturale strictum

In this section I present the definitions Grotius gave of natural law, and I also discuss briefly the importance of keeping in mind the distinction between natural and volitional law when approaching Grotius' descriptions of the *a priori* and *a posteriori* methods of demonstrating a rule of natural law. The fairly straightforward definitions Grotius gave of natural law all concern natural law in a strict sense. From it should be distinguished natural law in a broader sense. Grotius did not give a plain definition of natural in the latter sense precisely because of its equivocal character. Natural law in this broader sense I reserve for discussion in the next section.

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The starting point for the discussion of law in *De iure praedae* is the beginning which all law finds in God, and which Grotius formulates in the *regula*:

"What God has signified to be his will is law."<sup>55</sup>

Then Grotius comes with the description of natural law as the intention of God:

"The will of God does not only appear through oracles and extraordinary signs, but above all through the intention of the Creator [*ex creantis intentione*], wherefore we speak of the *law of nature*."<sup>56</sup>

As to this intention Grotius quotes Lucan: "*dixitque semel nascentibus auctor quidquid scire licet*". To this effect, says Grotius, God - who has brought all creatures into existence and has willed them to exist - has given to each certain inborn principles [*proprietates quasdam naturales singulis indidit*] by which it exists, is conserved and reaches its proper *bonum*.<sup>57</sup>

Conspicuously absent in the immediately following discussion of these principles in *De iure praedae* is any mention of the rational nature of man. As soon as Grotius does mention the subject, he introduces what

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<sup>55</sup> *De iure praedae* p. 7-8: "Unde nobis principium, nisi ab ipso principio? Prima igitur esto regula, supra quam nihil: Quod Deus se velle significarit, id ius est. Haec sententia ipsam juris causam indicat ac merito primi principii loco ponitur."

<sup>56</sup> *De iure praedae*, p. 8: "Dei voluntas non oraculis tantum et extraordinariis significationibus, sed vel maxime ex creantis intentione apparet. Inde enim ius naturae est."

<sup>57</sup> *Id.*, p. 9: "Cum igitur res conditas Deus esse fecerit et esse voluerit, proprietates quasdam naturales singulis indidit, quibus ipsum illud esse conservaretur et quibus ad bonum suum unumquodque, velut ex prima originis lege, duceretur."

he there calls "*jus naturae secundarium, seu jus gentium primum*". He establishes the link between natural law, reason and the law of nations by stating that reason is "an imprint of God's mind in man"; although it has become "overcast with sin; yet not such as not to leave some conspicuous seeds of the divine light, which become apparent in the consensus of nations"<sup>58</sup>. Hence, Grotius connects to the first rule another *regula*:

"What the consensus of men has signified to be their common will, is law."<sup>59</sup>

As concerns *De iure praedae*, I finally wish to recall what we saw above when discussing the concept of *ius civile*, that Grotius characterised natural law as a *ius per se*, while the volitional law is a *ius ex alio*; moreover, as the latter changes with its cause, it is different in different places, but because natural law has a perpetual cause, it lasts perpetually<sup>60</sup>.

The definitions which Grotius gives in the *Inleidinge* and in *De iure belli ac pacis* of natural law are more straightforwardly linked to human reason. In the *Inleidinge* he says:

"Inborn law in man is the judgment of reason signifying which things are from their own nature honest or dishonest, with the incumbent duty from God to follow it."<sup>61</sup>

The definition Grotius gives in *De iure belli* is:

"Natural law is the dictate of right reason indicating that there is in an act a moral turpitude or moral necessity, by virtue of its agreement or disagreement with rational nature itself, and consequently that such an act is forbidden or commanded by God, the author of nature."<sup>62</sup>

<sup>58</sup> Id., p. 11-12: "[*Amicitia quae*] in brutis animantibus clarior, in homine vero luculentissima, ut cui praeter communes cum caeteris affectiones peculiariter concessa sit ratio illa imperatrix: cui scilicet ab ipso Deo principium, qui mentis suae imaginem homini impressit, quod Epicharmi versu notatur: [...] 'Nam Dei a ratione ratio nascitur mortalium'. Est quidem ista ratio nostro vitio obnubilata plurimum, non ita tamen, quin conspicua restent semina divinae lucis, quae in consensu gentium maxime apparent."

<sup>59</sup> Id., p. 12: "Quod consensus hominum velle conctos significaverit, id jus est."

<sup>60</sup> Id., supra p. 37, note 8.

<sup>61</sup> *Inleidinge* I, 2, 5: "Aangeboren wet [*in margine*: "Latine: lex naturalis"] in den mensche is het oordeel des verstands, te kennen ghevende wat zaken uit haer eighen aerd zijn eerlick oftne oneerlick, met verbintenisse van Gods wegen om 't zelve te volgen."

<sup>62</sup> *De iure belli* I, I, x, 1: "Ius naturale est dictatum rectae rationis indicans, actui alicui, ex eius convenientia aut disconvenientia cum ipsa natura rationali, inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut vetari aut praecipi."

The prominence of reason in the definitions of natural law in the *Inleidinge* and *De iure belli* is also reflected in the fact that in these works Grotius denies that animals can be said to participate, in a proper sense, of law, including natural law. In the *Inleidinge* he explains this as follows:

"Of the things [contained in natural law] some are proper to man, and some he holds in common with other creatures. But this is not to say that irrational creatures in a proper sense participate of law, which only suits rational beings, but only that man through the reason which is in him finds to be right what other creatures do either by instinct or with some effort. For as all that exists seeks the common good and his own, in particular his preservation, and as also animals by the conjunction of male and female seek the procreation of their kind and the care of their offspring, so it is that man doing the same finds in conscience that he is doing what is right; but in so far as he is a rational being, he is led to religion and to rational community with other men."<sup>63</sup>

In *De iure belli* Grotius refers explicitly to "the distinction which is in the books of Roman law" where natural law is defined as that which man has in common with animals, whereas the *ius gentium* is the law proper to all men<sup>64</sup>. Again Grotius rejects it as "having hardly any use. For something is not really capable of law if it has not by nature the ability to apply general precepts"<sup>65</sup>.

While this definition of the Roman Digest has been said to confuse descriptive laws of nature and prescriptive natural law<sup>66</sup>, Grotius' rejection of it will not make it easy to accuse Grotius of a similar confusion. However, the two manners to prove that something belongs to natural

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<sup>63</sup> *Inleidinge* I, 2, 6: "Van deze zaken zijn eenige den mensch eigen: eenige hem gemeen met andere schepselen: niet dat de onredelicke schepselen eigentlick des rechts deelachtig zijn, 't welck alleen past op 't redelick wesen: maer dat den mensch door de reden die in hem is, bevind in hem recht te zijn 't gunt andere schepselen doen, of alleen door haer aengeschapen kracht ofte oock met eenigen treck ende zucht. Want gelijck al wat daer is zoekt het gemeene goed ende voorts sijn eigen, ende namentlick sijne behoudnisse, gelijck oock de dieren door gajng van man ende wijf zoeken haers geslachts voort-teeling ende 't gheboren onderhouden, zoo is 't dat een mensch oock sulcks doende, in sijn ghemoed bevind dat hy doet dat recht is: maer voor soo veel als hy een redelick schepsel is, werd hy vorder gheleid tot godsdienst ende tot redelicke ghemeenschap met andere menschen."

<sup>64</sup> Dig. I,1,1,3, traditionally attributed to Ulpian, but presently often regarded spurious.

<sup>65</sup> *De iure belli* I, I, xi, 1: "Discrimen autem quod in Iuris Romani libris exstat, ut ius immutabile aliud sit quod animantibus cum homine sit commune, quod arctiori significatu vocant ius naturae, aliud hominum proprium, quod saepe ius gentium nuncupant, usum vix ullum habet. Nam iuris proprie capax non est nisi natura praeceptis utens generalibus."

<sup>66</sup> E.g. M.B. Crowe, *The changing profile of the natural law*, 1977, p. 51.

law, which Grotius describes in *De iure belli*, might indeed seem to contain the seeds of such a confusion. The two manners in which - says Grotius - "it is usually proved" that something belongs to natural law, are the *a priori* and the *a posteriori* proofs respectively, of which the first is "subtilior" and the second "popularior":

"Something is proved to belong to natural law *a priori* if it is argued that something agrees or disagrees necessarily with rational and social nature; and *a posteriori* if it is concluded, although not with absolute confidence, at least with a certain measure of probability, that something belongs to natural law which all peoples, or all more civilized peoples have considered to be so. For a universal effect requires a universal cause; and there can hardly be thought of any other cause of such an opinion [that something belongs to natural law] beyond what is called common sense itself."<sup>67</sup>

Perhaps Grotius was aware of the fallacy of confusing what one ought to do with what one does, when he chose not to say that because all people *do* the thing itself it is a proof *a posteriori* that something belongs to natural law, but instead chose the formulation that it counts as a proof if all people say it belongs to natural law. Whatever the implications for Grotius' position on the is/ought problem might be (if he had any<sup>68</sup>), this formulation shows that in the context of the *a posteriori* proof it is not the *facts* of certain behaviour which matter but the *opinio iuris*; not their actions but their judgment is what counts. Central in this kind of proof is the assessment which others give of a norm as to its belonging to natural law, which - given Grotius' definition of natural law - implies that in this proof one relies on their assessment of the rationality of certain manners of behaviour in the light of man's nature<sup>69</sup>.

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<sup>67</sup> *De iure belli* I, I, xii, 1: "Esse autem liquid iuris naturalis probari solet tum ab eo quod prius et, tum ab eo quod posterius. quarum probandi rationum illa subtilior est, haec popularior. A priori, si ostendatur rei alicuius convenientia aut disconvenientia necessaria cum natura rationali ac sociali: a posteriori vero, si non certissima fide, certe probabiliter admodum, iuris naturalis esse colligitur id quod apud omnes gentes, aut moratiores omnes tale esse creditur. Nam universalis effectus universalem requirit causam: talis autem existimationis causa vix ulla videtur esse posse praeter sensum ipsum communis qui dicitur."

<sup>68</sup> In a later part of this study, I will suggest that in a different context Grotius did indeed make a decisive distinction of norms from facts; infra, chapter 4, p. 194 ff..

<sup>69</sup> That the *a posteriori* demonstration concerns primarily the reliance on others' assessment of the rationality of a certain state of affairs can also be seen in *De veritate* (Op. Th. III, 4 a 48ff.) where Grotius after the demonstration of God's existence from reason alone comes with an argument *a posteriori* in which the following passage occurs: "Nec est quod opponat hic quisquam paucos in multis saeculis, qui Deum esse aut non crederent, aut non credere se profiterentur. Nam & paucitas ipsa, & quod statim intellectis argumentis rejecta universim est eorum opinio, ostendit, non provenire hoc ex usu rectae rationis, quae hominibus communis est."

As a consequence of the fact that rationality is not only of prime importance in the *a priori* but also in the *a posteriori* demonstration, in the *a posteriori* demonstration of natural law not just any people's judgment is relevant to Grotius, but that of the more civilized peoples, *gentes moratiores*, suffices - for which point of view he adduces Porphyry, Andronicus Rhodius, Plutarch and Aristotle<sup>70</sup>. A similar caution with regard to the use one makes of authorities and the mere practice of nations can already be found in *De iure praedae*, where he states as a reason for this caution that "usually wicked things are done more frequently"<sup>71</sup>. And also in Grotius' popular work of Christian apologetics, *De veritate religionis christianae*, the proof that there is a Godhead is not only founded on reason, but also based on the "most manifest consensus of all nations amongst whom *ratio & boni mores* are not utterly extinct through the introduction of barbarism"<sup>72</sup>. As a matter of fact, Grotius even stipulates soundness of judgment as precondition of the *a priori* judgment; for the latter judgment is not just a judgment of any kind of reason, but a judgment of *right* reason. As Grotius puts it in the prolegomena to *De iure belli*:

"For the principles of [natural] law are in themselves clear and evident, almost as is the case with the things we perceive by the external senses; and the senses do not err if the organs of perception are properly formed and if the other conditions necessary for perception are present."<sup>73</sup>

At the basis of the validity of the *a posteriori* and *a priori* proofs, then, there are identical preconditions. With regard to both proofs these preconditions are stipulated in order to guarantee the correctness of the judgment of reason which is at the basis of natural law. The distinct *a priori* and the *a posteriori* demonstrations of natural law are

<sup>70</sup> *De iure belli* I, 1, xii, 2.

<sup>71</sup> *De iure praedae*, p. 6-7: "Nam quae passim ex omnium gentium annalibus alii collegerunt, ut ad rem illustrandam plurimum, ita ad dijudicandum aut nihil aut parum valent, cum fere idem saepius fiat, quod male fit. Veram igitur nobis viam munierunt veteres illi iurisconsulti, quorum nomina reveremur, qui saepissime artem civilem ad ipsos naturae fontes revocant. [...] In hoc igitur prima esse debet cura; nec parum tamen ad confirmandam fidem valet, si quod jam nobis naturali ratione persuasum est, sacra auctoritate comprobetur, aut idem videamus sapientibus quondam viris et laudatissimis nationibus placuisse"; see also prol., paragraph 40.

<sup>72</sup> *De veritate*, Op. Th. III 4 a 24: "Alterum argumentum, quo probamus Numen esse ali-quod, sumitur a manifestissimo consensu omnium gentium apud quas ratio & boni mores non plane extincta sunt inducta feritate."

<sup>73</sup> *De iure belli*, prol., paragraph 39: "Principia enim eius iuris [sc. naturae], si modo animus recte advertas, per se patent atque evidenter sunt, ferme ad modum eorum quae sensibus externis percipimus; qui et ipsi bene conformatis sentiendi instrumentis, et si cetera necessaria adsint, non fallunt." Cf. prol., paragraph 9: "Pro humani intellectus modo etiam in his iudicium recte conformatum sequi, neque metu, aut voluptatis praesentis illecebra corrumpi, aut temerario rapi impetu, conveniens esse humanae naturae."

therefore much more like two sides of the same coin than is sometimes suggested.

As both kinds of demonstration are, as we said, directed towards the establishment of the inherent rationality of a course of action, it would also seem to be wrong to suggest that the distinction of *a priori* and *a posteriori* runs parallel to the distinction of *intellectus* and *voluntas*<sup>74</sup>.

That this suggestion is actually wrong follows from the different sources of validity which natural law and *ius gentium* have respectively. The former finds its source in the moral turpitude which necessarily inheres in a certain act or state of affairs, which inherence comes to the fore in a judgment of reason; the latter, however, has not such a necessary inherence as its source but is based on the will of nations. In the former the bindingness follows from the nature of things and is therefore properly called natural law, whereas for the bindingness of the latter an act of the will is required and is therefore properly volitional law.

Let me be clear from the outset that in saying this, I do not wish to suggest that natural law is for Grotius an exclusively intellectualist and the law of nations (because it is volitional law) an exclusively voluntarist affair - I argue in various parts of the present study that this would not represent Grotius' position accurately. What I do here deny, though, is the assertion that because of Grotius' allowance of an *a posteriori* proof of natural law, this law can be said to find an independent and ultimate source of validity in the will. To think otherwise is to confuse the judgment of nations concerning natural law with the volitional law of nations, and would be tantamount to a denial of what Grotius considered the *optima partitio* of law in the body of natural and the body of volitional law.

Nor can Grotius' assertion in *De iure belli* that the *a priori* proof is a proof "non certissima fide, certe probabiliter admodum" be taken as an argument for the association of the *a posteriori* proof with the volitional *ius gentium*; for this assertion should not be understood to detract from the character of necessity of natural law as such, but refers only to the reliability of the judgment of others to which recourse is had in this method of proof. In other words, we must be careful to distinguish between the necessity of objective natural law and the reliability of the subjective perception thereof.

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<sup>74</sup> Todescan, *op. cit.*, p. 40-41: "Se pertanto la fiducia groziana nella natura assiomatica dei principi basilari del diritto naturale - a livello di affermazione - è palese, il ricorso al metodo deduttivo di fronte alla multiformità dell'esperienza giuridica si attenua fortemente nel ricorso allo stesso principio della *traditio*, che innervava il *De veritate*. In tale dualismo metodologico può forse riconoscersi una oscillazione che si radica, a un più profondo livello, nel difetto di una consapevole gnoseologia. Il giurista olandese ondeggiava fra *intellectus* e *voluntas*, così come nel *De veritate* aveva oscillato fra ragione e rivelazione. [...] Il metodo del giurista di Delft, nella sua impostazione, resta imprigionato teoreticamente entro un equivoco che giace alla sua stessa radice speculativa. La coesistenza di metodo *a priori* e *a posteriori* indica l'accostamento dell'elemento razionalistico e di quello volontaristico, ma in una posizione che oblitera ogni questione di connessione ontologica: da tale mancata connessione scaturirà, in parte, la stessa secolarizzazione groziana del diritto."

## The relation between natural and volitional law

So far I have treated the conceptual distinctions separating volitional law from natural law. For a clear understanding of this *optima partitio* of law it is important to insist on the urgency with which Grotius made this distinction. Nevertheless constructing a cleavage between these two kinds of law was neither exclusively emphasized by Grotius when giving an account of the concept of law nor, as I shall argue, the most important of Grotius' aims when viewed in the larger framework of his legal works.

Emphasizing the negative relationships, or the (relative) absence of relationships, between concepts is very much in the nature of distinguishing them. But between distinct concepts there can also be positive relations which may become evident when the distinction is looked at from a different viewpoint. When we differentiate the viewpoints from which Grotius approached law, *ius*, a multiplicity of ways arises in which natural law, *ius naturale*, can be seen to play a rôle outside the strict partition which we discussed so far.

In the following subsections I look at the positive relations between natural law and other kinds of law by examining the different ways in which according to Grotius things can be said to belong to natural law. In doing so I first focus on the meaning of the most general distinction Grotius made in this respect, viz. between that which belongs to natural law properly and that which belongs to it improperly<sup>75</sup>.

### - natural law proper and improper

Both in the politico-theological tracts and in the juridical works Grotius distinguishes the norms which are in a proper sense natural from the norms which are *improperly* said to belong to natural law. One major difference between them is that the latter norms lack the cogency with which proper natural law considers certain things right or wrong.

Thus Grotius writes in *De iure belli*,

"For an understanding of natural law it should be noted that some things are said to belong to natural law not properly but, as the

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<sup>75</sup> Although the terms used are not always identical, the most complete of Grotius' statements of the different ways in which things can more or less properly be said to be natural is found in Grotius' letter of 18 May 1615, *Briefwisseling* I, no. 405, p. 390-1. The different senses in which *ius naturale* are distinguished *kata dichotomian* as follows:

[ita ut ab hominibus enuntiari plerumque solet		
[ita ut a natura dictatur. Estque	convenientiae ( <i>prepetin</i> )	[concessivae praeceptivae".
	dispositionis ( <i>déin</i> )	

scholastics like to say, by reduction, natural law not being in conflict with them; in the way we said above that things are called just which lack injustice. But sometimes things which reason indicates to be honourable or to be better than their opposites, but not obligatory, are by a misuse of the term [*per abusioem*] said to be part of natural law."<sup>76</sup>

Similarly there is the following passage in the *Defensio fidei*:

"As in physics, so in moral matters, something is said to be natural either properly or less properly. In physics something is natural properly which belongs to the essence of things necessarily, such as the senses are to animals. But something that is convenient and agreeable is natural less properly, such as the use of the right hand. Thus in moral affairs things are natural properly, that necessarily follow from the relations of the things themselves to rational nature, such as the unlawfulness of lying; and some things are natural improperly, such as the son's succession to his father."<sup>77</sup>

These passages, and that of *De iure belli* in particular, may seem to sound like a disqualification of that natural law which is 'improperly' called so. This impression is reinforced when the precepts which are improperly said to belong to natural law are precisely those of which some scholastics took great pains to show that they belonged to natural law, such as monogamy, concubinage and divorce. Grotius words are unsparing when he speaks of those who claim that such norms pertain to natural law:

"How amazing it is to see how those who think differently sweat to prove that what the Gospel forbids is by natural law *illicite*, such as concubinage, divorce, matrimony with several women."<sup>78</sup>

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<sup>76</sup> *De iure belli* I, I, x, 3: "Ad iuris autem naturalis intellectum, notandum est quaedam dici eius iuris non proprie, sed ut scholae loqui amant, reductive, quibus ius naturale non repugnat, sicut iusta modo diximus appellari ea quae iniustitiae carent. interdum etiam per abusiosem ea quae ratio honesta aut oppositis meliora esse indicat, etsi non debita, solent dici iuris naturalis."

<sup>77</sup> *Defensio fidei*, Op. Th. III, 311 a 35-45: "Naturale autem aliquid, ut in physicis, ita in moralibus aut proprie aut minus proprie dicitur. Naturale in physicis proprie est, quod rei cujusque essentiae necessario cohaeret, ut animanti sentire: minus proprie vero, quod alicui naturae conveniens & quasi accommodatum est, ut homini dextra uti. Sic ergo in moralibus sunt quaedam proprie naturalia, quae necessario sequuntur ex rerum ipsarum relatione ad naturas rationales, ut perjurium esse illicitum: quaedam vero improprie, ut filium patri succedere."

<sup>78</sup> *Id.*, I, II, vi, 2: "Illud libens agnosco, nihil nobis in Euangelio praecipi quod non naturalem habeat honestatem: sed non ulterius nos obligari legibus Christi quam ad ea ad quae ius naturae per se obligat, cur concedam non video. Et qui aliter sentiunt mirum quam sudent ut probent quae Euangelio vetantur ipso iure naturae esse illicita, ut concubinatum, divortium, matrimonium cum pluribus feminis."



A moment's reflection must lead us to the conclusion that the latter quotation actually shows that saying that certain norms do not belong to natural law does not disqualify them at all - unless Grotius wished to disqualify the law of the Gospel, which he surely did not. But that the divine norms of the Gospel are not disqualified by saying that they are improperly counted as norms of natural law, does not necessarily mean that other norms are not disqualified either. I do, however, argue that also those other norms (i.e. those which are not divine norms) are not disqualified when Grotius says they are improperly considered part of natural law. I shall argue, moreover, that it is not right to say that for Grotius all considerations of natural justice have stopped to play any rôle outside the sphere of natural law proper so as to sever norms not properly natural from all and every tie with natural justice.

First we must ascertain that the topic of our discussion is not that of a direct conflict of natural norms with other norms; saying that norms are improperly considered part of natural law is something different from saying that those norms are *contra ius naturale*. This being granted, the conclusion must be that the norms improperly counted as natural law which we are interested in, contain precepts concerning things which from the point of view of natural law are permissible. This is also the sense in which Grotius speaks of the norms improperly considered part of natural law, as transpires from the passage quoted from *De iure belli* in which he distinguishes between natural law proper and less proper (I, I, x, 3).

It should be noted that this very passage from *De iure belli* occurs in the context in which the distinction between volitional and natural law is made; i.e. when Grotius is discussing the concept of *ius* in the sense of *lex*. This meaning of *ius* was the third Grotius distinguished and is roughly consonant with the present-day continental concept of 'objective' law. Grotius defines *ius ut lex* as

"Regula actuum moralium obligans ad id quod rectum est."

As a necessary element (of the definition of *lex*) Grotius included obligation and thus he consciously excluded "counsels and similar precepts which do not create a strict obligation" from his concept of *lex*<sup>79</sup>. The explanation Grotius offers for this exclusion is as follows:

"Permission is not properly an operation of law but a negation of operation, except in so far as it obliges another not to place an impediment in the way of him to whom something was permitted."<sup>80</sup>

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<sup>79</sup> *De iure belli* I, I, ix, 1: "Est et tertia iuris significatio quae idem valet quod Lex, quoties vox legis largissime sumitur, ut sit Regula actuum moralium obligans ad id quod rectum est. Obligationem requirimus: nam consilia et si qua sunt alia praescripta, honesta quidem sed non obligantia, legis aut iuris nomine non veniunt."

<sup>80</sup> *Id.*, I, I, ix, 1: "Permissio autem proprie non actio est legis, sed actionis negatio, nisi quatenus alium ab eo cui permittitur obligat ne impedimentum ponat." Similarly *Inleidinge* I, 2, 2: "Want die gebiedende wetten verbinden tot doen, de verbiedende tot mij- (footnote continued)"

Volitional law apart, the things which by nature are permitted, are only permitted because natural law (in the sense of *lex* - and that is what we have been discussing so far) is non-operative with regard to those things; strictly taken, natural law has not determined anything concerning permissible things. Only less properly, then, can permissible things be said to agree with natural law; for to say that they agree with natural law, might suggest that natural law does contain a precept relevant to those things - which it does not. For this same reason it would be even more improper to say that things which are naturally permitted really pertain to natural law. The only way that one can indeed say that things permitted agree with natural law is in the sense that those things are not unjust, *i.e.* not forbidden by natural law.

However, Grotius did indeed very often show a great interest precisely in reaching the conclusion that something is not forbidden by natural law. And whenever he was concerned to show that something is not unjust, Grotius was materially trying to establish precisely the same thing as those who tried (albeit improperly) to conclude that something belongs to "natural law".

One example of this concern can be found in the chapter of the *Defensio fidei* from which we took the quotation in which a distinction is made between natural law proper and improper. There Grotius tries to establish one of the theses which are fundamental to the whole book, *viz.* that it is not against natural law that God grants dispensation from punishment for sins which would deserve such punishment.

In proving that something is not unnatural Grotius sometimes seems even almost to say that that thing is natural or at least natural enough. So for example in Grotius' response "*ad primam ac generalissimam quaestionem*" of *De iure belli*, "*an bellum aliquod iustum sit*", he opens with the statement that "amongst the first things of nature there is nothing which is against war; they much rather favour it"<sup>81</sup>.

The dominance of this concern to establish that something is natural in that very broad sense of not being against natural law has led Haggenmacher to remark in his magisterial study of Grotius' just war doctrine that it is "disconcerting to find that all through the treatise [*De iure belli*] the broad sense is in fact the only one in which natural law appears. [...] Grotius should have known that thus he rendered the concept of *ius naturale* in the strict sense practically useless - as no doubt has been the case"<sup>82</sup>.

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(footnote continued)

den: de toelatende wetten werden mede gehouden verbiedende te zijn, niet ten aanzien van dien wien iet werd toe-ghelaten, maer ten aanzien van alle anderen den welcken ongeoorloft werd sulcs te beletten."

<sup>81</sup> *De iure belli*, I, II, i, 4: "Inter prima naturae nihil est quod bello repugnet, imo omnia potius ei favent." Titles of the relevant sections of this chapter are "i. *Ius naturae bello non repugnare probatur rationibus*: ii. *Historia*: iii. *Consensu*."

<sup>82</sup> Haggenmacher, *Grotius et la doctrine*, p. 526-527: "Qu'une telle distinction [entre droit naturel pris au sens large et pris au sens strict] fût familière à notre auteur, en  
(footnote continued)

The paradox which arises from this combination of a great interest in the things that are permitted by natural law with the simultaneous insistence that such things are not part of natural law, may perhaps be resolved in declaring that for Grotius, quite in agreement with tradition, the sphere of permissible things is the sphere *par excellence* of volitional law, which may command or forbid what natural law permitted. Grotius, once styled the 'Father of Natural Law', should, then, be considered as really much more interested in volitional than in natural law. This view leaves the separateness of natural and volitional law intact and is in fact based on the sharp distinction between these kinds of law. But it cannot, for instance, explain why Grotius never says that it is 'wrong' instead of 'improper' to consider permitted things part of natural law, or why Grotius does not avoid creating the impression that certain permitted things are natural enough. I believe, more importantly, that this view cannot adequately account for the import of the refutation of Carneades in the prolegomena to *De iure belli*. I propose therefore a different reading which does not unduly stress the cleavage between natural and volitional law but one which rather looks at the *nexus* between them and is based on the subtle differentiation by Grotius of various meanings of *ius*.

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tous cas dès l'époque du *De imperio summarum potestatum*, on l'a constaté plus haut. Cela admis, il n'en est moins déconcertant que tout au long du Traité l'acceptation large du droit naturel soit en fait seule à apparaître[...]. Or, Grotius devait savoir aussi qu'il rendait par là pratiquement inutile l'acceptation stricte du *ius naturale*. Tel a sans doute été le cas." Haggenmacher seems to acknowledge that Grotius' treatment of *ius naturale* in the strict sense is redundant: "S'il l'a néanmoins dessinée avec tant de précision, c'était avant tout pour compléter son tableau du *ius*. C'est là le reflet d'une nouvelle attitude devant son matériau. Rompant consciemment avec sa manière de 1605, il cherche maintenant à présenter au lecteur un tableau aussi complet que possible, plutôt qu'un système aussi cohérent que possible du *ius*, au risque même de n'en point utiliser toutes les composantes durant sa démonstration"(ibid). I will argue that a definition of natural law in the strict sense was necessary for reasons of coherence rather than for completeness.

- the three senses of *ius*

The importance of establishing that something does not conflict with a norm of law - a concern of any law practitioner and also therefore of Grotius, who in different functions during his life was invested with various legal tasks - finds expression in his general treatment of *ius* in the first chapter of *De iure belli*. There he gives as the first sense of *ius*:

"that which is not unjust. And unjust is that which conflicts with the nature of society of beings endowed with reason."<sup>83</sup>

The range of things which are to be judged according to this definition is wider than that of the things which are judged to be not in conflict with natural law *stricto sensu*. For something which does not conflict with natural law may still conflict with a norm of volitional law. But in the above quotation that is also unjust which is against volitional law, because the society of beings endowed with reason (*societas ratione utentium*) is not limited to the type of natural society (in the sense of the 'state of nature') but includes civil society and other types of society, as appears from the context<sup>84</sup>. This first and broadest sense of *ius*, containing all that is permissible, encompasses altogether much more than the 'objective' prescriptive and proscriptive natural law and more than prescriptive and proscriptive volitional norms. Also it encompasses more than *ius* in the second sense distinguished in *De iure belli*. *Ius* in this second sense flows from the fact that certain things are right in the first sense, but now it has reference to the person. This *ius* is

"the moral quality of a person by which he is competent rightfully

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<sup>83</sup> *De iure belli* I, I, iii, 1: "...sitne bellum aliquod iustum, et deinde quid in bello iustum sit? Nam *ius* hic nihil aliud quam quod iustum est significat: idque negante magis sensu, quam aiente, ut *ius* sit quod iniustum non est. Est autem iniustum, quod naturae societatis ratione utentium repugnat." The counterpart of this definition of *iustum* is found in *De iure praedae*, p. 30: "Quid *ius* sit vidimus: unde iniuria etiam noscitur, generali scilicet notione ut id significet quicquid non iure fiat." Maggenmacher (1983) would seem to be too reticent on the latter definition when he writes, p. 61: "Peut-être est-il permis d'y voir l'amorce du premier des trois sens du *ius* de 1625. [...] Il se pourrait qu'en 1605 Grotius n'eut pas encore eu pleinement conscience des distinctions qu'une analyse plus poussée lui fera découvrir plus tard."

<sup>84</sup> *De iure belli* I, I, iii, 2 continues: "Sicut autem societas alia est sine inaequalitate, ut inter fratres, cives, amicos, foederatos: alia inaequalis, *kath' hyperochen* Aristoteli, ut inter patrem et liberos, dominum et servum, regem et subditos, Deum et homines: ita iustum aliud est ex aequo inter se viventium, aliud eius qui regit et qui regitur, quae tales sunt."

to have or do something"<sup>85</sup>;

Grotius divided this *ius* in *facultates* or *suum* (consisting of *potestas*, *dominium* and *creditum* with its counterpart *debitum*)<sup>86</sup> and *aptitudines* (i.e. *dignitas* or what behoves a person)<sup>87</sup>; while *facultas* is the object of 'expletive' justice (which is Grotius' term for his concept of commutative justice) and *aptitudo* that of 'attributive' justice (Grotius' term for his concept of distributive justice).

The third sense, finally, of *ius* we have mentioned before - that is *ius* in the sense of *lex*, the *regula actuum moralium* which impose a duty to do or not to do<sup>88</sup>.

In the sequence of definitions of *ius* - that which is not unjust, that which is attributed to a moral agent, and that which is the volitional or natural rule of actions - there is a narrowing down of meaning. In the order in which they are given here there is no convertibility of the meanings of *ius*; that which is right in the first sense is not necessarily anybody's right in the second sense - thus for instance it is right that a child be supported by its parents, yet in as much as the parents do not have an obligation in the strict sense - as Grotius points out - to support their children, the latter will not have a perfect moral right (*facultas*) to support<sup>89</sup>. Nor is that which is right in the second sense necessarily right in the third sense, e.g. in as much as one may be right to do something (i.e. have the *facultas* or *aptitudo* to do so) which is not forbidden or commanded by a norm of 'objective' natural or volitional law. However, when we take the three senses of *ius* as

<sup>85</sup> De iure belli I, I, iv: "Ab hac iuris significatione diversa est altera, sed ab hac ipsa veniens, quae ad personam refertur: quo sensu ius est, Qualitas moralis personae, competens ad aliquid iuste habendum vel agendum. [...] Qualitas autem moralis perfecta, Facultas nobis dicitur; minus perfecta, Aptitudo: quidbus respondent in naturalibus, illi quidem actus, huic autem potentia."

<sup>86</sup> These *facultates* are largely co-extensive with the continental concept of 'subjective law'; cf. Michel Villey, Leçons d'histoire de la philosophie du droit, 1962, p. 221 ff.. Also Richard Tuck, Natural Rights Theories, 1979, pp. 58-81 stresses the importance and dominance of this concept of law in Grotius' work, which he uses as a major reason for considering Grotius' work as anti-Aristotelian. Haggenmacher qualifies Villey's view in a number of respects; for a response to Haggenmacher and a reiteration of Tuck's view, cf. Grotiana 1986, p. 90-91.

<sup>87</sup> De iure belli I, I, v & vii.

<sup>88</sup> Supra p. 60, note 79.

<sup>89</sup> De iure belli II, VII, iv, 1: "Disputant Iurisconsulti an alimenta a parentibus liberis debeantur. Nam quidam sentiunt esse quidem naturali rationi satis consentaneum, ut a parentibus alantur liberi, debitum tamen non esse. Nos omnino distinguendum arbitramur in voce debiti, quod stricte interdum sumitur pro ea obligatione, quam inducit ius expletorium; interdum laxius, ut significet id quod nisi inhoneste omitti non potest, etiamsi honesta illa non ex iustitia expletrice, sed ex alio fonte proficiscatur. Est autem id de quo agimus (nisi lex aliqua humana accedat) debitum illo sensu laxiore."

distinguished by Grotius in reverse order, then there is a substantial convertibility; because what a norm of natural (or volitional) law commands, can be done rightfully by somebody, while the thing done will also be right.

The convertibility of meanings of *ius* in this second, reverse direction makes it possible to discern a substantial relation between the rightness of a thing (*ius* in the first sense) and a norm of natural law; natural law is indeed relevant for the rightness of certain things of which we do not strictly speak from the viewpoint of 'objective' natural law. On the other hand, the *in*convertibility of the *iura* in the first direction may suggest the possibility of a severance of what is right in the first sense from what is right in the third sense; hence, what may be a right thing in the first sense, may seem to have no relation to a natural norm whatever; natural law would then be irrelevant for the rightness of such a thing in reality. However, also in this first order some connection with natural law is retained, because something cannot be right in the first sense if a norm of natural law (in the third sense) forbids the same thing. Hence natural law makes it impossible for something to be right if it forbids that thing; and at the same time natural law makes it possible for something to be right by not forbidding it. Natural law functions as a boundary of *ius* in the first and broadest sense, as is manifested by the definition of the latter as that which is not unjust, the unjust being taken as that which is in conflict with the rational and social nature of man<sup>90</sup>. Without such a boundary, *ius* in the broader sense would be a meaningless concept. Far from being a redundant exercise for the sake of completeness lacking all practical utility, the definition of *ius* in the first sense necessitated a treatment of *ius* in the third sense<sup>91</sup>.

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<sup>90</sup> De iure belli I, I, iii, 1.

<sup>91</sup> The relation between the three meanings of *ius* which we discussed Grotius spelt out elaborately for its counterpart *iniuria* in De iure praedae, pp. 71-75, from which the following quotation is taken: "Injuria igitur illa quae juri opponitur tres habet significationes, quas Graeci totidem vocabulis distinguunt. [...] Primum est to adikon, secundum adikema, cujus sunt species hybris kai zemia, tertium adikia. Hierax Philosophus [...] com-  
mode haec discernit cum dicit primum esse apotelesma, secundum praxin, tertium hexin, hoc est, opus, actionem, affectionem, quomodo differunt pictura, pictio et ars pingendi. Ex primo adikon ti prattontes, ex secundo adikontes, ex tertio adikoi dicimur. Omnis autem adikia secum habet adikema et adikema omne to adikon: sed non retro. [...] Et forte non errabimus si dicamus ton adikon ti prattonta - facere injuriam, ton adikounta - facere injuria, ton adikon - facere injuriose. Quibus respondent dikaion ti prattein, dikaipragēn kai dikaios prattein, facere jus, facere jure, facere juste." Hence Haggenmacher's remark when comparing De iure belli with De iure praedae, 1983, p. 525, is incorrect: "[A]u lieu de l'exposé synthétique d'autrefois, Grotius se borne à y présenter sur un mode purement analytique les trois acceptions majeures du terme *ius*. Ce faisant, il parvient à mettre en évidence et à dissocier ce qui était resté confondu dans le système du *Mémoire* [= *De iure praedae*]. Cela vaut tout spécialement pour la relation entre sources formelles du droit et normes matérielles censées en dériver: ce lien direct, si frappant autrefois, est dissout; il ne subsiste qu'une série de définitions formelles juxtaposées, sans véritable lien entre elles."

We can conclude, then, that there is a positive relation between 'natural law' and 'the things which are right' in the case of something which is *ius* in the (first) sense of not being unjust and is also *ius* in the (third) sense of *lex*. But even when such a positive relation is absent there is still this connection with natural law that the latter is the boundary delineating the space within which things can be right in the sense of not being unjust.

It now being established that natural law does play a rôle in determining the moral status of things outside the sphere of natural law itself by carving out a space for the things which are permissible, there arises the question whether natural law has any more constructive influence *within* this space. In other words, is it possible for Grotius to say that some of those things can be said to be right by nature even though they are not commanded by a norm of natural law? Is it possible to speak of a right by nature, a *ius naturale* which is not properly part of the *lex naturalis*?

I argue that that can indeed be said in a certain number of cases.

- things commendable and objectionable;  
full and less plenary permission

A first and quite clear indication that Grotius is willing to speak of a *ius naturale* outside the context of *ius* as *lex* can be found in the prolegomena to *De iure belli*. There Grotius gives an eloquent defence against the sceptics, impersonated by Carneades, of the view that law is not exclusively based on self-interest but finds its origin in the in-born social and rational character of human nature (paragraphs 5-7). This nature is "the source of law properly so-called", to which Grotius wishes to count "the abstaining from that which is another's, the restitution of what we have from another with the gains we have had from it, the obligation to fulfil promises, the reparation of injuries incurred through our fault and the desert of punishment among men" (paragraph 8). From this meaning of law, which covers the *ius quae personae competit* of *De iure belli* I, I, iv (i.e. *ius* in the second sense we discussed above) and which as just formulated is also part of *ius* in the sense of *lex*, there flows another and broader meaning of *ius*, which is based on the judgment of things present and future "quae delectant aut nocent". To follow this properly formed judgment "is befitting human nature; and what conflicts with this judgment must be understood to be against the law of nature, that is, of human nature" (paragraph 9)<sup>92</sup>.

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<sup>92</sup> *De iure belli*, prol., paragraph 9: "Ab hac iuris significatione fluxit altera largior: quia enim homo supra caeteras animantes non tantum vim obtinet socialem de qua diximus, sed et iudicium ad aestimanda quae delectant aut nocent, non praesentia tantum, sed et futura, et quae in utrumvis possunt ducere; pro humani intellectus modo etiam in

(footnote continued)

This larger sense of law clearly falls within the first and broadest sense of *ius* discussed above. Here it is described as 'that which does not conflict with the law of (human) nature' and moreover is "befitting human nature" (*conveniens esse humanae naturae*). That Grotius is actually willing to call this law *ius naturale* appears from what he says shortly afterwards when he refers back to paragraphs 8 and 9 and says

"But the natural law of which we have spoken, both the social one and *the one which is called so in a larger sense*, although flowing from principles within man, can yet deservedly be ascribed to God, because he has willed such principles to exist in us."<sup>93</sup>

The active rôle which natural law can play apart from determining what things are commanded or forbidden, can for instance be seen at work when Grotius discusses the duty for parents to support their children. He states that, unless a volitional human law intervenes, there is no perfect moral duty for parents in this respect (and hence, we may conclude, there is no natural 'subjective' right for the children to such support). Such an absence of a perfect duty is only possible if natural law (in the sense of *lex*) does not command parents to support their children. Nevertheless Grotius argues that yet it is right for parents to support their children - as we mentioned above. He does so not by stating it merely as not forbidden by any law, but by adducing several authorities who claim it as natural and by the following natural reasons:

"The one who brings a human being into existence is under a duty to look after it as much as he can and as much as is necessary in those things which are essential to human life, that is for the natural and social life for which man was born. For this reason, that is to say by natural instinct, the other animals also provide their offspring the necessary nourishment [...] Hence the ancient jurists ascribe the upbringing of children to natural law, that is to say, to that which natural instinct commends to other animals, and

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his iudicium recte conformatum sequi, neque metu, aut voluptatis praesentis illecebra corrumpi, aut temerario rapi impetu, conveniens esse humanae naturae; et quod tali iudicio plane repugnat, etiam contra ius naturae, humanae scilicet, esse intelligitur." Around the words "pro humani intellectus modo", also occurring in prol., par. 6 ("communitas pro sui intellectus modo ordinatae"), a lively debate ensued amongst Italian scholars on whether *modus* should be interpreted as 'limit' or as 'norm', the first stressing the imperfection and limitations of the human understanding, the second having a rationalist implication; cf. E. Di Carlo in: *I prolegomeni al De iure belli ac pacis*, 1957; G. Fassò, 'Sull'interpretazione di alcuni passi groziani', *RIFD*, 1951, pp. 753-761; A. Droetto, 'Instinto e ragione', *RIFD* 1963, pp. 586-607. De Michelis, *Le origini storiche e culturali del pensiero di Ugo Grozio*, 1967, pp. 190-193 derives a strong argument for translating the expression as "within the limitations of human understanding" from the explanation of the same term by Franciscus Junius in *De theologia vera* (1594).

<sup>93</sup> *De iure belli*, prol. paragraph 12: "Sed et illud ipsum de quo egimus naturale ius, sive illud sociale, sive quod laxius ita dicitur, quamquam ex principiis homini internis profluit, Deo tamen asscribi merito potest, quia ut talia principia in nobis existerent ipse voluit" (my underlining).



which reason tells us. [...] Because this duty is natural, a mother ought to nourish all children that were begotten."<sup>94</sup>

Although one might think that by giving these natural arguments Grotius gradually shifts towards a position in which this duty belongs to natural law (*lex*) in the strict sense, this is not so. Would this duty truly be part of natural law, then Grotius would have had to consider a human law which excludes every possibility for natural children to inherit from their parents to be an invalid law<sup>95</sup>, but he does not; such law is not an invalid but a rigid law:

"Although the Roman laws wanted to leave nothing to those born out of wedlock, as Solon's law provided that nothing needed to be left to natural children, the Christian canons corrected this rigor by teaching that what is necessary for support is rightly left to all children whatever, or rather, ought to be left in case there is a need for it."<sup>96</sup>

Also in the politico-theological works there are some examples to be found of things not commanded yet in some sense naturally right. Thus Grotius says in *De imperio* that "sovereignty and priesthood can come together in one person by natural law, not merely in the sense that it is not forbidden, but suavisely"; the combination of these offices is not classed "among the natural things which cannot be otherwise, but among the kind of things which *naturae rectaeque rationi satis congruunt*"<sup>97</sup>.

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<sup>94</sup> *De iure belli* II, VII, iv, 1-2: "Qui dat formam dat quae ad formam sunt necessaria, dictum est Aristotelis: quare qui causa est ut homo existat, is quantum in se est, et quantum necesse est, prospicere ei debet, de his quae ad vitam humanam, id est naturalem ac socialem, nam ad eam natus est homo, sunt necessaria. Ea de causa, instinctu scilicet naturali, caetera quoque animantia proli suae quantum necesse est alimenta suppeditant. [...] Hinc Iurisconsulti veteres liberorum educationem ad ius naturale referunt, id est, ad illud quod cum instinctus naturae aliis quoque animantibus commendat, nobis ipsa praescribit ratio. [...] Et quia naturale est hoc debitum, ideo etiam vulgo quaesitos alere mater debet."

<sup>95</sup> This Grotius does e.g. in *De iure belli* II, VII, i, where he argues "leges quasdam civiles esse plane iniustas, ut quae bona naufragorum fisco addicunt. Nulla enim causa praecedente probabili dominium alicui suum auferre mera iniuria est."

<sup>96</sup> *Ibidem*, II, VII, iv, 3: "Et quanquam ex damnato legibus concubitu natis nihil relinqui leges Romanae volebant, sicut et naturalibus ne quid relinquere necesse esset caverat lex Solonis, canones Christianae pietatis hunc rigorem correxerunt, qui docent quilibetque liberis id recte relinqui, imo si opus sit relinquendum etiam, quod ad alimenta necessarium est."

<sup>97</sup> *De imperio*, II, iii, Op. Th. III, p. 208 b 11 ff.: "Iure naturali non modo non prohibente sed suadente in unam personam coalescere posse, Imperium summum & sacram Functionem. [...] Neque enim statim sequitur quae diversa sunt ea uni atque eidem competere non

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The mirror image of the things which are not commanded by nature yet have something commendable are the things which though not forbidden are inferior and have something objectionable. These play an important rôle in *De iure belli*. There they are related to the distinction between two kinds of permission which Grotius introduces when he states that no precept of Jewish law contains anything which conflicts with natural law<sup>98</sup>. This absence of conflict between Jewish law and natural law is stipulated for precepts, but with regard to permission granted by law Grotius distinguishes between "full permission", which grants the right to do something entirely licitly, and the permission which is less plenary because it merely grants impunity amongst men and the right that no other person can licitly obstruct the permitted course of action. The "full permission" granted by Jewish law is, just as the precepts of Jewish law, not contrary to natural law, but with the less plenary permission "the case is different". So full permission grants a freedom which as it were carries the approbation of natural law by not in any way conflicting therewith, while the freedom from punishment and interference by men may not have the same legitimacy. It is in fact implied in the manner in which Grotius speaks of the latter kind of permission that it is in some way at variance with natural law, although obviously there is no natural prohibition. This means that for Grotius there must be some natural consideration dissuading from the permitted course of action without forbidding it. That such natural considerations can be said to be at least in some sense part of natural law follows from Grotius' statement that it is more appropriate to argue from natural law in order to establish with what kind of permission we are dealing, than to argue from the permission to natural law<sup>99</sup>.

Within the context of *De iure belli* this is a major distinction; it is at the basis of the distinction between the *iustitia interna* of things which are entirely and in all respects right (*ius*) and the *iustitia externa* of things which though not forbidden only have the external effect of law

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posse. Potest enim idem esse & cantor & medicus neque tamen aut canendo medebitur aut mendo canet. [...] Jure naturali potest idem habere summum imperium & sacerdotium gerere: quia haec duo suapte natura non ita sunt pugnantia, ut eidem homini convenire nequeant. Quod amplius est seposita lege positiva & impedimentis quae extrinsecus adveniunt, naturale aliquatenus est ut idem sit Rex & sacerdos: non quidem ex eo genere naturalium quae se aliter habere non possunt, sed ex altero genere quod eorum est quae natura rectaeque rationi satis congruunt."

<sup>98</sup> Supra p. 49, note 49.

<sup>99</sup> *De iure belli* I, I, xvii, 2: "Primum ergo ostendit lex Hebraea, id quod ea lege praecipitur non esse contra ius naturae. [...] De praeceptis loquor, nam de permissis distinctius agendum est. permissio enim quae lege fit [...] aut plena est, quae ius dat ad aliquid omnino licite agendum; aut minor plena, quae tantum impunitatem dat apud homines et ius ne quis alius impedire licite possit. Ex prioris generis permissione non minus quam ex praecepto sequitur id de quo lex agit contra ius naturae non esse. De posteriori genere aliter se res habet. Sed raro locum habet haec collectio: quia cum permittentia verba sint ambigua, magis ex iure naturae interpretari nos convenit utrius generis sit permissio, quam ex permissionis modo ad ius naturae argumentando procedere."

in that they may bind if prescribed by volitional law or merely are done with impunity if allowed by volitional law<sup>100</sup>. Thus it becomes possible to say that according to the law of nations in a war many things may be done with impunity which are better omitted; hence Grotius' celebrated *monita* and *temperamenta*<sup>101</sup>.

- middle things, cynicism, scepticism

We must conclude that within the large group of permissible courses of action, Grotius distinguishes those which are to be preferred from those which are to be rejected, and does not stop short of considering their preferability (or avoidance) in some sense natural. Precisely by doing so the *optima partitio* of (objective) law in natural and volitional is, in the end, not quite as neat as it appeared at the purely conceptual level. Because Grotius grants that permitted things are sometimes better done, sometimes better avoided and hence not entirely left to the arbitrary volition of the legislator, the classes of volitional and natural are not at such distance from each other as might appear at first instance. In fact, the summing up of the different sorts of natural law in *De iure belli* reflects this state of affairs by sometimes hovering awkwardly between volitional law and natural law in the strict sense. Thus Grotius, after mentioning what *non proprie* is said to belong to natural law<sup>102</sup>, admits that

"natural law does not only deal with things which exist beyond the domain of the human will, but also with many things which result from an act of the human will. Thus ownership as it now exists has been introduced by the will of man; but once introduced natural law points out that it is wrong for me to take away that which is yours without your permission."<sup>103</sup>

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<sup>100</sup> Cf. *id.*, prol., paragraph 41: "Itaque haec duo [sc. ius naturae et gentium] non minus inter se quam a iure civili discernere semper unice laboravi: imo et in gentium iure discevi id quod vere et ex omni parte ius est, et id quod duntaxat effectum quendam externum ad instar illius primitivi iuris parit, nempe ne vi resistere liceat, aut etiam ut ubique vi publica, utilitatis alicuius causa, vel ut incommoda gravia vitentur, defendi debeat: quae observatio quam sit necessaria ad res multas, in ipso operis contextu apparebit."

<sup>101</sup> *De iure belli* III, X - XVI. Cf. Haggenmacher, 1983, pp. 568-88.

<sup>102</sup> *De iure belli* I, I, x, 1-3.

<sup>103</sup> *Ibid.*, I, I, x, 4: "Sciendum praeterea, ius naturale non de iis tantum agere quae citra voluntatem humanam existunt, sed de multis etiam quae voluntatis humanae actum consequuntur. Sic dominium, quale nunc in usu est, voluntas humana introduxit: et eo intro-

(footnote continued)

Hence natural law does not exist of certain innate principles only but also of things which certainly and definitely follow therefrom<sup>104</sup>. The extension of natural law over things which only exist because of a volitional act should, however, not be interpreted to imply that natural law is altogether changeable. Grotius hastens to add to the above that

"natural law is so immutable that it cannot even be changed by God."<sup>105</sup>

In juxtaposition with this core of certain and unchangeable natural law, there are norms which lack the same degree of necessity but which are set by an act of will of a competent authority having in view a specific interest which in principle is of variable content. Although the latter norms do not lack every tie with natural justice, it would be wrong to consider this body of volitional law to be really part of the objective natural law ('lex naturalis').

Grotius is willing to go quite far in his acceptance of the consequences of the latter assertion, as can be inferred from a note to a passage in *De iure belli*. In the relevant passage Grotius gives a comment on Pomponius' choice of words when he said on the subject of cheating in the price of purchase and sale that it is "by nature permissible" [*naturaliter licere*]. Grotius remarks that 'permissible' here means that there is no legal remedy against this kind of cheating, while 'by nature' refers to a "widely accepted custom, in the same manner as the apostle Paul has said that nature teaches that it is wicked for a man to let his hair grow long, although this is not against nature and has been common in many nations"<sup>106</sup>. In the note we are interested in, Grotius

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(footnote continued)

ducto nefas mihi esse id arripere te invito quod tui est dominii ipsum indicat ius naturale; quare furtum naturali iure prohibitum dixit Paulus Iurisconsultus, natura turpe Ulpianus, Deo displicere Euripides." Hence to natural law do not only belong naturally known principles but also things which follow therefrom certainly and definitely; cf. De imperio summarum potestatem circa sacra, 211 b 62 ff: "Ea quae prioris sunt generis ad ius naturale referuntur. Iuris autem naturalis, ne quis fallatur vocis ambiguo, non ea tantum dicuntur esse quae ex principiis natura notis, sed illa etiam quae ex naturalibus principiis naturaliter, hoc est certo & definite, fluunt. Naturale enim in hoc argumento non supernaturali, sed arbitrario opponitur. Sic quandoquidem constat Deum Patrem, Filium, Spiritum Sanctum, unum esse verum Deum, illum ipsum coli debere juris naturalis est."

<sup>104</sup> Ibid. I, I, x, 5: "Est autem ius naturale adeo immutabile, ut ne a Deo quidem mutari queat."

<sup>105</sup> Cf. De imperio summarum potestatem circa sacra, 211 b 62 ff: "Iuris autem naturalis, ne quis fallatur vocis ambiguo, non ea tantum dicuntur esse quae ex principiis natura notis, sed illa etiam quae ex naturalibus principiis naturaliter, hoc est certo & definite, fluunt. Naturale enim in hoc argumento non supernaturali, sed arbitrario opponitur. Sic quandoquidem constat Deum Patrem, Filium, Spiritum Sanctum, unum esse verum Deum, illum ipsum coli debere juris naturalis est."

<sup>106</sup> De iure belli II, XII, xxvi, 1-2: "Hoc enim est quod ait Pomponius, in pretio ven- (footnote continued)"

adds another attribution to nature of what in reality is not nature but custom:

"Similarly Gellius says of the conjugal act 'It is a thing to be done in private by the law of nature'"<sup>107</sup>.

The implication of this is that, according to Grotius, it is not *per se* natural to have sexual intercourse in private<sup>108</sup>. Up to this point Grotius goes along even with Crates the Cynic, who reportedly had the habit of having sexual intercourse with his companion Hipparchia in public<sup>109</sup>.

But the charge of Cynicism (one of the few I have not found in the literature on Grotius) would be unfounded. Apart from intuitional grounds, we can also reject this charge on the basis of Grotius' position on that which does not belong to natural law in the strict sense. Unlike what the Cynics held, Grotius considers it wrong rashly to presume that one can indulge in that which is not absolutely forbidden; some *ratio probabilis* can dissuade from doing what is not absolutely forbidden. Such a reason may well be that something is customarily not done, for offending the generally accepted mores may lead to a disruption of public order that in the end threatens the social life for which man has been born<sup>110</sup>.

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(footnote continued)

ditionis et emtionis naturaliter licere se mutuo circumvenire: ubi licere est non quidem fas esse, sed ita permitti ut nullum contra proditum sit remedium in eum qui se pacto velit defendere. Naturaliter autem eo in loco, ut et alibi interdum, positum est, pro eo quod recepti passim moris est, quomodo apud Apostolum Paulum ipsa natura docere dicitur viro turpe esse comam alere cum tamen id neque repugnet naturae, et multos apud populos usitatum sit."

<sup>107</sup> Ibid.: "Sic Gellius lib. ix, c 10, de actu coniugali: rem naturae lege operiendam"; cf. Noctes atticae, IX,10,1: "...Vergilii versus [...], quibus Vulcamum et Venerem iunctos mixtosque iure coniugii, rem lege naturae operiendam ..."

<sup>108</sup> In De veritate religionis christianae I, vii Grotius mentions "pudency in love-making, rites of marriage & avoidance of incest" as customs which are not instituted by nature or evident rational conclusions from natural principles, but by uninterrupted tradition: "Ium vero instituta quaedam ita & hominibus communia, ut non tam naturae instinctui, aut evidenti rationis collectioni, quam perpetuae & vix paucis in locis per malitiam aut calamitatem interruptae traditioni, accepta ferri debeant: qualis olim fuit victimarum in sacris mactatio, & nunc quoque pudor circa res Veneris, nuptiarum solemnia, & incestorum fuga."

<sup>109</sup> Diogenes Laertius, vi, 96-97.

<sup>110</sup> Cf. Votum pro pace ecclesiastica, in Op. Th. III, 660 b 15 ff. (on the veneration of the Host): "Invocari Christus ubique potest: honoris signis affici ubique: ubi autem justius quam ubi modo adeo singulari praesentiam sui exhibet? Dicam amplius, flexus corporis varios, ad honoris significationem olim usurpatos, non habere ex Lege Divina certum & definitum aliquid quod significant; sed in usu esse libero, nisi quatenus populorum mores huic vel illi significationi eum defigunt. itaque si Apostoli caput flexere, alii genua, in eo quod rem attinet, nihil plane interest. Sed voces istae latreias, adorationes & (footnote continued)

This kind of argument, which occurs in several places in Grotius' works, though anti-Cynical, closely resembles the Sceptical attitude of attaining quietude by leading the undogmatic life of conformity to the prevalent laws and customs.

But certainly one cannot call Grotius a Sceptic in an unqualified manner, because Grotius does endorse the view that there is one unchangeable natural law which is binding upon everyone. Grotius could nevertheless be considered a Sceptic of sorts if this natural law is only a 'minimalist' natural law, as is the fundamental thesis in Tuck's interpretation of Grotius. Grotius is in this interpretation someone who transcended but did not refute Scepticism<sup>111</sup>.

We will need to discuss this interpretation, because it is at the basis of Tuck's view that Grotius' natural law and divine positive law are sharply distinguished, while the bulk of religious teaching must be placed in the latter category. This discussion is in place here because Tuck's view emphasises too exclusively the division of law into natural and volitional, and does not give adequate weight to the intermediate justice which we have been discussing.

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(footnote continued)

similes, quia ambiguae sunt, egregie serviunt rixas quaerentibus." And Rivetani apologe-  
tici discussio, Op. Th. III, 743 a 24 ff.: "Canones Apostolici non sunt quidem ab Apostolis  
scripti, sed consuetudines continent, partim ab Apostolis introductas, partim paulo post  
eorum tempora, & harum alias ubique receptas, alias multis in locis. Quae ubique receptae  
sunt, non dubium christianis bonis & pacis amantibus, quin observari debeant. Quae non  
ubique, hanc certe auctoritatem habent, ut nemo eas, tanquam illicitas, damnare debeat";  
idem, 745 a 21: "... in rebus mediis ea praeferenda, quae plurimis locis invaluerunt".

<sup>111</sup> Tuck, Grotiana 1983, p. 54: "It is important, moreover, to stress that his [Grotius'] was an argument which transcended but did not straightforwardly refute the sceptic. The sceptical argument against traditional moral theories still stood: there was an enormous variety in human moral and political practices, and, outside an extremely slim core, what people believed and did in their societies was up to them." (Tuck's underlining.)

- the nature of middle justice

In order to appreciate Grotius' distance from the Sceptical position, it is necessary to see that the class of permissible things is conceived by him as something 'in between' good and evil, not as something outside or beyond good and evil. The permissible things are not per se either commanded or forbidden (they are not part of the *lex naturalis* in the strict sense), but depending on the nature of the circumstances they are things which sometimes ought to be done, and sometimes ought to be avoided. In any particular case they are to be placed somewhere in between good or evil; these things are 'intermediate' between those which by natural law are forbidden and those which are by nature commanded. The very intermediateness of this domain leads what is sometimes an awkward balancing between the *perseitas* of natural justice and the natural contingency of the human situation - a balancing which tends now in this, now in that direction. It is this intermediateness which accounts for the fact that we do not find the same degree of certainty in moral affairs as we do in mathematics:

"This stems from the fact that mathematical science completely separates forms from matter, while the forms are mostly such that there is no intermediate, just as there is no mean between a straight and a curved line. But in moral affairs even trifling circumstances alter the matter, and the forms which we are dealing with usually have something intermediate, which is of such latitude that it approaches now more closely to this, now to that extreme. Thus there is between what ought to be done and what is evil to do the mean of that which is permissible, but which is sometimes closer to the latter and sometimes closer to the former. Hence there often arises ambiguity like in the twilight or when cold water slowly becomes warm."<sup>112</sup>

Similarly Grotius had remarked:

"What we call moral goodness for the diversity of the matter consists at times so to say in a point, so that the least departure from it is a turning towards evil; but at other times it occupies a wider space, so that something is praiseworthy if it is done but at same time is without wickedness if it is omitted or done differently

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<sup>112</sup> De iure belli II, XXIII, i: "Dubitandi causae in moralibus unde Verissimum est quod scripsit Aristoteles [N.E. 1094 b 20 ff.], in moralibus non aequae, ut in mathematicis disciplinis certitudinem inveniri: quod eo evenit, quia mathematicae disciplinae a materia omni formas separant, et quia formae ipsae tales plerumque sunt, ut nihil habeant interiectum, sicut inter rectum et curvum nihil est medii. At in moralibus circumstantiae etiam minimae variant materiam, et formae de quibus agitur solent habere interiectum aliquid, ea latitudine, ut modo ad hoc, modo ad illud extremum propius accedatur. Ita enim inter id quod fieri oportet, et inter id quod fieri nefas est, medium est quod licet, sed modo huic, modo illi parti propinquius: unde ambiguitas saepe incidit, ut in crepusculo, aut in aqua frigida calescente." Cf. Briefw. I, no. 417, 29 Aug. 1615, p. 407.

- just as usually the transition of being into not being is immediate, while with other contraries like white and black, some mean can be found which is a mixture of both or a reduction to either. It is with the latter kind of things that divine and human laws are wont to be concerned mostly, so that the action which per se was only praiseworthy begins to be obligatory."<sup>113</sup>

The distinction of the class of intermediate things and the distinction within this class of preferable things from those which are better omitted are moral concepts derived from Stoicism, and Grotius was well aware of this. Zeno is commended to the reader of *De iure belli* via a verse from Juvenal just before the passage quoted immediately above; Cicero's third book *De finibus*, in which the "officium medium quod neque in bonis ponatur neque in contrariis" is distinguished, is mentioned passim in all the contexts from which we have been quoting<sup>114</sup>. The use of these particular Stoic concepts are part and parcel of Grotius' refutation of contemporary sceptical (and - in as far as *De iure praedae* is rightly considered to be directed against the Mennonites<sup>115</sup> - also perhaps cynical) views, which views appear in the personification of Carneades the Academic at the opening of the prolegomena to *De iure belli*. The procedure of making Carneades the standard-bearer of the sceptical attack on justice has as logical consequence that Grotius takes on a line of defence quite similar to that of the (later) Stoics; Cicero (as transmitted via Lactantius and Augustine) had done the same in his *De republica*, where Carneades' attack on justice was described<sup>116</sup>.

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<sup>113</sup> *De iure belli* I, II, i, 3: "Hoc ipsum vero, quod honestum dicimus, pro materiae diversitate, modo (ut ita dicam) in puncto consistit, ut si vel minimum inde abeas, ad vitium deflectas; modo liberius habet spatium, ita ut et fieri laudabiliter, et sine turpitudine omitti aut aliter fieri possi, ferme quomodo ab hoc esse ad hoc non esse statim fit transitus; at inter aliter adversa, ut album et nigrum, reperire est aliquid interpositum, sive mixtum, sive reductum utrinque. Et in hoc posteriori genere maxime occupari solent leges tum divinae tum humanae, id agendo ut, quod per se laudabile tantum erat, etiam deberi incipiat." Cf. also *Annotaciones* ad Luc. VI, 35: "Caeteros quod attinet, primum cavere debent ne usurarum nomine plus aequo exigant, quod quia non positum est en stigma, in puncto individuo, sed platos, latitudinem aliquam, aliquod habet pro regionum ac populorum diversitate, legibus Civilibus definiendum, est."

<sup>114</sup> *De iure belli* I, II, i, 2: "Iuvenalis Satyra XV: 'melius nos/ Zenonis praecepta movent: neque enim omnia, quaedam/ Pro vita facienda movent.'" Id. II, II, ii, 2: "Zenoni Cittienensi prudentia, scientia, bonorum, et malorum et mediorum. Est id apud Diogenem Laertium." Cf. Cicero, *De finibus* III, 58 and *De officiis* I, 7; Cicero had suggested in the *Academica Post.* I, 37 that the intermediate things are to be divided into "officia servata praetermissaque". J.M. Rist, *Stoic Philosophy*, Cambridge 1969, p. 97 considers Cicero's statement in the *Academica* "clearly a false version" of Stoic thought.

<sup>115</sup> See Hamaker's preface to *De iure praedae* p. vii.

<sup>116</sup> Grotius refers several times to the third book of Cicero's *De republica* in which  
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Already in *De iure praedae* Grotius had referred to "middle justice" in precisely the same anti-sceptical context. There we find Grotius saying "how erroneously the Academics, those masters of ignorance, have argued against justice, that the kind derived from nature looks solely to personal utility, while civil justice is based not upon nature but merely upon opinion. For they omitted middle justice which is characteristic of mankind."<sup>117</sup>

The aim of overcoming scepticism as a motive in Grotius' works has been well recognized and described by Tuck<sup>118</sup>. The particular form, however, which Grotius gave to his response to scepticism is not equally well represented by Tuck. He suggests that Grotius had been favourably disposed towards the sceptical intellectual climate of the late 16th and early 17th centuries, and takes as evidence of Grotius' earlier virtually Pyrrhonist stance in the far-fetched description of the moral diversity of different societies of the *Parallelon Rerumpublicarum*. Tuck suggests that in later works, Grotius was able to transcend the sceptical position by bringing about a radical division of law into a 'minimalist' natural law, which concerns points on which everyone can agree, and a volitional law under which all points of difference in things human and divine are brought. On the basis of this interpretation Tuck can come to the conclusion which we reproduced at the beginning of this chapter to the effect that Grotius "abandoned vast areas of traditional theology" by ranking all points of religious controversy and diversity in the class of volitional law<sup>119</sup>.

This reading, however, ignores the fact that according to Grotius volitional law is particularly concerned with things the status of which is described as 'intermediate' between good and evil, as a 'mixture' of good and bad, and as something which can be 'reduced' to either one or the other. Middle justice is not concerned with things which have no relation to good and evil; the group of things with which it is concerned with does in fact retain a connection with what is good and what is evil. Even though those things are not absolutely good and evil, it remains possible to argue that some of them are better than others, and some worse. This is also the starting point of the *Parallelon Rerumpublicarum*; its purpose is not merely to describe the variety and relativity of morals in different cultures but actually to show that,

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the disputation of Carneades is refuted, most significantly when Grotius gives a definition of natural law in *De iure belli* I, I, x, 1.

<sup>117</sup> *De iure praedae*, cap. II, p. 13: "Unde apparet quam non recte magistri ignorantiae Academici contra justitiam disputaverint, eam quae natura est ad utilitatem duntaxat suam ducere, civilem vero non ex natura esse, sed ex opinione. Hanc enim mediam justitiam, quae humano generi propria est, omittebant."

<sup>118</sup> R. Tuck, *Grotiana* IV, 43 ff., who speaks of "the anti-sceptical thrust of the Grotian enterprise".

<sup>119</sup> *Supra*, p. 35.

when set on a scale ranging from better to worse, one nation (the Dutch) is better than others (Rome and Athens). Quite in line with this state of affairs, Grotius' refutation of Carneades in the prolegomena to *De iure belli* is *not* limited to a rejection of the validity of sceptical views with regard only to natural law properly speaking; Carneades' view is also rejected with regard to civil law. After stating in the prolegomena that there is in man a natural "*societatis custodia, humano intellectui conveniens*" which is source of natural law both in a strict sense and in a larger sense (paragraphs 6-10), Grotius goes on to say that *stare pactis* is the natural principle on which the *iura civilia* are based. Hence civil law is ultimately founded on nature:

"What is said not only by Carneades, but also by others, that 'utility is as it were the mother of what is just and fair', is not true if we speak accurately. For the mother of natural law is human nature itself, which even if we had no lack of anything would lead us to seek the mutual relations of society. But the mother of municipal law is that obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be considered, so to say, the great-grandmother of municipal law."<sup>120</sup>

In saying this, Grotius does not wish to deny that utility has a rôle to play in the civil context. But asserting the importance of *utilitas* does not do away with civil law's natural foundation. In fact Grotius considers this rôle of utility to be itself a natural part of the human condition:

"Natural law nevertheless has the reinforcement of expediency [*utilitas*]; for the author of nature has willed single persons to be infirm and lacking many things needed to lead an upright life, so that we might be more inclined to seek life in society."<sup>121</sup>

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<sup>120</sup> Prol. paragraphs 15-16: "Deinde vero cum iuris naturae sit stare pactis [...] ab hoc ipso fonte iura civilia fluxerunt. [...] Quod ero dicitur non Carneadi tantum, sed et aliis, utilitas iusti prope mater et aequi, si accurate loquamur, verum non est: nam naturalis iuris mater est ipsa humana natura, quae nos etiamsi re nulla indigeremus ad societatem mutuum appetendam ferret: civilis vero iuris mater est ipsa ex consensu obligatio, quae cum ex naturali iure vim suam habeat, potest natura huius quoque iuris quasi proavia dici." The point that volitional law is founded on natural law is also clearly made in the introduction "Ad Principes Populosque Liberos Orbis Christiani" of *Mare liberum*, ed. Brown Scott/ Magoffin, Carnegie Foundation, New York 1916 (TMD 551), p. 2, where speaking of the laws which God has written "non in aere aut tabulis, sede in sensibus animisque singulorum", Grotius says: "Quin illa ipsa populorum atque urbium singularum iura ex illo fonte dimanare, inde sanctimoniam suam atque maiestatem accipere."

<sup>121</sup> Ibid. paragraph 16: "Sed naturali iuri utilitas accedit: voluit enim naturae auctor nos singulos et infirmos esse, et multarum rerum ad vitam recte ducendam egentes, quo magis ad colendam societatem raperemur." The naturalness of the rôle of utilitas led him to say in *De iure praedae* that because of the inborn primary natural law which aims at the self-preservation of beings, "culpandum non est quod secutus Academicos Moratius

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The polemic against Carneades ends only after Grotius has remarked that it is no folly not to break civil law or the law of nations even if that means foregoing a present interest. It is no folly because these kinds of law were instituted for some larger and longer lasting interest than a present and individual interest, viz. for the common good. And more than that, observing the laws is in itself a natural good:

"For even if there were no advantage in observing the law, it would still be wisdom, not folly, to be drawn to that which we feel our nature leads us to"<sup>122</sup>.

Grotius did not need to extend his refutation of Carneades also to civil law (and law of nations) if he had only wished to assert the existence of natural law in the strict sense quite separately from other kinds of law and if, for the rest, he granted the sceptics' thesis, as Tuck suggests. It is impossible to see why Grotius would go as far as he went in his rejection of scepticism if natural law in the strict sense were to him really so radically different and altogether separate from volitional law, and if, therefore, 'natural law' in its larger sense would be an entire misnomer for a phenomenon which has nothing to do with natural justice. The reason for going so far in his refutation of Carneades must be that Grotius wished to assert that there is not only an absolutely binding natural law, but also that, concerning the things which are not absolutely commanded or forbidden, a judgment as to their rightness can be made which is truly rational and based not merely on egotistic opinion. When we are dealing with the class of things which are the proper domain of volitional law, we deal with what Grotius (harking back to a term associated with Stoicism) referred to as 'middle justice' - that is, with things which are not per se just, but still partake of justice.

The importance of middle justice in Grotius' work is very closely linked with the refutation of Scepticism. Much more than just an 'ideological' opting for Stoicism, however, Grotius considers the dominance of middle justice characteristic for the human condition because it is a direct consequence of the Fall.

Before the Fall, Grotius says, there was no knowledge of vice and man's life was devoted to the worship of God and the contemplation of Him and his Creation, which is symbolized by the tree of life. After the

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utilitatem iusti et aequi prope matrem dixit", p. 9 (cf. supra p. 20??). In a note in De iure belli, prol. paragraph 16 to Horatius' verse, Grotius explains "Ad quem locum Acron, aut quisquis est vetus Horatii interpres: repugnat praeceptis Stoicorum, ostendere vult iustitiam non esse naturalem, sed natam ex utilitate. contra hanc sententiam vide quae disputat Augustinus de Doctrina Christiana libro III, c. xvi."

<sup>122</sup> Ibid, paragraph 18: "Male autem a Carneade stultitiae nomine iustitia traducitur. [...] Nam sicut civis qui ius civile perumpit utilitatis praesentis causa, id convellit quo ipsius posteritatisque suae perpetuae utilitates continentur; sic et populus iura naturae gentiumque violans suae quoque tranquillitatis in posterum rescindit munimenta. Tum vero etiamsi ex iuris observatione nulla spectaretur utilitas, sapientiae, non stultitiae esset eo ferri, ad quod a natura nostra nos duci sentimus."

Fall, man's life is characterized by his "mind being turned to all kinds of arts of which the symbol is the tree of knowledge of good and evil, i.e. of the things which may be used sometimes for good or sometimes for evil; this Philo called *phrónesin mesen*"<sup>123</sup>.

In his Annotations to the New Testament, Grotius deems it significant that the description in the Apocalypse of life in paradise the tree of life appears twice but no mention is made of the symbol of the 'middle knowledge', the tree of knowledge of good and evil. Grotius considers this an indication that the distractions and worries associated with this knowledge, which is "the prudence occupied with the things of this life", will have ceased in the afterlife<sup>124</sup>.

Thus middle things are inextricably wound up with the very nature of man's fallen state. In this sense middle things are natural to man. But this fallen state is not one in which all man's habits, customs and laws

<sup>123</sup> De iure belli II, II, ii, 1-2: "Simplicitatis in qua primi homines sunt conditi argumentum praebuit nuditas. Erat in illis ignoratio magis vitiorum quam cognitio virtutis [...] Negotium erat illis unicum Dei cultus, cuius symbolum arbor vitae, ut Hebraei veteres explicant, assentiente Apocalypsi [...] Verum in vita hac simplice et innocente non perstiterunt homines, sed animum applicuerunt ad artes varias, quarum symbolum erat arbor scientiae boni et mali, id est earum rerum quibus tum bene tum male uti licet: *phrónesin mesen* vocat Philo." Cf. Annot. ad V. T., Gen. II, 9, Op. Th. I, 2 b 29-60; for a description of the life of contemplative worship which man led before the Fall, see Adamus Exul, 2nd Act. Todescan argues that the status naturae lapsae is turned by Grotius into an immanentist state of nature. He interprets Grotius' conception of history in De iure belli as a secularized version of the three stages of the historia salutis. The status naturae integrae and status naturae lapsae are a mere epiphenomenon of the secularized history of the respective stages of community of goods, the introduction of property and finally the contractual establishment of the state as guarantee of peace after the division of properties (parallel to the status gratiae), property virtually taking over the rôle of sin, Le radici, pp. 54-71. Such a parallelism between the sacred history of salvation and the secular history of property, however, does not fit the text of De iure belli II, II, ii very well. The origins and development of property are placed in a much wider perspective of biblical history, encompassing Fall, Flood and Babel. The original community of goods is not exclusively associated with prelapsarian simplicity, but - says Grotius - still is found among those who live in conditions of "simplicitas eximia", such as American tribes. Moreover it can exist "ex caritate"; this community of goods "exhibuerunt olim Esseni, deinde Christiani qui Hierosolymis primi exstiterunt, ac nunc quoque non pauci qui vitam degunt asceticam" (D.i.b. II, ii, 1).

<sup>124</sup> Annotationes ad N.T., Lucam xxiii, 43, Op. Th. II-I, 461 b 11-26: "Ne hoc quidem notatu indignum bis in Apocalypsi nominari vitae arborem, nusquam vero arborem scientiae boni & mali, quia arbor scientiae boni & mali symbolum erat, Philone explicante, tes meses phroneseos [mediae scientiae], ejus scilicet prudentiae quae circa res hujus aevi occupata est, qua uti quidem licet, ut per gustum & olfactum significatur; at vesci, id est, frui, non licet: nam animus ei studio deditus pietati quantum satis est vacare non potest: quod nobis Adami peccato sub figura ostenditur, explicante Solomone Ecclesiastae VII, 29: 'Hoc observavi quod Deus hominem fecerit rectum, & ipse se miscuerit infinitis quaestionibus'. Hae curae atque avocamenta pietatis plane cessabunt en to paradeiso ton noeton [in Paradiso intelligibili]."

are but arbitrary vanities of petty importance, to which the best approach is either one of total rejection or otherwise one of resignation in order to achieve quietude. The Cynic's option of total rejection could be retraced without great difficulty in some of the radical protestant movements such as the radical lutheran Flacians, who were the opponents of Grotius' great example Melanchton<sup>125</sup>, and the anabaptist Mennonites, who as powerful shareholders in the East Indian Company had objected to the taking of prize which Grotius in turn defended in *De iure praedae*; sceptical resignation was the approach adopted by many humanist intellectuals tired of religious quibbles, struggles and wars<sup>126</sup> (which background to Grotius' work is stressed by Tuck). Elements of both the Cynical and the Sceptical approaches were at the basis of (at least the older) Stoa<sup>127</sup>, and perhaps that contributed to Grotius' objection against some of the Stoa's rigid theses, notably that of God's subjection to *fatum*, through which Grotius associated Stoicism (deliberately or not)<sup>128</sup> with the rigid predestinarian doctrines of the Counter-remonstrants. Hence, Stoicism could never be an 'ideological'

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<sup>125</sup> H.J.M. Nellen, *Hugo de Groot*, p. 312, nt. 239 gives some references of Grotius' to Melanchton, and remarks that the latter has been to Grotius "more of an example than Erasmus, Arminius, Junius or whomever". On the polemics between Matthias Flacius Illyricus and Melanchton see C.L. Manschreck, 'The Rôle of Melanchton in the Adiaphora Controversy', *Archiv für Reformationsgeschichte* 1957, vol. 48, pp. 165-182.

<sup>126</sup> This is sketched with particular emphasis on Justus Lipsius in G.Oestreich, *Geist und Gestalt des frühmodernen Staates*, 1969; a good description of this approach in the environment in which Grotius found himself in Paris, R. Pintard, *Le libertinage érudit dans la première moitié du xviie siècle*, 1943.

<sup>127</sup> On the close connections between Cynicism and Stoicism, see Rist, 'Cynicism and Stoicism', in *Stoic Philosophy*, 1969, pp. 54-80.

<sup>128</sup> *Meletius*, 7, 16: "Et ea ipsa voluntas [sc. Dei] debet esse libera nec impedita, quia et hoc ad perfectionem pertinet et per naturam fieri non potest ut suprema causa aliqua alia sit superior; quae ratio Stoicos refellit stultissima persuasione Deum sub fati necessitate ponentes." According G.H.M. Posthumus Meyes in his introduction to *Meletius*, p. 57, Grotius "could not help saying that if in his text he had made a stand against Stoics and Manichaeans, the adherents of the strict doctrine of predestination should not immediately take this as directed against themselves." Posthumus Meyes refers to *Briefw.* I, no. 221, 11 Jan. 1612 to Walaëus, who in a final comment to the *Meletius* had reproachfully suggested that Jacobus Arminius had perhaps not steered clear of the Charybdis of pelagianism: "Vicissim puto eos, qui praedestinationis decretum rigidius urgent, si quid a nobis adversum Stoicos aut Manichaeos necessario dicitur, non id continuo ut in se gravius interpretaturos ..." The remarks about the Stoics would have been entirely superfluous if it would not have some parallel in one of the divisions keeping Christians divided. So the very denial of the identification of the doctrine of strict predestination with Stoicism suggests such an identification. Grotius tries hard to save the irenic intent of his *Meletius*, but in response to Walaëus what we quoted sounds just too much like "it takes one to know one". That thus the *Meletius* might very easily instead of a contribution to the peace of the Churches become fuel for further dissension Grotius seems to have realised.

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alternative to Grotius, even though the Stoics provided him with part of the conceptual framework for the refutation of Scepticism. That Stoicism is not integrally adhered to with regard to morals may be illustrated by a passage from the *Meletius* where Grotius censures the Stoics' disparagement of certain things which must be considered *adiaphora* far as absolute virtue and absolute vice are concerned:

"As to human affairs one theoretical dogma may suffice: except for true virtue, to wit religion, all other things are indifferent to man's ultimate end. Christians do not argue over words, and unlike the Stoics, they do not protest against calling life, health, learning, honour and wealth good things and death, illness, lack of education, shame and poverty bad. On the contrary, they feel that these words should keep their accepted meaning, the better to make man realize that for the former he has to be thankful to God, and that the latter, on the other hand, are either a penalty for his sins or a test of his endurance. For man to be thoroughly convinced of this, it is necessary both that he enjoys the former as being consistent with nature and deplore the latter as incompatible. But meanwhile we have to bear in mind that neither of the two categories has the power either to give or to take away the supreme and ultimate good, but that they can become the subject-matter of virtues or vices, depending on whether we use them rightly or wrongly."<sup>129</sup>

This passage affords us a good insight into the importance of the middle things in relation to the ultimate things. From the perspective of the ultimate good, formulated by Grotius as "*Deo frui, sive beatitudo*"<sup>130</sup>, all other goods, when viewed in themselves, cannot but be indifferent goods. Yet these other goods, just because they are goods, can be related to the ultimate good.

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lised himself, for he continues: "Sed [...] non est tanti quaecumque hoc opusculum, ut propterea quisquam, praecipue autem eae ecclesiae, quas ego omnium purissimas profiteor, offendi debeant, quare, si id aliter vitari non potest, prematur hic foetus, neque certa damna subeamus in spem fructus incertam".

<sup>129</sup> *Meletius*, paragraph 58: "Haec sunt de homine ipso decreta. De rebus humanis hoc unum satis est: praeter veram virtutem, hoc est religionem, caetera esse ad summum hominis finem *adiaphora*. Non litigant Christiani de verbis nec intercedunt, ut Stoici, quo minus vita, sanitas, eruditio, honos, divitiae, bona dicantur; mors, morbi, *apaideusia* (eruditionis penuria), ignominia, paupertas, mala. Imo putant utile esse, ut ista verba, ut usu recepta sunt, ita maneant, quo magis homo et pro illis gratias se Deo sciat debere et haec contra norit aut peccatorum esse poenas aut patientiae experimenta. Id enim ut serio sentiatur, necesse est et illis gaudere hominem, ut naturae congruentibus, et his indolere ut contrariis. Hoc interim tenendum est neutra istorum boni supremi atque ultimi aut dandi aut auferendi ius habere, sed posse fieri aut virtutum aut vitiorum materiam, prout utrisque aut recte aut secus utimur. Et decreta quidem hactenus. Ad praecepta venturos ...."

<sup>130</sup> *Meletius*, paragraph 13.

The structure of this relationship between the ultimate end and other ends, is precisely that which we find with regard to justice: whatever is not part of 'objective' natural law is neither commanded, nor forbidden; yet, a permissible thing can (and ought to be) viewed from the perspective of what is right to be done, and is thus related to the requirements of justice that it is sometimes better done and sometimes better avoided. Hence, in the legal works Grotius avoids calling the middle things 'indifferent' things. And what is not part of natural law in the strict sense, but part of natural law in the larger sense or part of volitional law is no indifferent matter for Grotius.

The structural identity of these relations highlights the centrality in Grotius' works of the meaning and importance of intermediate things. Once their importance is understood, the consistency of theory, law and politics becomes perspicuous.

#### - conclusion

A number of significant connections emerge from what we have seen so far. The remarkable interest Grotius showed in the things which are naturally just in the broad sense of not being in conflict with natural law, is to be explained by his interest in middle justice. Far from being indifferent, the things which are the domain of volitional law are, from the point of view of their rightness, to be considered as intermediate between being commanded and being forbidden. This is the theoretical basis on which Grotius was able not just to transcend but actually to refute Cynicism, Scepticism and a number of Stoic theses. The refutation of these schools of thought at the same time determined Grotius' position in the controversy on predestination between the Remonstrants (followers of Jacobus Arminius, who adhered to the doctrine of conditional predestination) and Counter-Remonstrants (adhering to the doctrine of strict predestination), for it meant a rejection of the possible implications and consequences of the latter. The importance of the rejection of strict predestination in Grotius' personal and political biography is easy enough to establish. It broke off the brilliant career which would have led to the highest political office. It led to him being sentenced to life imprisonment, which, after his escape, was followed by an unhappy exile for life.

However, it was not only because it suited the position Grotius took in an eventually political controversy that he attributed such importance to intermediate things. To Grotius their status was part of the nature of things; just as some acts are necessarily good and therefore commanded while others are necessarily evil and therefore forbidden, so there are also things which by their very nature are sometimes good (and then better done), and sometimes wicked (and then better avoided). The intermediateness which many things have and the dominance of these things in human life is interpreted by Grotius as closely connected to the *status naturae lapsae*.

This is not the only sense in which there is something 'natural' about intermediate things. For although the partition of norms into natural and volitional might seem to suggest otherwise, we have seen that considerations of natural justice remain important for determining the rectitude of a certain course of action in the sphere of middle things. Those

considerations are no longer of an absolute and exclusive nature, because justice becomes related to the contingency of the human condition; the sheer variety of circumstances begins to exert its influence in judging the morality of a certain course of action. Nevertheless, this judgment remains wedded to justice and is not arbitrary - though it does not have the precise status of natural law in the strict sense. In the framework of dogmatic exposition of the different *leges* Grotius still considers it an improper usage of the term 'natural law'<sup>131</sup> for it to include intermediate things. But that he does not altogether deny the rôle of natural justice with regard to intermediate things is evident when he speaks of those things being in accordance with natural law suasively<sup>132</sup> or of *ius naturale convenientiae*<sup>133</sup>; the existence of this vocabulary in Grotius' work clearly expresses the rôle which natural justice has outside the *lex naturalis stricto sensu*.

All in all we must conclude that between natural and volitional law there are two different relations. The first is established by the fact that volitional law finds its primary task within the sphere set by the boundaries of natural law in the strict sense. The second relation is that natural considerations do play a rôle when volitional law further determines the appropriateness or otherwise of that which natural law in the strict sense has left permissible.

Once these relationships are sufficiently acknowledged, volitional law and natural law are no longer as far apart as Grotius' treatment of their distinction has suggested to several authors such as Dufour, Tuck and Todescan<sup>134</sup>. These authors' interpretation of this distinction turns out to be based on a too one-sided reading of Grotius' legal works. The conclusions concerning the relation between divine volitional law and natural law which such authors draw from their interpretation hence lack sufficient support.

Thus the point of "l'élaboration très poussée" of the concepts of natural law and divine positive law was not to create a cleavage between the sphere of the natural and the sphere of divine operation, as Dufour suggested. In fact, we found that when Grotius describes the meaning of divine positive law in relation to natural law, he makes the significant distinction between plenary and less plenary permission<sup>135</sup> - a distinction which, as we have seen, points up the actual nexus between volitional and natural law.

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<sup>131</sup> *Defensio fidei*, supra p. 59 note 77.

<sup>132</sup> As in *De imperio*, supra p. 68 note 97.

<sup>133</sup> Cf. p. 58, note 75.

<sup>134</sup> Supra, pp. 34-36.

<sup>135</sup> *De iure belli* I, 1, xvii, 2; supra p. 69 and note 99.



Also Tuck's claim<sup>136</sup> that Grotius by his strict separation of natural and volitional law "abandoned vast areas of traditional theology" in his exegesis of the Ten Commandments is, in the light of what we have seen, incorrect. Firstly, it should be remarked of Tuck's claim that those commandments "could not be an account of natural law" such claim can be found in Grotius' work, and moreover it is inconsistent with Tuck's (correct) claim that an independent comparison could show which of these precepts are natural<sup>137</sup>. Secondly, the importance of natural law in the larger sense is evident in almost every paragraph of the *Explicatio decalogi*<sup>138</sup>. The type of natural consideration associated with natural law in this larger sense actually constitutes a nexus between natural and volitional law. That this approach of Grotius is not a radical break with traditional theology at all, can best be proven by a quotation from Aquinas:

"[Whether all the moral precepts of the Old Law belong to the law of nature] ... It is therefore evident that since the moral precepts are about matters which concern good morals; and since also every judgment of human reason must needs be derived in some way from natural reason; it follows of necessity that all the moral precepts belong to natural law; but not all in the same way. For there are certain things which anybody's natural reason of its own accord and at once judges to be done or not to be done: such as [...] 'thou shalt not kill' and 'thou shalt not steal': and these belong to natural law absolutely. And there are certain things which after a more careful consideration wise men deem obligatory. Such belong to natural law yet so that they need to be inculcated, the wiser teaching the less wise. [...] And there are some things, to judge of which, human reason needs Divine instruction, whereby we are taught about the things of God: such as 'thou shalt not make to thyself a graven thing, nor the likeness of anything'; 'thou shalt not take the name of the Lord thy God in vain'."<sup>139</sup>

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<sup>136</sup> *Supra*, p. 35.

<sup>137</sup> Quite obviously the divine law as it is expressly given to Israel can proclaim that which is already promulgated by natural law in the strict sense.

<sup>138</sup> *Op. Th. I*, 40 ff..

<sup>139</sup> *Summa Theologiae* I-IIae, qu. 100, art. 1: "Utrum omnia praecepta moralia [veteris legis] pertineant ad legem naturae. [...] Sic igitur patet, quod cum moralia praecepta sint de his, quae pertinent ad bonos mores; haec autem sunt quae rationi conveniunt; omne autem rationes humanae iudicium aliquo modo a naturali ratione derivatur, necesse est, quod omnia praecepta moralia pertineant ad legem naturae: sed diversimode. Quaedam enim sunt, quae statim per se ratio naturalis cuius libet hominis diiudicat esse facienda, vel non facienda; sicut [...] Non occides: Non furtum facies: et huiusmodi sunt absolute de lege naturae: quaedam vero sunt, quae subtiliori consideratione rationis, a sapientibus iudicantur esse observanda: et ista sic sunt de lege naturae, ut tamen indigeant disciplina, qua minores a sapientibus instruantur [...]: quaedam vero sunt, ad quae iudicanda ratio

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The two conclusions we drew concerning the relationships between natural law and volitional law, are in principle valid for volitional law in general<sup>140</sup>. We may assume that they are equally true for both human and divine volitional law: both are to remain within the boundaries of natural law *stricto sensu* and both are in their content not purely arbitrary, but partake of natural justice.

That divine positive law does, according to Grotius, indeed remain within the limits set by natural law I have occasion to argue in greater detail in the next chapter. As to the second point, there arises the question whether, just as volitional law participates of natural law (albeit not exclusively and necessarily), natural law is to be understood as a participation of Eternal Law. Because this question has been raised in the context of the conceptual distinction between natural and volitional law I here try to formulate an answer.

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humana indiget instructione divina, per quam erudimur de divinis: sicut est illud: Non facies tibi sculptile, neque omnem similitudinem: Non assumes nomen Dei tui in vanum."

<sup>140</sup> Thus Grotius says in De iure belli I, II, 1, 3 of the intermediate things that "in hoc posteriori genere maxime occupari solent Leges tum divinae tum humanae".

### The eternal law eclipsed?

It has been claimed that Grotius' distinction of natural and volitional law supplanted the tripartition of *lex aeterna*, *naturalis*, and *humana*; Todescan speaks of the "vanificazione e scomparsa della *lex aeterna*"<sup>141</sup>. The main argument for this thesis is the alleged separation of divine positive law from natural law, by which the latter only came to refer to the order of human nature in a secularized sense. As a sequel to our repudiation of the alleged separation of (both divine and human) volitional from natural law, I here will state the case for saying that the idea of the *lex aeterna* has not perished in Grotius' works.

Firstly it should be said that the expression *lex aeterna* is not absent from Grotius' vocabulary<sup>142</sup>. It can be found in the *Adamus Exul* at the opening of the second act, which contains a rapturous description of the working of the universe according to the *lex aeterna*:

"Dies tenebras legis aeternae vice  
Fugans resurgit: Certus ordo temporum  
Solis reducit aureum terris caput:  
Stellis fugatis majus exoritur jubar;  
Nox jussa luci cedit, & Phoebus soror."

["By an eternal law the day resurges while darkness  
flies: the fixed order of times returns the earth its  
golden head of sun: when stars have fled, the greater  
light appears; night cedes compelled by light, and to  
Phoebus his sister."] <sup>143</sup>

This is not the immanentist, quasi-stoic eternal law it at first sight might seem to be; it is God's law governing the universe as is clear from the immediately following verses which issue into a hymn of praise of the God Creator, whom the cosmos invites us to serve:

"O quantus ille est, cujus ingenti manu  
Coeli rotatur axis ...  
... Sidera authoris sui  
Secuta legem temperant anni vices,  
... Ætherei sacer  
Sonus ille motus cantat artificem manum,  
Omnesque stellae celeris ad coeli modos  
Plaudunt choreis : Ipse nos Mundus monet  
Servire rerum conditori nec sinit  
Hærerere terris: supera nos rapit in loca,  
Mentesque proprium ducit ad primordium."

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<sup>141</sup> Todescan, op. cit., p. 111.

<sup>142</sup> Contra Fassò, *supra* p. 35, note 3.

<sup>143</sup> *Adamus Exul*, vss. 312-316.

["How great he is by whose hand the heavens are rotated round their axis ... The starry skies, following their author's law, regulate the yearly seasons ... The ethereal movement's sacred sound sings praise to its maker's hand and all the stars stamp their choruses at the speed of heavens' modes: The whole world admonishes us to serve the creator of all things and does not allow our dwelling in what is but earthly: it raises us to higher spheres and leads our minds to their proper origin."] <sup>144</sup>

The other direct use of the term *lex aeterna* occurs in a letter to Grotius' brother Willem on the origin of the bindingness of promises, which we mentioned previously. There he says that

"... this law by which we are bound to fulfil our promises procedes from the eternal law, that is, from God's own nature, after whose image man was created." <sup>145</sup>

Indirectly Grotius refers to the concept of *lex aeterna* in *De iure praedae* twice, by referring *in margine* to Thomas Aquinas' *Summa theologiae*. The first time this happens is when Grotius says that the statement "What God has signified to be his will is law" indicates the very source of law and rightly holds first place; and

"it seems that the ancients called 'jura' 'jusa', that is commands. For commanding belongs to power. The first power in all things belongs to God, like that of the artificer over his work and that of a superior over an inferior." <sup>146</sup>

The article in Aquinas Grotius refers to, is that in which the *lex aeterna* is described as 'summa ratio in Deo existens' in the manner in which the *ratio* of works pre-exists in the artificer (i.e. an art or exemplar) and as there ought to be in the ruler the *ratio ordinis* of what is to be done (i.e. the law) <sup>147</sup> - an idea which (without using the

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<sup>144</sup> Ibidem, vss. 317-331.

<sup>145</sup> Briefw. I, 28 Februari 1616, no. 450, p. 500: "Unde apparet ius hoc quo ad implenda promissa obstringimur ex aeterna lege, hoc est ipsius Dei natura, proficiisci, ad cuius imaginem homo est conditus."

<sup>146</sup> *De iure praedae*, p. 8: "Haec sententia ipsam iuris causam indicat ac merito primi principii loco ponitur videturque ius a Iove dictum, unde et jurare et jusiurandum, Iovis-jurandum: aut quia veteres quae nos dicimus, *iura*, hoc est iussa dixerunt. Jubere autem potestatis est. Prima potestas in omnia Dei, ut artificis in opus et ut dignoris in minus dignum."

<sup>147</sup> *Summa theologiae* I-IIae, 93, art. 1.

expression *lex aeterna*) can be traced in Grotius' paraphrase of the opening of John's gospel<sup>148</sup>.

The second reference is in the passage where Grotius states that human reason is an impression of the image of God's mind; wherever common reason or sense (*communem rationem sive sensum*, as Grotius translates Heraclitus' common *logos*) agrees, we are to ascribe this to the right and divine reason. In this context Grotius also quotes Heraclitus' dictum that all the mortals' laws are nourished by one divine law. The intent of Aquinas' article above is similar to Heraclitus' dictum; in it he argues that all laws, in so far as they participate of right reason, are derived from the eternal law<sup>149</sup>.

From the above it can be legitimately inferred that Grotius associated the *lex aeterna* with *ipsius Dei natura* (in the correspondence) and with God's will as *ipsam iuris causam* (in *De iure praedae*). The nexus between the eternal law and natural law becomes apparent when Grotius ascribes natural law to God in the prolegomena to *De iure belli*:

"But the natural law of which we have spoken, both the social one and the one which is called so in a larger sense, although flowing from principles within man, can yet deservedly be ascribed to God, because he has willed such principles to exist in us. And in this sense Chrysippus and the Stoics should be understood when they said that the origin of law can only be traced to Jove himself."<sup>150</sup>

This attribution to God was not a rhetorical turn of phrase, as is proven by the *Florum sparsio ad ius Justinianum*:

"Those laws which are called natural are rightly ascribed to God, as we have stated in the prolegomena and in the first chapter of the first book *De iure belli ac pacis*."<sup>151</sup>

Hence in *De imperio* chapter III Grotius speaks continuously of a *ius divinum naturale* and *ius divinum positivum*<sup>152</sup>.

<sup>148</sup> *Initium Evangelicae historiae scriptore Iohanne*, in *Dichtw. I A*, p. 10: "Omnigenas Mundi species, rerumque figuras/ Conclusas in se Ratio divina tenebat./ Hinc Deus exemplar molis, formamque futurae/ Prompserat, utque notas omnes in imagine cerae/ Cernimus expressas signaculum reddere primum,/ Mentirique typos: sic ingens Mundus imago / Primigenae Rationis erat, Verbiq; Paterni."

<sup>149</sup> *Summa theologiae* I-IIae, 93, art. 3.

<sup>150</sup> *Proleg.* paragraph 12; supra page 67, note 93.

<sup>151</sup> *Florum sparsio ad ius Justinianum*, Blaeu, Amsterdam 1643, [TMD 792], i.v. Inst.. I, tit. II, no. 11, p. 12: "Eas vero, quae naturae dicuntur leges recte Deo ascribi, et nos in prolegomenis de iure Belli ad Pacis, librique primi capite primo ostendimus, et late Origines libro quinto contra Celsum."

<sup>152</sup> *De imperio* III, 2: "Definitarum partitio in definitas iure divino naturali & definitum  
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The proximate source of natural law is man's nature which consists of a number of natural instinct-like innate principles - these are the "first things of nature", such as the instinct of self-preservation, which man has in common with other animals - and more importantly of the reason proper only to man<sup>153</sup>. Reason, *ratio illa imperatrix*, as most important source of natural law is but the proximate cause. It is itself "an image of God's mind impressed upon man" - as Grotius puts it in a verse of Epicharmus:

"For from God's reason the reason of mortals is born."<sup>154</sup>

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nitas iure divino positivo"; III, 5: "... eos dumtaxat extra imperii jus esse, qui naturaliter, aut alteri cuiusvis Divino juri repugnant"; *ibid.*, "Definitorum autem iure divino (in quo comprehendo naturale) duo sunt genera: alia enim iusta sunt, alia vetita."

<sup>153</sup> Cf. *De iure belli* I, II, i, 1-2: "M. Tullius Cicero tum tertio de Finibus, tum aliis in locis, ex Stoicorum libris erudite disserit esse quaedam prima naturae, Graecis *ta prota kata physin*, quaedam consequentia, sed quae illis primis praeferenda sint. Prima naturae vocat, quod simulatque natum est animal, ipsum sibi conciliatur et commendatur ad se conservandum, atque ad suum statum et ad ea quae conservantia sunt eius status diligenda: alienatur autem ab interitu iisque rebus quae interitum videantur afferre. Hinc etiam ait fieri ut nemo sit, quin cum utrumvis liceat, aptas malit et integras omnes partes corporis, quam easdem usu imminutas aut detortas habere: primumque esse officium ut se quis conservet in naturae statu, deinceps ut ea teneat quae secundum naturam sint pellatque contraria. At post haec cognita sequi notionem convenientiae rerum cum ipsa ratione quae corpore est potior; atque eam convenientiam, in qua honestum sit propositum, pluris faciendam quam ad quae sola primum animi appetitio ferebatur; quia prima naturae commendat nos quidem rectae rationi, sed ipsa recta ratio carior nobis esse debeat quam illa sint a quibus ad hanc venerimus." In *De iure praedae* these *prima naturae ac consequentiae* are clearly associated with primary natural law, with its principles of *fuga* and *appetitus* which are common to all animate nature (cf. also *Adamus* vss. 337-350 and 1231-7), and with secondary natural law, where *ratio* comes into play, respectively; cf. *De iure praedae*, pp. 9-10 and *supra* pp. 52-3.

<sup>154</sup> *Id.*, p. 11-12: "[Amicitia quae] in brutis animantibus clarior, in homine vero luculentissima, ut cui praeter communes cum caeteris affectiones peculiariter concessa sit ratio illa imperatrix: cui scilicet ab ipso Deo principium, qui mentis suae imaginem homini impressit, quod Epicharmi versu notatur: [...] 'Nam Dei a ratione ratio nascitur mortalium'. Est quidem ista ratio nostro vitio obnubilata plurimum, non ita tamen, quin conspicua restent semina divinae lucis, quae in consensu gentium maxime apparent." Epicharmus' verse is also quoted in *De veritate* I, xvi, Op. Th. III 14 a 2, 32. In the prolegomena to the *Dicta poetarum quae apud Jo. Stobaeum exstant, emendata et latino carmine reddita ab Hugone Grotio*, Paris 1623, TMD 458, (18th of the unnumbered pages) Grotius even claims that this verse shows a certain understanding of the divine hypostases: "De hypostasium quoque distinctione, quanquam eo per se pertingere non potest humana ratio, aliquid ex traditione veteri hausisse putatur Plato, & ut quidam existimant etiam Aristoteles. Certe *peri tou logou* heraclitus quaedam scripserat cum christianorum sensu congruentia [...]. Christiani veteres eodem trahunt illud Epicharmi, *Sicut est humana ratio, ratio sec est & Dei*, deinde, *Et Dei a ratione ratio nascitur mortalium*."

We saw that Grotius in *De iure praedae* continued by stating that reason "is overcast by sin, yet not such as not to leave some conspicuous seeds of the divine light, which become apparent in the consensus of nations"<sup>155</sup>. In the index to the *Adamus Exul* Grotius gives two references under the heading 'Religio', the first - 'Religio homini soli data' - forming a parallel to the first part of the indicated passage from *De iure praedae*:

"O te beatum, cujus in praecordiis  
Imago magni nobilis fulget Dei,  
Et cui, quod unum maximum & summum bonum est,  
Rationis usus cum Dei cultu datur."

[ O thou blessed, in whose heart/the noble image shines of  
mighty God/and to whom is given, as is the one highest and  
greatest good,/the use of reason together with the worship of  
God.]<sup>156</sup>

*Religio* and *ratio* are here strongly related to bring out the particular manner in which man is bound to God; reason makes man the shining image of God.

Unlike the first one, the second reference is to man's *religio* to God after the Fall. The sub-heading in the Index is "Religio; Ei [sc. homini] parva scintilla residua". In it the *religio* between man and God<sup>157</sup> is not one of man's shining likeness to God, but that of a spark of the old light, precursor of salvation, cherished and fomented by God:

"Lucis antiquae favillam, quae salutis praevia est,  
Mente in humana fovebo, nec sinam cinere obrui."<sup>158</sup>

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<sup>155</sup> Supra, p. 53, note 58.

<sup>156</sup> *Sacra in quibus Adamus Exul*, in: *Dichtwerken IA*, p. 59, vss. 332-335.

<sup>157</sup> The term *religio* is described in the *Meletius* as something in between God and man; par. 19: "Cum religio inter hominem Deumque intercedat, decreta religionis ad Deum et divina, hominem et humana pertinent, non qua in se sunt modo, sed qua se mutuo respiciunt."

<sup>158</sup> Ibid., vss. 1903-4

Together with the connection which the index-reference makes with *religio*<sup>159</sup>, this verse forms a parallel to the *semina divinae lucis* of *De iure praedae*<sup>160</sup>.

The images of 'impression of the divine mind' and 'seeds of the divine light' here used by Grotius call to mind the very first article in the *Summa theologiae* in which Aquinas describes natural law as a participation of the eternal law in the rational creature. He recalls the answer of the Psalmist to the question what the works of justice are which are to be done, and what it is that makes them good things:

'Who shall show us good things?' To which he says: 'The light of your countenance is signed upon us' - thus implying that the light of natural reason, whereby we discern what is good and what is evil, which pertains to natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural

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<sup>159</sup> In the *Meletius* the idea of the continued existence of *religio* also after man, who was created after the image of the good God (paragraphs 30-33), turned to all kinds of depravities (paragraphs 34-39), appears in similar ethico-religious form which links the *Adamus* to *De iure praedae*, paragraph 43: "Atqui non esse eversam religionem hoc ipso colligi potest, quod Deus et humanum genus propagat et mundi huius usum ipsi prorogat: quo nisi ut colatur ipse ab homine?"

<sup>160</sup> The editors of the *Adamus* in the *Dichtwerken* have established the strict contextual affinity of Grotius' 'lucis antiqua favilla' with F. Junius' *Protoktisja*, ed. 1603, p. 146. In the broader context I here place the image in, Justus Lipsius' definition of conscience in *Politicorum seu civilis doctrinae libri sex* (1589) I,V is relevant: "Reliqua in homine rectae rationis scintilla, bonorum malorumque facinorum iudex et index." The image of the *scintilla* recurs in the prolegomena to Grotius' *Dicta poetarum*, p. 14: "Ante omnia vero in lectione Graecorum ac latinorum observare juvenes diligenter debent quicquid occurrit non ad vitae communis regulas, sed ad veram pietatem pertinens: cuius sicut lux plena in sacris tantum codicibus apparet, ita scintillas passim apud alios conspiciere est tam multas atque varias, ut ferme dicere audeam, sicut nemo omnia vidit, ita nihil esse quod non aliquis viderit: ut partim miserari liceat gentes in densissimis tenebris palpando viam quaerentes, partim mirari Dei bonitatem qui veritatem sub injustitia detentam non plane sinit obrui." The image of the *scintilla rationis* which precisely in this sense emerges from Grotius' texts, goes back to the *logoi spermatikoi* of the Stoics, revived by Augustine's *rationes seminales*. More apposite to the present context is the association which is made of the term *scintilla conscientiae* (St. Jerome) or *scintilla rationis* (Peter Lombard) via the scholastic term *synderesis*, conscience, with natural law; thus it was variously associated with the innate moral principles, the *habitus* containing the precepts of natural law, the *habitus* of first principles of practical reason, or the major premiss of the practical syllogism. On *synderesis* and its relation to *scintilla conscientiae* or *rationis* generally, see M.B. Crowe, "The Term *synderesis* and the Scholastics", *Irish Theological Quarterly*, vol. 23 (1956), pp. 151-164 and pp. 228-245; more in particular in relation to natural law theories M.B. Crowe, *The Changing Profile of the Natural Law*, 1977, pp. 123-140.



law is nothing else than the rational creature's participation of the eternal law".<sup>161</sup>

For Grotius, as it was for Aquinas, human reason as proximate source of natural law is an impression of the divine mind; and because it is an impression of the divine mind, also Grotius' natural law can legitimately be conceived of as a participation of the eternal law.

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The conclusion on natural and eternal law can stand on the basis of the texts themselves. Some of the texts I used in establishing this conclusion, particularly those ascribing natural law not just to God or God's mind but to His *will*, have led to an interpretation which may cast a quite different light on our conclusions. Also the question arises how the relation between God and natural law which emerges from the above can be made to agree with Grotius' statement that what he had said on natural law would have a degree of validity "even if there be no God, or human affairs be of no concern to him". It is these questions which I address in the next chapter.

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<sup>161</sup> S.Th., I-IIae, q. 91, art. 2; the image of divine illumination is also used as symbol of participation in I-IIae q. 19, art. 4. In Augustine's philosophical epistemology the idea of divine illumination is of course central; the idea of natural notions of justice as divine impression upon man occurs in e.g. De libero arbitrio I, 6 where he says: "I think you also see that men derive that all is just and lawful in temporal law from eternal law. For if a nation is justly self-governing at one time and justly not self-governing at another time, the justice of this temporal change is derived from that eternal principle by which it is always right for a disciplined people to be self-governing, but not a people that is undisciplined. [...] Therefore, to explain shortly as far as I can the notion which is impressed on us [*impressa nobis*] of eternal law, it is the law by which it is just that everything should have its due order. [...] Since there is this single law, from which all temporal laws for human government derive their various forms, I suppose [...] cannot itself be varied".



### **CHAPTER III**

**"EVEN IF WERE TO CONCEDE THAT THERE BE NO GOD,  
OR HUMAN AFFAIRS BE OF NO CONCERN TO HIM"**



### III "... even if there be no God or human affairs be of no concern to him ..."

#### Status quaestionis

Grotius' claim that what he has said concerning natural law would somehow hold "even if [etiamsi daremus] we were to concede - which cannot be conceded without the utmost wickedness - that there be no God, or that human affairs be of no concern to him"<sup>1</sup>, has been pivotal in assigning him his place in the history of legal and political thought. As I have mentioned in the introduction, the "etiamsi daremus" formula led some people to place Grotius at the beginning of the modern rationalist period. Recent research devoted to the formula, however, has stressed the fact that the 'impious hypothesis'<sup>2</sup> has important roots in scholastic philosophy and in antiquity. As a consequence some of this research interprets the meaning of the hypothesis (and of Grotius' work) as a continuation of scholasticism, while others interpret it as a continuation of some school of thought of antiquity. Still others who recognize the scholastic roots of the hypothesis insist on the particular way in which Grotius treats it and conclude from this that he diverged in such manner from his scholastic predecessors as to constitute the definite break with their system of values, thus ushering in the period of rationalist enlightenment. In the various interpretations of the hypothesis a wide variety of arguments are put forward which affect in sundry ways the conclusions we have come to so far. I will first take stock of these arguments by briefly summarizing the work done by St. Leger, Crowe, Berljak and Hervada on the hypothesis.

James St. Leger's monograph devoted to the subject, proceeds from earlier work done by Sauter, Chroust, Rommen, Del Vecchio and Welzel<sup>3</sup>. These authors had already pointed to the "etiamsi" hypothesis in the work of Grotius' scholastic predecessors, in particular Hugh of St. Victor, Duns Scotus, Gregory of Valencia (erroneously)<sup>4</sup>, Gregory

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<sup>1</sup> Prolegomena, paragraph 11: "Et haec quidem quae iam diximus, locum aliquem haberent etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana."

<sup>2</sup> The expression is Pufendorf's, De iure naturae et gentium, II, 3, 19. Pufendorf echoes Marcus Aurelius, Meditations VI, 44, vide infra, p. 97.

<sup>3</sup> James St. Leger, M.M., The 'Etiamsi daremus' of Hugo Grotius: a Study in the Origins of International Law, 1962, p.2.

<sup>4</sup> Sauter and Chroust, the latter most probably basing himself on the former, mistook the 'Gregorius' Suárez spoke of in De legibus ac deo legislatore, II, 6, 3, for Gregory of (footnote continued)

of Rimini, Gabriel Biel, Molina, Gabriel Vásquez, Francesco Suárez and Rodrigo Arriaga.

In his assessment of the literature, St. Leger is interested primarily "in determining whether Grotius' notion [...] marks him definitively as an intellectualist and establishes his continuity with the school of scholastic intellectualists."<sup>5</sup> In this approach he follows the example of Chroust, who had made the voluntarist/intellectualist issue the criterion for deciding whether or not Grotius' work is a "continuation of the great Natural Law tradition which stretches from St. Augustine to Suárez, and which culminated in St. Thomas."<sup>6</sup> Chroust's conclusion had been that "this famous passage from Grotius is but a rebuke of William of Occam's and Hobbes's voluntarism or 'positivism'.... and an indirect proof of Grotius's belief, quite in accordance with the thomistic tradition, in the *perseitas boni et iusti*."<sup>7</sup> St. Leger tries to render this conclusion more precise by comparing the rationalist gist of Grotius' 'etiamsi daremus' with the works of the scholastic predecessors mentioned, in particular Suárez<sup>8</sup> and G. Vásquez<sup>9</sup>. The conclusion he arrives at is that both the 'etiamsi' formula and Grotius' definition of natural law go "beyond moderate Scholastic intellectualism"<sup>10</sup> in that they rest the foundation of the natural law squarely on rational nature". As to the historical origin of the phrase, he concludes that "it is evident that of all the Scholastics, Vásquez was the one with whom Grotius' ideas most accorded"; "if it is true that Grotius had read these passages of Vásquez, then we must conclude that the celebrated Dutchman, far from being an innovator in the field of the philosophy of law, was actually expressing his approval

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Valencia instead of Gregory of Rimini. J. Sauter, Die philosophischen Grundlagen des Naturrechts, 1932, also confused Fernando Vasquez de Menchaca and Gabriel Vásquez. Giorgio Del Vecchio has identified the different persons and mistakes in Lezioni di filosofia del diritto, XXVII, 1950, pp. 357-364. See St. Leger, p. 53 notes 58 and 62. Also Arriaga is mentioned as a predecessor although his work appeared later than that of Grotius.

<sup>5</sup> St. Leger, p. 98.

<sup>6</sup> A.-H. Chroust, 'Hugo Grotius and the Scholastic Natural Law Tradition', 1943, p. 125.

<sup>7</sup> Chroust, p. 126.

<sup>8</sup> F. Suárez, De legibus ac deo legislatore, II,6; this book was first published in 1612 at Coimbra.

<sup>9</sup> G. Vásquez, Commentariorum ac disputationum in primam secundae Sancti Thomae, II, disp. 150, c.3. This book was published posthumously in 1605. Vásquez and Suárez, fellow Jesuits, were each other's academic opponents. During their lifetime they were forbidden by the General of their order to quote each other. See the introduction to F. Suárez, Selections from three works, Oxford 1944; and L. Pereña in the critical edition of De legibus ac deo legislatore in the Corpus Hispanorum de Pace, Madrid, vol. xiii, p. xxvi.

<sup>10</sup> St. Leger wishes not to take a definite stand on the alleged voluntarism of Suárez's self-professed via media; see pp. 118-121.

of the legal theory of Gabriel Vásquez"<sup>11</sup>. A supporting argument for "a substantial Grotian dependence on Gabriel Vásquez" St. Leger believes to have found in the supposed change from voluntarism in *De iure praedae* to intellectualism in *De iure belli ac pacis*, which may have been caused by reading Vásquez's *Commentariorum* in the intermediate period<sup>12</sup>.

M.B. Crowe addresses in an article the paradox that some of the most significant scholastic sources of the "etiamsi" hypothesis, notably Gregory of Rimini and Gabriel Biel, appear to be voluntarist; moreover, the subsequent diffusion of Grotius' views was the work of writers, like Pufendorf, Thomasius and Barbeyrac, who were indubitably voluntarist<sup>13</sup>. In setting about the clarification of this paradox, Crowe may have taken his cue from St. Leger's highly paradoxical - if not self-defeating - statement, that the intellectualist intent of the hypothesis "is brought out most strikingly by the little-remarked fact that some of the defenders of the condition 'etiamsi daremus' were basically voluntarist. Their very voluntarism made it imperative for them to find another explanation for the binding force of natural law."<sup>14</sup> As a matter of fact, Crowe suggests that when Gregory of Rimini uses the phrase "si per impossibile ratio divina sive Deus ipse non esset, aut ratio illa esset errans", he is actually purporting to reconcile the essentialist view (the distinction between good and evil is in the nature of things) and the voluntarist (God's will is what determines good and evil). That Gregory is not that much of a voluntarist at all is borne out by the recent research in the field of late medieval nominalism which Crowe adduces<sup>15</sup>. As a result of the reassessment of authors who were formerly often considered to be outright nominalists, such as not only Gregory of Rimini, but also Gabriel Biel, Crowe is able to say that "there is no longer an insurmountable difficulty in tracing the origins of Grotius' *etiamsi daremus* to Gregory of Rimini and Gabriel Biel, no less than to the recognised essentialist Gabriel Vásquez: (...) the hypothesis no

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<sup>11</sup> Ibid., p. 133; the liking of Grotius to G. Vasquez can also be found in Labrousse, 1951, p. 15: "La sua concezione del diritto naturale è molto analoga a quella di Gabriele Vazquez: e così come il Suarez reagì contro il razionalismo di Vazquez, il Pufendorf reagirà contro il razionalismo del Grozio."

<sup>12</sup> Op.cit., pp. 137-142.

<sup>13</sup> M.B. Crowe, "The 'Impious Hypothesis': a Paradox in Grotius", 1976, pp. 379-410. An important part of this article re-appears in Crowe's The Changing Profile of the Natural Law, 1977, pp. 223-234; his assessment of the 'voluntarism' of Biel and Rimini, however, does not appear in the last mentioned work.

<sup>14</sup> St. Leger, p. 123.

<sup>15</sup> Crowe, 1976, p. 396-400; for the literature adduced in support of the view that Rimini may even perhaps be considered a "standard-bearer against nominalism", see p. 399 notes 51-55.

longer protrudes like an intellectualist good deed in the naughty world of nominalism"<sup>16</sup>.

Crowe answers the question how it was possible for Grotius to have voluntarist successors, by suggesting that large parts of Grotius' political theory and jurisprudence can be detached from his theology or philosophy of moral obligation without suffering serious mutilation. The appeal to divine authority provides little more than a formal basis for the law of nature, and the validity of the hypothesis does not cause the system to stand or fall. Thus, preoccupations about realism and voluntarism were placed between parentheses, and the disagreement there may be between Grotius and his successors concerning the foundation of the natural law in the will or intellect of God becomes relatively unimportant<sup>17</sup>.

Matija Berljak in his appreciation of the literature which traces the origins of the 'etiamsi daremus' via Suárez to other scholastic sources, is left somewhat dissatisfied with the remaining divergences between Grotius and at least some of the authors adduced, and with the rather conjectural nature of the literature in question<sup>18</sup>. Instead, Berljak pursues the stoic clue in Grotius' work. He finds in the *Annotata* which Grotius had added to the 1642 edition of *De iure belli* (and in Grotius' notes published in the posthumous 1646 edition) the references to Marcus Aurelius to be of special significance<sup>19</sup>. In the latter's *Meditations*, the dilemma of the existence or non-existence of the divinity can be found in several places, viz., II, 11; VI, 44; IX, 40; XII, 28. In the annotation to paragraph 24 of the *prolegomena* to *De iure belli*, Grotius quotes a sentence from the *Meditations* VI, 44. In this same section Marcus Aurelius speaks of the "impious belief" that the Gods do not care for anything, and says: "Yet, even if it be that they [the Gods] care nothing for our mortal concerns, I am still able to take care of myself and to look to my own interests; and the interest of every creature lies in conformity with its own constitution and nature". It is, however, through a textual comparison of *prolegomena* 11 with the *Meditations* II, 11, that Berljak tries to reveal the affinity between the two authors, both in the aim and the structure of the argument. First, the hypothesis is introduced that "there be no Gods, or that they take no care of the world", which both authors regard as a matter counterfactual hypothesis as they make clear subsequently; finally, they

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<sup>16</sup> *Ibidem*, p. 405; the conclusion quoted may well be a response to A.-H. Chroust, cited, *supra* p.3.

<sup>17</sup> *Ibidem*, pp. 406-408.

<sup>18</sup> M. Berljak, *Il diritto naturale e il suo rapporto con la divinità in Ugo Grozio*, Roma 1978, pp. 91-99.

<sup>19</sup> Thus also M. Fortuin, *De natuurrechtelijke grondslagen van De Groot's volkenrecht*, 1946, p. 149; G. Fassò, 'Ugo Grozio tra medioevo ed età moderna', 1965, p. 184; P.D. Dognin, 'La justice de Dieu et le droit naturel', 1965, p. 72, note 18; S. Pufendorf, *loc.cit.* (note 2, *supra* p.1): "Videtur autem Grotii sententia expressa ex illo M. Antonini l. VI, 44."



arrive at the positing of rational human nature as a universally valid criterion for the distinction between good and evil<sup>20</sup>. Berljak's conclusion is, that even if Grotius may have appreciated the ins and outs of the scholastic use of the 'etiamsi' formula, the ancient Greco-Roman world and in particular Marcus Aurelius, had a far greater impact on his use of it:

"Senza dubbio queste idee esistevano anche nella scolastica ed è chiaro, come si può vedere dagli studi critici fatti su Grozio, che di questi ne apprezzava le impostazioni. Però, come abbiamo dimostrato, il mondo antico greco-romano e in special modo Marco Aurelio hanno influito sulla dottrina groziana, e soprattutto sull' 'etiamsi daremus' molto più che non il mondo scolastico. Del resto non ci sembra necessario avvicinare forzatamente il pensiero di Grozio a quello degli scolastici per poterlo così giustificare."<sup>21</sup>

The last of the authors whose work on the Grotian 'etiamsi' formula I wish to summarize here, is J. Hervada<sup>22</sup>. He stresses that until the period of 'juridical humanism' the juridical and philosophico-theological traditions evolved separately, the mutual influences remaining largely indirect. As Grotius is an exponent of 'juridical humanism' in which the two merged, both traditions need be researched for possible origins and orientations of the 'etiamsi' hypothesis. As a matter of fact none of the older lawyers use this hypothesis, nor similar thought experiments. On the contrary, the glosses and commentaries to the Ulpian definition of natural law as "quod natura .. docuit", conceive of *natura* in the Christian sense of nature created by God, summarized in the famous gloss *natura idest Deus*<sup>23</sup>. As to the philosophical precursors, Marcus Aurelius cannot - in Hervada's opinion - have been more than a source of inspiration for the literary form of the hypothesis. The major reason which Hervada gives for this, is that the relevant passages in the *Meditations* do not speak "of natural law nor of its fundament [sic], but rather of the attitude which man must have regarding life if he wishes to live philosophically". Hervada concludes:

"Grotius could not have drawn his main idea concerning natural law from Marcus Aurelius, among other reasons because it cannot be found in Marcus Aurelius. Furthermore, why should we think as being the source of the idea thoughts which are so far removed from natural law, and if the hypothesis 'etiamsi daremus' was quite thoroughly studied in authors much closer to Grotius' day, among whom several - Gabriel Vázquez, Vitoria, Molina and Suárez - are quoted in *De iure belli ac pacis*"<sup>24</sup>.

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<sup>20</sup> Berljak, pp. 97-99.

<sup>21</sup> *ibid.*, p. 129.

<sup>22</sup> Javier Hervada, "The Old and the New in the Hypothesis 'etiamsi daremus' of Grotius", 1983, pp. 3-20.

<sup>23</sup> *op. cit.*, pp. 8-10.

<sup>24</sup> *op. cit.*, p. 11.

As to the theologians concerned, from Gregory of Rimini to Vázquez and Suárez, Hervada emphasizes that the counterfactual supposition "si Deus non esset vel nihil praeciperet" is never called merely false, but is always branded "*impossibile*". This brings out the point that the ultimate foundation of the moral order is not human reason, but the divine. The rigorous impossibility of the supposition, which is a consequence of the ontological nexus between the divine and the human, means in Hervada's words, that "human reason can be *imaginably* unlinked to God, but it is not intelligible in this manner"<sup>25</sup>.

From this perspective Hervada judges the introduction of the hypothesis by Grotius, as such, as nothing new. The context in which Grotius does so, however, leads Hervada to call him an innovator. The novelty resides for Hervada in the fact "that Grotius does not establish any relation of causal exemplarity - analogy and participation - between divine nature and human nature, between God's reason and man's." Hervada thinks he has found the "key point" in the opening sentence of paragraph 12 of the prolegomena, i.e. the paragraph immediately following the one giving the "etiamsi"-hypothesis. It reads:

"And this again is another origin besides the natural to wit the one flowing from the free will of God."<sup>26</sup>

According to Hervada this sentence shows that the free will of God forms the only nexus which Grotius posits between God and natural law<sup>27</sup>. The alleged absence of any other ontological nexus between God and human nature, leads Hervada to the conclusion that God's non-existence is not an impossibility for Grotius, but only a false idea; thus the hypothesis not only turns "out to be imaginable, but even to be intelligible". The mere falseness "induces Grotius to add a few lines [to the "etiamsi" hypothesis] to prove that the existence of God is a certain truth which can be known by arguments, miracles and Christian Faith. Neither Gregorius of Rimini nor Vázquez saw the need to do this because in their case it was unnecessary."<sup>28</sup> Why this 'novelty' should arise in Grotius' work, Hervada deems sufficiently explained by a reference to the Protestant Reformation.

"Protestantism reaffirmed the rejection of the *analogia entis* - which was already contained in Voluntarism and Ockham's Nominalism - and the free divine decision to save man through Faith and not through works."<sup>29</sup>

<sup>25</sup> op. cit., p. 15. Hervada seems to derive this from Vitoria, see ibid. p. 16.

<sup>26</sup> Proleg., paragraph 12: "Et haec iam alia iuris origo est praeter illam naturalem, veniens scilicet ex libera Dei voluntate."

<sup>27</sup> op. cit., p. 19: "...the link between natural law and God is established in nothing other than God's free will."

<sup>28</sup> ibidem.

## The points of discussion

Leaving the wrong attribution to Grotius of the said distinction between saving faith and meritorious grace for what it is, there is no doubt that Hervada's claim that Grotius rejected the *analogia entis* is at the basis of all the other points in his interpretation. In fact Hervada's assertion that from Grotius' treatment of the 'etiamsi' hypothesis one ought to conclude that he rejected the *analogia entis* has the most far-reaching consequences for the interpretation of Grotius' concept of natural law. If his views prove to be right this would undo much of what we have said so far.

However, in the present chapter I try to argue that Hervada's assumption is incorrect. I argue that Grotius did as a matter of fact assume an ontological (as opposed to an arbitrary) nexus between human nature and God, and I try to assess to what extent this nexus can be said to be ontologically necessary. Thus it will become possible to answer Hervada's claim that the impious hypothesis seems merely false to Grotius, and not impossible and that the hypothesis would therefore not be just 'imaginable but even intelligible'.

Another point which requires discussion in this chapter and which has received the attention of a wide circle of authors (also outside the ones I summarized above) is the question of which sources Grotius drew on with regard to his hypothesis.

Hervada asserts the irrelevance of Marcus Aurelius to Grotius' natural law doctrine, whereas Berljak considered Marcus not only the most important source for Grotius' concept of natural law, but more in particular for his 'etiamsi' hypothesis. Berljak's opinion in its turn contrasts with Crowe's and St. Leger's, who look for the origin of the hypothesis in scholastic doctrine from the late Middle-Ages and (Spanish) Renaissance. In doing so Crowe and St. Leger wish to emphasize the intellectualist and realist meaning of the hypothesis, as opposed to voluntarist and nominalist conceptions of law stressed in Hervada's interpretation. The question of the intellectualist versus voluntarist meaning of Grotius' hypothesis looms large in the whole discussion of that hypothesis that exists in the literature - only Berljak skirts the problem

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<sup>29</sup> *ibidem*. In similar vein J. Schlüter, Die Theologie des Hugo Grotius, Göttingen 1919, p. 35: "[A]uch der Gottesbegriff des Grotius [steht] unter dem Einfluss des Skotismus. Gottes Wesen fasst er nicht sowohl als eine einheitliche Substanz mit innerer begrifflicher Notwendigkeit, sondern als den nach freien Entschlüssen handelnden souveränen Willen. Die göttlichen Handlungen wie die sittlichen Gebote fließen daher nicht aus dem Wesen, sondern aus dem Willen Gottes. [...] Ähnlich steht es mit den göttlichen Eigenschaften. Zwar schreibt Grotius Gott gewisse inhärierenden Eigenschaften zu, doch steht es dem Willen Gottes frei, je nach den Umständen von ihnen Gebrauch zu machen."

by looking for an entirely different inspiration of the hypothesis. However much the conclusions vary which authors reach on the subject, all authors who have gone into the problem in any depth take the approach of deriving the meaning of Grotius' hypothesis from things his predecessors had to say on similar hypotheses. A consequence of this approach is that the greater part of what is written about Grotius' hypothesis consists of a description of what the predecessors meant with their hypotheses<sup>30</sup>. This approach, however, is not without its problems. As the contexts in which predecessors made their pronouncements vary between one another, the discussion turns into one where the most important question has become which of them was the source which Grotius used. Indubitable answers to this question, however, have been particularly unforthcoming.

A more serious complication with this approach is that the contexts in which the predecessors produce their hypotheses would seem to differ from the context in which Grotius produces his own statements - in which case this approach cannot yield any useful results.

Given the preeminence enjoyed by this approach, I am forced to digress in order to substantiate my claim that in fact Grotius' 'etiamsi' hypothesis differs from that of his predecessors. I will first illustrate this with reference to Suárez and two of the authors he mentions in *De legibus ac Deo legislatore* - to the other predecessor mentioned in the literature, Suarez's opponent Gabriel Vasquez, I will turn in the final section.

Having done this I will adopt the alternative approach, which is to study the context in which the 'etiamsi' hypothesis and the questions related therewith occur in Grotius' work and from that basis return to an examination, independently from what other authors have said on similar subjects, of the alleged rejection of the *analogia entis*, and the meaning of the will and intellect with regard to law respectively. Not until the last section will I (re-)address the question of the sources which Grotius may have used in order to see whether the results of this study can contribute to finding an answer to it.

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<sup>30</sup> Thus also, quite uncritically, P. Haggenmacher, 1983, p. 466: "L'apport de Grotius en la matière [de la conception volontariste et intellectualiste du droit naturel] ne peut se mesurer que par référence aux prédécesseurs qui l'ont inspiré; on examinera leurs thèses."

**Intellectualist and voluntarist, indicative and preceptive, realist and nominalist.**

It is not immediately clear from the wording of Grotius' hypothesis that it is connected to an intellectualist concept of natural law, as opposed to a voluntarist concept. In the form given to it by Grotius, the hypothesis states no more than that natural law would more or less be what it is even if one were counterfactually to assert the non-existence of God or his unconcern with human affairs. As such, the answer to the question whether natural law flows primarily and essentially from God's intellect or from God's will, is left in suspense. The hypothesis merely says that without a divine intellect and without a divine will, we would still be left with a natural law.

Nevertheless, Grotius' hypothesis has been placed within an older tradition in which the opposition of intellect and will developed and in which impious hypotheses were developed that allegedly are similar to Grotius's.

As to this similarity, however, it should firstly be remarked that the voluntarist/intellectualist controversy is not equally prominent at the point at which different authors bring up their version of the impious hypothesis in their respective works. Three of the scholastic authors - Hugh of St. Victor (1096-1141), Gregory of Rimini (d. 1358) and Francesco Suárez (1548-1617) - have in the literature received special attention as representative exponents in the development of the controversy, each using an 'impious hypothesis'. I will briefly try to show that such hypotheses are not used by all three authors to take a stand on the issue of the primacy of will or of intellect with regard to natural law, and that therefore the meaning of the impious hypothesis cannot exclusively and unreservedly be restricted to this issue.

Gregory of Rimini's hypothesis occurs in the context of his definition of sin as "nothing else but voluntarily to commit or omit something against right reason"<sup>31</sup>. Gregory first asserts this definition to be consonant and identical with Augustine's definition of sin as "anything done, said or desired against the eternal law," the eternal law being defined as "the divine reason or will of God commanding the natural order to be conserved and forbidding it to be perturbed"<sup>32</sup>. Next he answers those who might ask why he defines sin unreservedly to be "against *right* reason" and not restrictedly "against *divine* reason". It is wrong to think, Gregory writes, "that something is a sin not because it is against divine reason insofar as it is right but because it is against divine reason insofar as it is divine. For if, *per impossibile*, divine reason or God himself were not to exist or reason were to err, still if

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<sup>31</sup> Gregorius Ariminensis, *In II Sententiarium*, d. xxxiv, q.1, art. 2: "...videtur mihi posse dici quod peccatum actuale non est aliud quam voluntarie committere aliquid vel omittere contra rectam rationem."

<sup>32</sup> *ibid.*; the reference is to Augustine, *Contra Faustum*, 22, 27.

somebody were to act against angelic or human or whatever other right reason there might be, he would sin." <sup>33</sup>

The distinction Gregory makes is between the divinity and the rightness of reason and not between reason as opposed to will. Actually, that he deems his definition of sin in accordance with Augustine's also with respect to the latter's definition of the eternal law, suggests that Gregory does not here wish to construe a strict separation of will and reason. The nearest he comes to a distinction of reason and will, is further on in the same discussion. There he points out that 'prohibition', and similarly 'precept' and 'law', may be understood in a two-fold sense; firstly, as indicative or ostensive (*indicativa*), or secondly, as prescriptive or preceptive (*imperativa*). An indicative precept, law or prohibition merely points to something that is to be done or avoided, whereas a prescriptive rule imposes the doing or avoiding of an act or omission imperatively. Gregory maintains that a sin is a sin because of a specific prohibition from God in both the indicative *and* imperative sense, and that in the absence of God's imperative, sin would still by right reason be indicated as (i.e. by indicative law be) a wrong. Perhaps the concept of preceptive law may lead one to suggest that the imperative mood of the preceptive law presupposes an act of will, whereas for an indicative law a mere act of the intellect might conceivably suffice. Consequently a parallel might be constructed between the distinction of a preceptive (or imperative, or prescriptive) law and an indicative (or ostensive law) law on the one hand, and the distinction of will and intellect (or reason) on the other. But this inference from imperative and indicative to voluntarism and intellectualism is in itself not imperative - it is, for instance, possible to conceive of an indicative law existing by a mere act of the divine will or of the existence of an imperative law merely addressed to man's intellect. It is at least questionable whether Gregory wished to make this parallel between will\imperative and intellect\indicative. On the basis of Gregory's distinction of an imperative and indicative law we can say that the (hypothetical) absence of a divine imperative and command of the will leaves intact the possibility to decide what is right and wrong by nature, and one could hence conclude that natural law is not dependent on God's will. But this does not make Gregory an intellectualist, as can be shown from the fact that the 'impious hypothesis' we quoted above is not concerned with the absence of a divine will or command, but with the hypothetical absence of divine right reason or of God himself. Moreover, in distinguishing the indicative and imperative law Gregory refers to a passage from Hugh of Saint Victor, in which again there are

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<sup>33</sup> Ibidem: "Si quaeretur cur potius dico absolute contra rectam rationem quam contracte contra rationem divinam, respondeo ne putetur peccatum esse praecise contra rationem divinam et non contra quamlibet rectam rationem de eodem; aut aestimetur, aliquid esse peccatum, non quia est contra rationem divinam inquantum est recta; sed quia est contra eam inquantum est divina. Nam si per impossibile ratio divina sive Deus ipse non esset aut ratio illa esset errans adhuc si quis ageret contra rectam rationem angelicam vel humanam aut aliam aliquam si qua esset peccaret. Et si nulla penitus esset ratio recta adhuc si quis ageret contra illud quod agendum esse dictaret ratio aliqua recta si aliqua esset, peccaret."

no direct references to the human or divine will as opposed to the intellect. In the passage concerned, Hugh of Saint Victor gives an exposition of the twofold nature of man, viz., visible and invisible, corporeal and spiritual, temporary and eternal, leading to pleasure and to felicity, providing solace and joy, the one gives and the other promises. In order to enjoy both kinds of good, Hugh says, two kinds of rules have been given to man: the *praeceptum naturae* and the *praeceptum disciplinae*; the first is *intus aspiratum per naturam*, the second *foris appositum ad disciplinam*, "intus per sensum, foris per verbum". The natural rule is understood as the natural discretion and intelligence, *intrensecus inspirata* and *cordi hominis aspirata*, to pursue and to avoid certain things<sup>34</sup>.

Crowe and Hervada find it hard enough to retrace the distinction between an imperative and an indicative law in this exposition<sup>35</sup>. But except for the characterization of the *praeceptum naturae* as an *intelligentiam agendi* - which refers to the human intelligence concerning acts - a consideration of at least the divine will or intellect is absent in this discussion. The distinction is between a divinely given law *per sensum ac naturam* and one given *per verbum*, and not (explicitly at least) between the divine intellect and divine will.

So whereas we must conclude that it is at least doubtful whether there is in Gregory of Rimini and Hugh of St. Victor a direct line from preceptive law to the will and from indicative law to the intellect, such a line is indeed drawn fully and explicitly by Suárez; and it is precisely in this context that Suárez discusses the 'impious hypothesis'. He does so in a chapter devoted to the question whether natural law is in truth preceptive divine law. The question arises, according to Suárez, because "a preceptive law never exists without an act of willing on the part of him who issues the command." If we grant that God is the

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<sup>34</sup> Hugo de Sancto Victore, *De sacramentis christianae fidei*, I, vi, 6-7 (Migne, *Patrologia Latina*, vol. 176, p. 267-8): "Quia vero homo ex duplici natura a compactus fuerat, ut totus beatificaretur, duo eius illi bona; conditor a principio praeparabat unum visibile, alterum invisibile. Unum corporale, alterum spirituale. Unum transitorium, alterum aeternum. Utrumque plenum et utrumque in suo genere perfectum. Unum carni, alterum spiritui, ut in uno sensus carnis ad iucunditatem foveretur, in altero sensus mentis ad felicitatem repleretur. Carniabilia, spiritui invisibilia; carni ad solatium, spiritui ad gaudium. Ex his bonis unum dedit, alterum promisit [...] Bonum homini a Deo vel datum vel promissum nihil profuisset, nisi et ad illud quod datum fuerat apponeretur custodia ne amitteretur, et ad illud quod promissum fuerat aperiretur via ut quaeretur et inveniretur. Propterea ad bonum datum posita est custodia, praeceptum naturae; et ad bonum promissum aperta est via, praeceptum disciplinae. Duo ista praecepta data sunt homini: praeceptum naturae et praeceptum disciplinae. Praeceptum naturae fuit quod intus aspiratum est per naturam; praeceptum vero disciplinae quod foris appositum est ad disciplinam: intus per sensum, foris per verbum. [...] Praeceptum autem naturae nos nihil aliud intelligimus, quam ipsam discretionem naturalem quae intrensecus aspirata est. [...] Quasi enim quoddam praeceptum dare erat, discretionem et intelligentiam agendi, cordi hominis aspirare. Quid ergo cognitio faciendorum fuit, nisi quaedam ad cor hominis facta praeceptio? et quid rursus cognitio vitandorum fuit nisi quaedam prohibitio?"

<sup>35</sup> Crowe, 1976, pp. 397-398; Hervada, *op. cit.*, p.12.

efficient cause, author and "as it were the teacher of natural law", this does not yet mean that God is its *legislator*<sup>36</sup>. On this point Suárez presents two contrary opinions. The first is supposedly held by Gregory of Rimini (who, as Suárez remarks, refers to Hugh of St. Victor), Gabriel Biel, Almain and Corduba, who according to Suárez assert "that natural law is not a preceptive law, properly so-called, since it is not the indication of the will of some superior", but only indicative and demonstrative of what is intrinsically good or evil and is therefore to be done or avoided. "Consequently, it seems that these authors would grant that natural law is not derived from God as a legislator, since it does not depend on God's will." And because of this, says Suárez, Gregory and those who follow him can draw this line of argument to its logical conclusion and formulate their impious hypothesis<sup>37</sup>. The second opinion is ascribed to Ockham, Gerson and Pierre d'Ailly; according to this opinion "the natural law consists entirely in a divine command or prohibition proceeding from the will of God as the Author and Ruler of nature... Their opinion would assuredly seem to be founded upon the fact that actions are not good or evil, save as they are ordered or prohibited by God."<sup>38</sup> Neither of these opinions satisfy Suárez, and consequently he holds "that a middle course should be taken, this middle course being in my judgment, the opinion held by St. Thomas and common to the theologians". This *via media* consists in the assertion that natural law not only indicates what is good or evil, but also contains its own prohibition of evil and command of good. Suárez argues furthermore that the divine volition prohibiting or commanding certain actions "necessarily presupposes the existence of a certain righteousness or turpitude in these actions and attaches to them a special obligation derived from divine law." The conclusion is, therefore, that natural law is truly and properly divine law of which God is the author: "As existing in God it implies, to be sure, according to the order of thought an exercise of judgment on the part of God himself with regard to the fitness or unfitness of the actions involved and adds the will to bind men to observe the dictates of right reason [....]. As it exists in man, it does not merely indicate what is evil, but actually obliges us to avoid the same; it consequently does not merely point out the natural disharmony of a particular act or object with rational nature, but is also a manifestation of the divine will prohibiting that act or object."<sup>39</sup> As if the arguments set forth so far do not yet suffice to establish his point, Suárez devotes another eleven paragraphs to the examination of an hypothesis "upon which the whole matter turns" and which is "at the root" of the two contrary opinions set out at the beginning of the discussion. This is the hypothesis that "even if God does not issue the

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<sup>36</sup> F. Suárez, De legibus ac deo legislatore, II, vi, 1 and 2 in fine.

<sup>37</sup> ibidem, II, vi, 3.

<sup>38</sup> ibidem, II, vi, 4.

<sup>39</sup> ibidem, II, vi, 5-13.



prohibitions or commands which are part of the natural law, it shall still be wicked to lie, and to honour one's parents shall still be a good and dutiful act." <sup>40</sup> There is enough of a resemblance to the hypothesis as formulated by Grotius and e.g. Gregory of Rimini to summarize Suárez's treatment of it briefly.

The examination is in two parts, firstly, concerning the question whether the hypothesis can have any sense, and secondly, whether the hypothesis should be granted. The first question is answered affirmatively, in the sense that a human act in its relation to right reason and considered separately in relation to the object of the act, can be good or evil in so far as the object of the act is in harmony or disharmony with right reason; an act contrary to right reason is an evil, sin and source of guilt. If one grants the supposition that God did not forbid a particular action opposed to rational nature, it would lack the special depravity of acts transgressing a divine law, that is to say, it only would lack special and perfect wickedness in relation to God. "Therefore, from the hypothesis in question as it is thus explained and its truth conceded, there can be drawn no conclusion opposed to our opinion, nor to the arguments by which we have proved that opinion." And he adds that the objections and opposite replies on this point "are without force save that which consists in words only" <sup>41</sup>.

The second question, however, is answered negatively, in the sense that it cannot be admitted that God by an act of his own will has abstained from imposing prescriptively the things which fall under the dictates of natural reason. The argument for this answer is, that, assuming the existence of the will to create rational nature with sufficient knowledge and means for the doing of good and evil, God could not have failed to will to forbid that such a creature commit intrinsically evil acts; nor could he have failed to prescribe the necessary righteous acts. "For just as God cannot lie, neither can he govern unwisely or unjustly; and it would be a providence utterly foreign to divine wisdom and goodness to refrain from forbidding or prescribing to those subject to providence the things which are intrinsically evil, or necessary and righteous." This does not do away with divine freedom, "for absolutely speaking, God could have refrained from laying down any command or prohibition; yet, assuming that he has willed to have subjects endowed with the use of reason, he could not have failed to be their lawgiver, at least in those matters necessary for natural moral rectitude." <sup>42</sup>

From this summary of Suárez's position on the matter under examination, it is clear how a counterfactual hypothesis concerning God can be at the core of the decision between an intellectualist or voluntarist conception of natural law. The treatment of the hypothesis in terms of voluntarism and intellectualism may be helpful in Suárez' elucidation of his rather intricate views on natural law. But that does not necessarily mean that anyone using a similar hypothesis could for the reason that

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<sup>40</sup> *ibidem*, II, vi, 14.

<sup>41</sup> *ibidem*, II, vi, 17-19.

<sup>42</sup> *ibidem*, II, vi, 23.

he considers such an hypothesis admissable in one way or another, be nailed down as an intellectualist or as an adherent to the indicative conception of natural law only. If the world could be divided in two camps, one consisting of the authors who are all realists, intellectualists and indicativists, and the other of those who are all nominalists, voluntarists and imperativists, each camp having its own specific approach to the impious hypothesis, then a scrutiny of the works of Grotius in comparison with his predecessors would suffice to make out to which camp Grotius belongs; but the world is not thus<sup>43</sup>. Suárez may well have contributed to such a simplified view of the question by opening his discussion with a highly schematic opposition of an extremely intellectualist and indicative view to an extremely voluntarist and preceptive view of natural law. But this contraposition has much of a man of straw set up to be defeated and replaced by a more subtle approach to the matter.

It is also important to note the subtlety of Suárez's attitude to the hypothesis and the extreme precision with which he rejects it in one way but not in another. For Suárez the hypothesis must be accepted as making sense logically. (In fact we saw that Suárez considers the logical objections against it nonsense.) Yet the hypothesis must be rejected because the presupposed condition for its actual validity is not true. This attitude does not easily fit Hervada's categories of 'imaginable but unintelligible' and 'not merely false but impossible' which he said should be ascribed to Grotius' predecessors; so also in this respect the impious hypotheses which different authors use should be studied on the merits of the proper contexts in which they appear rather than on the basis of some preconceived scheme which may not fit all these authors equally well.

Moreover, we can now see that the impious hypothesis is not identical in the works of different authors; hence we should not uncritically derive the meaning one author is supposed to attach to his hypothesis from what another author states about a different hypothesis. Thus, Suárez's hypothesis may look similar to that of Gregory's which he had paraphrased before, but it is not identical. Gregory was speaking of the non-existence of "the divine reason or God himself", whereas Suárez is only asserting the non-existence of the "issue of a prohibition or command" with regard to natural law, which leaves the existence of God and God's reason intact. The specificity of the hypothesis may not have been crucial in the context in which Gregory came up with his

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<sup>43</sup> A good example of the approach I mean, is T. E. Davitt, The Nature of Law, B. Herder, St. Louis/London 1953, where he treats of his subject in two parts, Part I 'The Primacy of the Will in the Concept of Law' summarizing the views of Henry of Ghent, John Duns Scotus, William Ockham, Gabriel Biel, Alphonse De Castro, and Francesco Suárez respectively, and Part II 'The Primacy of the Intellect' giving the views of Albert the Great, Thomas Aquinas, Thomas de Vio, Dominic Soto, Bartholomew Medina, Robert Bellarmine. Davitt legitimates his approach by referring to Suárez, De legibus, I, v, 6. Presumably Suárez's warning at the outset of this chapter, that the question whether law is an act of the intellect or of the will "will turn almost entirely upon a manner of speaking" went unnoticed.

hypothesis, for he was not so much concerned with the rôle of the will versus the intellect, but it is crucial when Suárez brings up his. If next we compare Grotius' hypothesis to Suárez's, we must conclude similarly that the part "non esse Deum" of Grotius' formulation of the hypothesis is not contained in Suárez's. But whether the part "non curari ab eo negotia humana" is similar to Suárez's hypothesis depends on whether this care involves the attachment of prohibitions and commands to natural law, and therefore implies specifically an act of the will.

That Suárez as a matter of fact maintains that the divine providence implies such will-acts, appears from his refutation of the admissability of the hypothesis as far as its veracity is concerned<sup>44</sup>. In order to reject the veracity of a limited hypothesis concerning the will of God with respect to natural law, Suárez has recourse to the argument of the existence of divine providence generally. This suggests that Suárez's seemingly limited hypothesis was indeed concerned with the divine care for human affairs. It should be pointed out that this procedure is particularly meaningful within Suárez's frame of argument, because it results in the assertion of a divine act of will with regard to the commandments and prohibitions of natural law; but this is so because providence is understood by Suárez in terms of the divine will<sup>45</sup>. The whole of Suárez's approach to the hypothesis, treating it as he does in terms of the intellectualist/ voluntarist controversy by relating its acceptability to a correct understanding of God's will with respect to creation, is begging the question whether Grotius understood God's 'concern with human affairs', of which his hypothesis speaks, also in terms of the divine will as Suárez understood it. As long as it has not been established that Grotius viewed divine providence in such terms, and moreover his hypothesis is not limited to the absence of divine will-commands only but is extended to the entire nonexistence of God, his hypothesis cannot sufficiently be dealt with in Suarezian terms. Before we can turn to the problem of whether Suárez was nevertheless the (or a) source for Grotius' *etiamsi*-formula, we must therefore turn to an examination of Grotius' texts in point, assessing them on their own merits, in order to establish the formula's meaning and discuss the various points brought up in the research reviewed above.

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<sup>44</sup> See note 42 above.

<sup>45</sup> Cf. also *De legibus* II, iii, 11-12.

## The context of paragraph 11 of the Prolegomena

The impious hypothesis occurs within that part of the *prolegomena* to *De iure belli ac pacis* where Grotius is trying to refute the sceptics' thesis that there is no such thing as natural law or justice (paragraphs 5-20). To this purpose, Grotius stipulates the existence of a social appetite in man, which is a striving for tranquil community *pro sui intellectus modo ordinatae* with his fellow-man, "which the Stoics called *oikeiosin*" (paragraph 6). As instruments for the satisfaction of this appetite, man possesses speech and, says Grotius, also -it may be understood- the faculty of knowing and acting according to general precepts; he knows moreover how to act similarly in similar cases (paragraph 7). This *societatis custodia humano intellectui conveniens* is the source of law in a strict sense, to which belong the abstaining from the things which belong to others, the restitution of the things of others which we have, the obligation to fulfil promises, the reparation of damages incurred due to our fault, and the deserving of punishment among men (paragraph 8). From this meaning of law there follows another one, which is law in a wider sense and which is based on the power of judgment concerning the things which can be enjoyed and things which do harm (*quae delectant aut nocent*) both in the present as in the future and concerning the things which can lead to either. It is proper (*conveniens*) to human nature to follow in these matters a correctly formed judgment according to the human intelligence (*pro humani intellectus modo*). Whatever is clearly at variance with such judgment is understood to be against the law of nature, to be precise, of human nature (*contra ius naturae, scilicet humanae*) (paragraph 9). To law in this wider sense belongs also the prudent dispensation of the goods proper to each man or community - although this does not have the same nature as law strictly speaking (paragraph 10). It is at this point that Grotius comes up with his impious hypothesis (paragraph 11):

"And the things which we have said so far, would have some place [or, "would have a degree of validity", *locum aliquem haberent*], even if we would concede - which cannot be conceded without the utmost wickedness - that there be no God, or that human affairs are of no concern to him [*non esse Deum aut non curari ab eo negotia humana*]."

Grotius immediately continues to say that as far as God's existence and his providence are concerned, the contrary is instilled in us by reason and uninterrupted tradition, and confirmed by many arguments and proven miracles through all centuries. From these it should be concluded that we ought to obey God as the creator to whom we owe what we are and have, "particularly, as he has revealed himself to be supremely good and powerful, so much so that he can give the highest rewards to those who obey him - even eternal [rewards] as he is himself eternal; and it should be believed that he has indeed willed to do so [*et voluisse credi debeat*], the more as he has promised it expressly [*id disertis verbis promiserit*]. The paragraph following reads:

"Herein, then, is another source of law besides the one in nature, that is, the free will of God, to which beyond all cavil our intellect bids us we must be subject. But the law of nature of which we have spoken, both the social one and the one so called in a larger sense, although flowing from principles within man, can yet deservedly be ascribed to God, because he has willed, such principles to exist in us [*quia ut talia principia in nobis existerent ipse voluit*]." <sup>46</sup>

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The immediate context of the impious hypothesis, shows us that the voluntarist/intellectualist controversy is not raised explicitly as the theme at issue. The hypothesis itself is presented as an element in the refutation of the stance adopted by Carneades towards the branch of law Grotius wants to give a treatment of. In Grotius' words, Carneades had for his sceptical position "no more valid argument than this: that men have established laws for themselves for reasons of utility, which vary with their mores, and for the same people are often changed as times change"; and by nature all men are led only to consider their own advantage (*utilitas*) to the exclusion of that of others' <sup>47</sup>.

The claim that human nature is egoistic, Grotius counters by positing sociability (*appetitus societatis*) as a trait proper to man (*oikeiosis*), and from there Grotius develops the notion of natural law. The central theme of the discourse in which the hypothesis has a place is the differentiation of and relation between that which is variable and changeable and that which is natural with respect to law. Viewed thus, the hypothesis seems to have more obviously to do with the naturalness of law than with its intellectualist or voluntarist character.

Still in the context in which the hypothesis occurs, mention is made several times of the intellect and the will - as I have also tried to indicate in the summary given above. The intellect is mentioned three times in the relevant paragraphs before the hypothesis is formulated, whereas the will is mentioned three times thereafter.

In two cases the reference to the intellect concerns the nature of human society. The first points out that the human appetite for community is

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<sup>46</sup> *Prolegomena*, paragraph 12: "Et haec iam alia iuris origo est praeter illam naturalem, veniens scilicet ex libera Dei voluntate, cui nos subiaci debere intellectus ipse noster nobis irrefragabiliter dictat. Sed et illud ipsum de quo egimus naturale ius, sive illud sociale, sive quod laxius ita dicitur, quamquam ex principiis homini internis profluit, Deo tamen ascribi merito potest, quia ut talia principia in nobis existerent ipse voluit: quo sensu Chrysippus et Stoici dicebant iuris originem non aliunde petendam quam ab ipso Iove, a quo Iovis nomine ius latinis dictum probabiliter dici potest."

<sup>47</sup> *Proleg.*, paragraph 5: "Is [Carneades] ergo cum suscepisset iustitiae, huius praecipue de qua agimus, oppugnationem, nullum invenit argumentum validius isto: iura sibi homines utilitate sanxisse varia pro moribus, et apud eosdem pro temporibus saepe mutata: ius autem naturale esse nullum: omnes enim et homines et alias animantes ad utilitates suas nature ducente ferri: proinde aut nullam esse iustitiam; aut si sit aliqua, summam esse stultitiam, quoniam sibi noceat alienis commodis consulens."

ordained in accordance with the order of man's intellect (paragraph 6). The second is in relation to the social care which Grotius says is *humano intellectui conveniens*, after remarking that for the satisfaction of the social appetite the mature man possesses the instrument of speech and the faculty to know and act in accordance with general precepts - although, he adds, such social care can even be noticed in children and some other animals as deriving from an extrinsic intelligent principle (paragraphs 7-8)<sup>48</sup>.

The third mention of the intellect is in relation to the correctly formed judgment concerning enjoyable or harmful things, which judgment is to be followed *pro humani intellectus modo* and should be considered next to the *vis socialis* just mentioned (paragraph 9). All three references are explicitly to the *human* intellect, stressing the intelligibility and intelligent nature of man's social end and of his judgment.

The three references to the will, however, are to *God's* will. The first is that God must be believed to have *willed* to reward those who obey him, as he has promised so expressly (paragraph 11); a point enhanced by the statement which is the second reference, viz., that this is "the other source of law besides the one in nature [*praeter illam naturalem*], that is, the free will of God" (paragraph 12).

As I have mentioned above, Hervada takes this last reference to be proof of the ultimately voluntaristic conception of natural law; although proximately natural law can be known to man through his intellect, it ultimately originates in God's will. What in Hervada's view is essential, is that in this context "divine reason does not appear at all, nor does God's nature, as the exemplary cause of human reason or of human nature"<sup>49</sup>.

It seems to me that Hervada is wrong in basing his view on the last quoted sentence from paragraph 12 of the prolegomena. From the order of the argument it can easily be inferred that this reference to God's will as a source of law, is substantially the same as a previous (admittedly less explicit) reference in the immediately preceding paragraph, which is to the revelation of God's will contained in the New Testamentary promises. These promises, however, are not strictly part of natural law as understood by Grotius but on the contrary are part of divine volitional law as described in *De iure belli* I, I, XV. The divine will meant in the last quoted sentence from the prolegomena is therefore not intended to refer to the ultimate source of natural law.

Things would be different had Hervada based his view on the next and third reference to God's will in the immediately following sentence of paragraph 12. There Grotius switches back from divine volitional law, which he had been discussing after introducing the impious hypothesis, to natural law and remarks that, although it flows from principles in man, it can yet be ascribed to God, who has *willed* such principles to exist in us.

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<sup>48</sup> *ibid.*, paragraph 7: "...quod in illis quidem procedere credimus, ex principio aliquo intelligente extrinseco, quia circa actus alios, istis neutiquam difficiliore, par intelligentia in illis non apparet."

<sup>49</sup> Hervada, *op. cit.*, p. 19.

This is a highly important remark which lends support to Hervada's interpretation that the Grotian natural law has a voluntarist origin, because it stems from God's sovereign will. We see here in fact a doubling of will and intellect with regard to natural law, a kind of intersection of divine will and human intellect. God's will is the origin of natural law, and natural law is known to man through human intelligence. On the basis of the prolegomena, it would be possible to draw the conclusion that the respective order of intellect and will in God and in man is not identical. Indeed, it is logically not excluded that natural law issues from the absolutely groundless will of God, but can be known to man only by the use of the intellect, which holds superior rank in the rational judgment preceding man's actions, which judgment is only in that sense founded in man's intellect. This interpretation suggests an incommensurability between God and man which would constitute - as Hervada says it actually does - a break with the *analogia entis*.

However, arguing from natural law's divine foundation in God's arbitrary will and its human foundation in man's intellect to a rupture with the idea of the *analogia entis*, though possible, is not necessarily appropriate. That a position on will and intellect as here described does not necessarily imply such a rupture can be illustrated by reference to Suárez, who takes a similar position on the issue of divine will and human intellect. He wrote - concerning the proposition he held, that "natural law is truly and properly divine law, of which God is the author" - that natural law "as existing in God implies [...] the will to bind men to observe the dictates of right reason"<sup>50</sup>; for if such a will were absent, then it would not truly be law. Yet Suárez also holds that "the very faculty of judgment which is contained in right reason and bestowed by nature upon men, is of itself a sufficient sign of such divine volition"<sup>51</sup>. One cannot readily infer from this that Suárez rejected the *analogia entis*, for in fact he held to a strong doctrine of *analogia entis*<sup>52</sup>. I argue that similarly one should not readily assume a rejection of the *analogia entis* by Grotius either. This can be shown on the basis of arguments which I also used to show that Grotius did not reject the idea of the eternal law governing man and creation. I briefly restate the arguments in the present context.

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<sup>50</sup> *De legibus*, II, vi, 13.

<sup>51</sup> *ibidem*, II, vi, 24.

<sup>52</sup> Suárez held that "in the *analogia entis* [between man and God] there is no metaphor"; "as having being it [the creature] depends essentially on God, much more than an accident depends on a substance", *Disputationes Metaphysicae*, 28, 3, 11 and 28, 3, 16. See F. Copleston, *A History of Philosophy*, Image Books edition 1963, vol. III, pt. II, Ch. 22, 7, pp. 181-182.

-*analogia entis*

The opinion that Grotius denied the analogy between the being of God and the being of man cannot be refuted by a simple reference to Grotius' texts owing to the fact that he does not make any explicit reference to the concept of *analogia entis*. Nevertheless we might expect to be able to say something concerning his probable position on the matter. The development of such an analogy was made possible - or at least facilitated<sup>53</sup> - by the biblical notion of man as the *imago Dei*<sup>54</sup>. It is, therefore, no great surprise to find the topic of *imago Dei* in Grotius' *Adamus Exul*. It occurs after Adam has given a brief contemplative description of the order to be discerned in the celestial cosmos (which is "*vice legis aeternae*") which ends with him saying that the world itself prompts us to serve the maker of things and leads our minds (*mentes*) to their origin (*ad primordium*)<sup>55</sup>. The angel takes over from Adam and says of Adam:

"O te beatum, cujus in praecordiis  
Imago magni nobilis fulget Dei,  
Et cui, quod unum maximum & summum bonum est,  
Rationis usus cum Dei cultu datur."

[ O thou blessed, in whose heart/the noble image shines of  
mighty God/and to whom is given, as is the one highest and  
greatest good,/the use of reason together with the worship  
of God.]<sup>56</sup>

These verses are followed by a description of the other creatures in-animate and animate: although all are made by the sovereign creator, the stones lack *motus*, the plants and trees *sensus*, and the animals all lack a mind and speech, *nulla religio Deum demonstrat*<sup>57</sup>. The context of this passage strongly suggests that the image of God refers particularly to man's mind which is - as the quoted verse says - rational, and the reflection of God in man's mind binds him to God.

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<sup>53</sup> In the *Annotationes ad Vetus Testamentum* (Op. Theol. I, p. 2, a 14) Grotius remarks: "*Homo Dei simulachrum etiam Platoni.*"

<sup>54</sup> Genesis I, 26-27; also Wisdom II, 23; Eccles. XVII, 1 and echoed in Acts 17, 27; Romans I, 20. The Genesis verse is adduced time and again when Thomas Aquinas develops the *analogia entis*, e.g. *Summa Th.* I, q.4, art. 3; I, q. 13, art. 5.

<sup>55</sup> *ibid.*, vss. 312-331; *supra* p. 86.

<sup>56</sup> *Sacra in quibus Adamus Exul*, in: *Dichtwerken* IA, p. 59, vss. 332-335.

<sup>57</sup> *ibid.*, vss. 336-353.



This interpretation of the *imago Dei* (an entirely orthodox interpretation) is borne out by other passages in the *Adamus*<sup>58</sup> and by Grotius' Annotations to Genesis I, 26, which he wrote much later<sup>59</sup>. In the latter Grotius suggests that there is also a bodily aspect to the image of God, in so far as he suggests that the presence of a divinely given mind is reflected in man's face:

"Adame tantum est haec quod a te different,  
Quem vultus ipse destinat majoribus,  
Te, cum creasset imagine imbutum sua  
Deus, quievit septima sancta die."

[Adam, how different are these creatures from you/ whose face already destines you to higher things /you, after whose creation, imbued with his image,/ God rested on the holy seventh day.]<sup>60</sup>

This point is again reinforced by the Annotations to Genesis II, 7. Grotius follows the text of the Vulgate in this verse, which reads as follows: "And the Lord God formed man *de limo terrae, et aspiravit in faciem eius spiraculum vitae*; and man became a living soul." Grotius remarks:

"Although it can in some sense be said that other animate creatures have a spirit from God, yet not without reason this is said particularly of the human spirit as the more divine one, as Moses and Job XXXIII,4 say. But it should not be said that this spirit is breathed into his nostrils, but into his entire face, which is the index of the mind and capable of speech"<sup>61</sup>.

The image of God's rational mind in man's soul is of course not a perfect reflection. One reason for this is the Fall of man - although even after the Fall, Grotius wrote in the *Adamus*, God fomented a spark of His light<sup>62</sup> - but it is also inherent in the philosophico-theological

<sup>58</sup> Id., p. 39 vss67 ff.: "... nec tamen vitam dedit/ Sensusque solos, propriae sed imaginis/ Expressit altum mente in humana decus.

<sup>59</sup> Op. Th. I, p. 1 b 44 ff.: "In quo autem homo creatus sit a Dei instar, explicant sequentia, ut & apud Ovid. Et quod dominari in cetera posset. Nimirum dia to epistemonikon [ob scientiarum capacitatem]". The date of first publication of these annotations is 1644.

<sup>60</sup> *Adamus Exul*, loc. cit., p. 81, vss. 633-636.

<sup>61</sup> Annot. ad V.T., Op. Theol. I, p. 2 b 16: "Quamquam & aliorum animantium spiritus a Deo esse aliquo sensu dici potest, non tamen sine causa speciatim hoc de hominis spiritu, ut diviniore, dixit Moses & Job xxxiii, 4. Neque vero hic spiritus in nare inditus dicitur, sed in faciem totam, mentis indicem & loquendam capacem." More generally Grotius takes the Latin Vulgate as the basis for these annotations; see on this point A. Kuenen, "Hugo de Groot als uitlegger van het Oude Verbond", in: *Verhandelingen der Koninklijke Akademie van wetenschappen*, Afd. Letterkunde, Amsterdam 1883, vol. 12, pp. 305-308.

<sup>62</sup> *Adamus*, vss. 1903-4.

conception of the relation between God and man on which the *analogia entis* as developed in scholasticism rests<sup>63</sup>. Hence, in the *Adamus*, Grotius is able to let the angel say, when describing Adam before the Fall:

"...quantaque ingenii tui  
Mensura summum pectori inculpsit Deum,  
Quem novimus parte: perfecto modo  
Deus ipse novit, seque dum capit, & cupit  
Pleno, quod aliis dividit, fruitur bono.  
Deus ipse Mens est, universum quae replet superatque mundum,  
..."

[...How much the measure of your genius has engraved God in your heart, whom we know only partly. Only God knows and understands himself, and only God fully enjoys the good which by others is shared. God is the mind which fills the universe and transcends the world.]<sup>64</sup>

These verses express beautifully that man is a participation of the Divine being and therefore like God, yet at the same time this likeness is solely according to analogy, inasmuch as what God is essentially, men are only by participation<sup>65</sup>.

One could multiply the texts which show that Grotius nowise rejected the *analogia entis*<sup>66</sup>, even if he did not employ the term. Together with what we said before on the *lex aeterna*, Grotius' assumption of the *analogia entis* is of great importance for a correct interpretation of his concept of natural law in general. Now I turn to the more particular question whether according to Grotius there is an analogy in the being of God and man which tells us anything concerning the order of will and intellect.

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<sup>63</sup> Thus Thomas Aquinas is able to develop the crucial elements of the doctrine of *analogia entis* from the concept of a transcendent Creator God, without ever needing to recur to the fall for saying e.g. that the likeness of the creature to God is imperfect (*S.Th.* I, q. iv, art. 3), and univocal predication is impossible between God and creatures (*ibid.*, I, q. 13, art. 5); cf. also Aristotle, *Metaphysics*, XII, 9, 1074 b 34.

<sup>64</sup> *Adamus*, vss. 384-390.

<sup>65</sup> Cf. Aquinas, *S. Th.* I, q. 4, art. 3 ad 3.

<sup>66</sup> E.g. *Eucharistia* II, vss. 108-111; 149-50; 190-5, *infra* nt. 75; *De iure praedae*, p.12: "[Deus] qui mentis suae imaginem homini impressit"; *Briefw.* I, p.500: "...jus hoc [naturae] ex aeterna lege hoc est ipsius Dei natura proficisci, ad cuius imaginem homo est conditus"; the major part of *De veritate religionis christianae*, I, ii-xi, would be incoherent if Grotius would have rejected the *analogia entis*.

- God, man & reality: the juxtaposition of will  
& intellect

So far we have only seen that God's image in man is primarily one which regards his mind (*mens*) and reason (*ratio*). The relation we saw Grotius made with speech in this context, suggests particularly that he means something similar to the Greek *logos*. When we look then to Grotius' poetic paraphrase of the opening of John's Gospel, with its ecstatic contemplation of the divine *logos*, we find that Grotius uses again the same vocabulary of the word, reason and mind with regard to the nature of God before creation and incarnation<sup>67</sup>, and develops it in a trinitarian direction:

"Iam tum Dia fuit Ratio, Sapientia Patris,  
Internus Sermo, Verbum a Genitore profectum,  
Par summo, junctumque Deo....  
Ipse Deus fuit hoc Verbum, Deus unus & idem,  
Quem Patrem, Flamenque sacrum, Natumque vocamus  
Nec Pater est Natus, sed sunt Deus ambo sed unus."

[Then already there was the Divine Reason, the Wisdom of the father, internal speech, the word generated from the Father, equal and one with God the highest .. This word was God himself, the one and same God, which we call Father, Holy Spirit and Son; and the Father is not the Son, but both are God and one.]<sup>68</sup>

What makes the paraphrase so interesting to us, is that after this rendering of the first two verses of the Gospel of John, Grotius does not immediately go on with a paraphrase of the third verse of the Gospel ("3. All things were made by him.."). Instead he comes with an interjection, which also in the composition of the print (at least of the first edition of the *Sacra*) is represented as an interjection, in which he sketches the analogy of the divine trinity in human psychology using the words mind, intellect and will:

"Sic quoque si parvis componere magna licebit,  
Finitis quae fine carent, aeternaque natis,  
Una Anima est hominum: Mens est vice Fontis in illa:  
Hinc Intellectus secreto nascitur ortu:

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<sup>67</sup> Grotius locates the description before time with the use of the following words: "Principio rerum, cum nec natura citato/... /Coelum / nec Tellus, nec Pontus erat" ; in *Sacra, Initium Evangelicae Historia scriptore Iohanne paraphrasikoo*, Dichtwerken I, IA, p. 205, vs. 1-3. "Natura" is the subject of the sentence and Grotius means here God, whom he described in another poem as "natura naturâ prior", *Eucharistia* (II), Op. Th., III, p. 633 b 19.

<sup>68</sup> *Initium Evang. loh.*, vs. 5-7, 10-12.

Rursus & ex ipsa procedit Mente voluntas.  
 Quippe QUOD EST DEUS EST, Causa est,  
 Verumque, Bonumque:  
 Haec tria sunt, DEUS est unum, DEUS omnia solus.  
 (Quicquid ubique vides divina potentia fecit/...) "

[Thus also - if it will be at all allowed to compare small to great, finite to infinite, what is created to what is eternal - man has one soul: in it the mind is as a fount: from this originates mysteriously the intellect: again and from the mind itself proceeds the will. For all that is, is God; he is the origin, the truth, the good: these are three, God is one, God alone is all.]<sup>69</sup>

The actual wording of the psychological analogy is that of the trinitarian dogma: the intellect is said to be *born* (*nascitur*) from the mind, and in turn the will is said to *proceed* (*procedit*) from it. But it is hard to say whether Grotius intends also to refer to the so-called 'double procession' of the Holy Spirit, when he uses the words "*rursus et*" for the procession of the will. There is a good chance that Grotius considered the issue of the double procession a ninth century theological quibble, the dogmatic abstruseness of which can be explained by reference to its largely political origin. Although the trinitarian dogma is important enough to Grotius for him to refute the heresy of patripassianism<sup>70</sup> with the remark "*nec Pater est Natus*", the question whether the Spirit proceeds both from the Father and the Son, he probably considered non-fundamental as it did not arise during the "*aevo superiore ac puriore, hoc est, intra quadri gentos a nato Christo annos*" - an argument he would later often use with regard to other theological controversies as well<sup>71</sup>.

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<sup>69</sup> id., vss. 13-20.

<sup>70</sup> Patripassianism and Sabellianism are the two main versions of Monarchianism. The latter is a doctrine insisting on the unity of God to such an extent as to fall into heresy. Patripassianism is the heresy which identifies the Son with the Father - it is described by Tertullian in *Adversus Praxean*, I; Sabellianism considers the Trinity as mere temporary manifestations of the one God. See H. Bettenson (ed.), *Documents of the Christian Church*, Oxford, 1946, pp. 44 ff.. Grotius refers to Tertullian's *Adversus Praxean* in his annotation to John XV, 26, Op. Th. II-I, p. 553 a 3 ff..

<sup>71</sup> *Briefwisseling* I, p. 432. In *De imperio* c. VI, ix, entitled '*Concordiae Ecclesiae studendum & quomodo id fieri possit in dogmatibus & praeceptis divinis*', Grotius wrote: "*Cautiones quae servandae unitati conducant, hae sunt potissimae. Prima, ut a definiendo absteineatur quantum fieri potest: hoc est salvis dogmatibus ad salutem necessariis, aut valde eo facientibus. Omnem in jure definitionem periculosam esse tradunt Iuris auctores. De Theologicis idem quis merito dixerit, Vetus enim est sententia, de Deo etiam vera dicere periculosum est. [...] Hanc definiendi modestiam secuti sunt Patres in Nicaena & Constantinopolitana prima Synodo, & qui has Synodos moderati sunt Imperatores. Hac enim confessione posita, Patrem, Filium & Spiritum Sanctum distinctos esse inter se, & hos unum esse Deum, ac proinde homousious, in explicando modo discriminis inter essentiam &* (footnote continued)

Yet this matter is of some interest to us, because a strong insistence on the "filioque" doctrine would in this context analogically suggest a certain subjection and subordination of the will to the intellect. An insistence on the 'monarchy' of the Father from whom alone the Son and Spirit proceed within the trinity, would analogically imply that intellect and will are not related in, respectively, superior and subordinate ranks, but stand side by side, connected only by the tertium comparitionis of the mind in which both find their origin.

The use of the words "*rursus et*" in the verses quoted above would seem to be too scanty evidence even of a reference to the "filioque" clause at all. The verses in which the trinity is mentioned and which precede the analogical sketch of the human soul's composition, contain no reference whatever to the procession of the Holy Spirit. Moreover, the literary form of the paraphrase - heroic verse - makes the requirements of metre a prime consideration. Good use can always be made of the dactyl "*rursus et*"; and because the fifth and sixth foot must be a dactyl and spondee, the place of "*mente voluntas*" within the sentence is determined by the necessities of metre, not by semantic considerations.

If we consult the other works by Grotius in which reference is made to the trinitarian dogma - with the exception of the Meletius (1611) all of much later date than the paraphrase of the Gospel of John - there appears to be no strict insistence on the 'filioque' clause, although its correctness is not disputed by him either. When he refers to those who say that Son and Spirit are persons who proceed from the Father, he says: "I am quite dull witted in these matters and I must admit that I do not see what is wrong in this.... Nor does he who says this deny that the Spirit is given to us through Christ."<sup>72</sup> Grotius' approach is typically irenic: "The Greeks do not sin when they say in accordance with Scripture, the universal councils and many Fathers of the Church that the Holy Spirit proceeds from the Father; and the Greeks must not

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(footnote continued)

hypostasin non putarunt anxie laborandum" (Op. Th. III, 231 b 1-26). For the distinction of fundamental from non-fundamental issues by Grotius, see G.H.M. Posthumus Meyjes, 'Grotius as an Irenicist', p. 49; for the political context of the filioque-controversy, see T. Ware, The Orthodox Church, 1975, pp. 61-65.

<sup>72</sup> In the Animadversiones Andreae Riveti (1642), Grotius defends the formulation of the confession of faith (1455-6) of Gennadius, the Patriarch of Constantinople, installed by sultan Mohammed II after the fall of Constantinople. This confession speaks of the persons of the Son and Spirit as energias and hypostases which "originate from the nature of God as light and heat from fire". Grotius comments: "In quibus si quid est mali, id ego, qui obtusior sum in istis rebus, me fatior non videre: .. nec id qui dicit negat eum Spiritum a Christo dari" (Op. Th., III, p. 639 b 24 ff.). This last statement seems to skirt the theological problem. Orthodoxy does indeed acknowledge that Christ sent the Spirit to mankind, because Christ himself said so (John XV, 26). The real problem is whether the Spirit proceeds from Christ from eternity: the problem is not the temporal emission, but the eternal procession (see also Ware, op.cit., p. 220). Orthodoxy wishes to avoid ditheism and also the merging of Father and Son. As we saw patripassianism is rejected by Grotius; but he equally rejects ditheism as will be shown presently. See also Grotius' annotation to John. XV, 26, Op. Th. II, vol. I, p. 553 a 3 ff..

condemn what the Latins add, 'from the Son', or 'through the Son' for this admits of a correct meaning, which also the Greeks assent to, who do not intend anything else than that the Father be acknowledged as the source of the entire Divinity."<sup>73</sup> Not less typical is it when Grotius says that "the extreme subtlety of the inquiry in these matters is not without danger, particularly among the common people"; and he adduces Gregory Nazianzen, Augustine and Chrysostomus in order to express the point that human reason can never fully explain the mystery of the generation and procession of Son and Spirit<sup>74</sup>.

So far we must conclude that the trinitarian dogma does not provide an example from which straitforward analogies can be derived concerning the order of intellect and will in the soul of man. The safest general conclusion we can draw so far and which we could base on the paraphrase of the Gospel of John is that the intellect and will are juxtaposed in man like the Son and the Spirit in the Godhead.

There is, however, one further element which the analogy of the paraphrase contains. For the analogy sketched is not only between Father, Son and Spirit on the one hand, and mind, intellect and will on the other, but is carried further to *causa, verum, bonumque*. This further analogy leads to a threefold parallelism of triads which can be represented in the following diagram:

Father	Son	Spirit
mind	intellect	will
cause	truth	good

The parallels which concern us are in particular between Son, intellect and truth, and Spirit, will and good respectively. Considering these two sets of parallels, we notice they suggest that there are two different spheres to which they relate: one of the truth which can be

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<sup>73</sup> Rivetani apologetici discussio (1645): "Unum est dogma, in quo videtur esse dissensus, de processione Spiritus Sancti. Sed si Arcudium & alios audimus, pax & hic repertu non difficilis; nam nec Graeci peccant, qui cum Scripturis & Conciliis Universalibus, Patribusque multis, Spiritum sanctum ex Patre aiunt procedere: neque damnare debent Graeci id quod Latini addunt, ex Filio, aut per filium, cum id sensum recipiat commodum, & talem quem Graeci ipsi agnoscunt, qui in hac controversia non alio tendunt, quam ut Pater agnoscat fons totius Deitatis" (Op. Th. III, p. 680 a 45 - b 7).

<sup>74</sup> Ibid.: "Certe si eas, quas personas plerique dicunt, licuit Calvino proprietates dicere, cur Gennadio non licuit Verbum & Spiritum dicere efficacias; praesertim post Athanasium & Cyrillum Alexandrinum; qui eadem voce in re eadem utuntur?... Patres Graecos Latinoque si sequimur, personae non sunt proprietates, sed ipsa Dei natura, sumta cum distinctivis proprietatibus. Nimis subtilis in ista inquisitio, apud plebem praesertim, periculo non caret. Sapienter Gregorius Nazianzenus, in oratione trigesima septima: 'Quae est igitur haec processio? inquires. Dic tu, quid sit ingenitum in Patre; & ego Filii generationem & Spiritus generationem explicare aggrediar; ut insaniamus ambo, in Dei mysteria oculos injicientes: idque qui tandem? nempe il, qui nec ea, quae ante pedes sunt, scire possumus.' idem alibi, Divinam generationem silentio colendam ait." Grotius further adduces Augustine, Epistula CII and Chrysostomus to support this stance (Op. Th. III, 686 a 30 - b 8).

grasped intellectually and the other of the good to which the will can attain - the former being the sphere of speculation, the other of action within time.

That we can interpret the distinction of the triad in this sense is confirmed by another poem, the *Eucharistia* (II)<sup>75</sup>, where he speaks of the Trinity and says:

"Unumque tria sunt: nam quod es, scis, vis, idem est"<sup>76</sup>

This verse results in another triad. The diagram can then be slightly extended to include this one also.

Father	Son	Spirit
mind	intellect	will
cause	truth	good
being	knowledge	action <sup>77</sup>

Just as the distinction of *scire* and *vis* is unified in the the Godhead, so the intellect of man and his action are not unrelated. This is also expressed, in the *Eucharistia*:

Si prima virtus mentis est sapientia,  
Eademque nobis ultima est felicitas,  
Et sapere cuncta est scire:.....  
Praestare sola quod potest sapientia  
Divina, per quam cuncta & in quâ cuncta sunt.  
Beatitatem donat hanc nobis amor:

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<sup>75</sup> There are two Eucharistic poems, both published in the *Poemata collecta* (1617), TMD 1. The first (*Eucharistia* I) opens with the words "Mystica secreta ritus", and the second (*Eucharistia* II) - which has a more decisively meditative character - with "Procul profani" (see TMD 210-212). The *Eucharistia* II is also included in the later editions of the *Via ad pacem ecclesiasticam*, and is hence printed in the Op. Th. III, pp. 632-3.

<sup>76</sup> Op. Th. III, p. 633 b 22 ff., vss. 190-95: "Aeterna tua mens hoc quod est intelligens/ Sapientiam progenuit aequalem sibi,/ Se mensa quanta est compari sub imagine./ At hinc videntem colligans visumque amor/ Processit, in se vim reperiens suam,/ Unumque tria sunt: nam quod es, scis vis, idem est."

<sup>77</sup> The correctness of the diagrams is now confirmed by the *Meletius*, which has very recently come to light, paragraphs 22-23: "In hac igitur una et simplici natura [Dei] primum id ipsum quod est esse intelligitur; secundo ratio divina; tertio virtus, quae duo et Aristoteles in Deo notasse videtur, appellans noun kai energeian. [...] Ratio illa logos et sophia vocatur quidem et a Platoniceis, sed et res ipsa et nomina a Christianis clarius explicantur. Rursum ipsa Dei virtus apud Christianos et hoc nomine vocatur et Spiritus, quae vox non modo to asomaton, sed vero et to energetikon designat. [...] Videt enim congruere hoc omne divinae maiestati, nec terrere eam ab assensu debet, quod modum quo ista tria sint unumque non capiat, cum et in animo nostro, qui tanto est inferior, et ipsam animi naturam et intellectum et voluntatem agnoscamus, et tamen animum unum quam maxime fateamur impartibilem. [...] ... intellectus sit perfectio scire quam plurima, voluntatis autem virtus optima velle atque operari ..."

Quo noster intellectus, is qui non capit  
Formas quidem omnis, capere sed tantum potest,  
Patique natus agere nil per se valet,  
Fit purus intellectus, inque actum venit,  
Ut cuncta agenti junctus intellectui.  
Sic finis absque fine mentem perficit."

[If wisdom is the first virtue of the mind, then the same is to us the highest felicity. To understand all things is to know; and this only divine wisdom can accomplish, through which and in which all things are. Love grants us this beatitude, that through it our intellect - although it cannot grasp all the essences, yet can but grasp, and fit to experience is unable to act by itself - become pure intellect, and enters into action, so that all acting be joined to the intellect. Thus the end perfects the mind through the end.]<sup>78</sup>

Such a relation of the intellect to action ties in with what Grotius says in *De imperio*:

"Judgment preceeds proximately the act of exerting authority, for exerting authority belongs to the will. And every volitional act in order to be right, must have a twofold congruence: the one of the will with the intellect, the other of the intellect with the things itself."<sup>79</sup>

Right action in reality has, therefore, a foundation in the mind through the intellect. This, however, does not mean that the will is always necessarily and in all respects under the sway of the intellect, as if all reality were an intellectual reality. To conclude along such extremely intellectualist lines would contradict the kind of juxtaposition of intellect and will which (analogously to the relation between the Son and the Spirit) Grotius described in the paraphrase of the Gospel of John. What Grotius says in *De imperio* should rather be understood in terms of the different natures of intellect and will which go with the different spheres to which they pertain, i.e. of knowledge and action respectively. Also, whenever the goal of the will is action in society, the working of the will is not to remain within the soul itself but should become external. Social action is thus not a purely mental affair, yet has a foundation through the intellect in the mind. It is hence that Grotius insists several times in *De iure belli* that "juridical effect cannot follow from a *mental* act alone (*solum animi actum*), unless that act has been indicated by certain outward signs. For to attribute legal effect to mere acts of

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<sup>78</sup> Ibid., a 60 - b 11. Similarly the last three verses of the *Euch.* 11: "Deus unus, unus in tribus, fac nos ita/ Amare, & intelligere, & esse, unum et simul/ Fiamus alter alteri, atque unum tibi" (b 58 - 61).

<sup>79</sup> *De Imperio*, V,i,1, Op. Th. III, 222 a 13 -18: "Proxime autem ipsum Imperii actum praecedat iudicium. Est enim imperare voluntatis. Omnis autem actio voluntaria ut recta sit, duplicem habere debet congruentiam; alteram voluntatis cum intellectu, alteram intellectus cum re ipsa."



the mind would not be congruous with human nature."<sup>80</sup> When speaking on the alienation of rights he says: "In the case of the giver a mental act of will is not sufficient, but together with it words or other external signs are required; for an internal act is not congruous with the nature of human society[.] But the act of will expressed by a sign, must be understood to be the act of a rational will."<sup>81</sup> Another reason why we should not attribute extreme intellectualism to Grotius is that the subservient rôle which the will is assigned in extreme intellectualism would run counter to the very importance Grotius attaches to the free will - on which subject he held an entrenched position from the moment of the outbreak of the predestinarian controversy. In this context it comes as no surprise to see that in his commentary on the epistle of James II, 14 ("What shall it profit, my brethren, if somebody say he hath faith, but hath not works") in *De fide et operibus*, Grotius makes clear that the will can dominate the human faculties and (to some extent) even the intellect<sup>82</sup>. Grotius does so when explaining in what way James can concede that it is at all possible to have faith without works. But, says Grotius, 'faith' does then not mean "metonymically or synecdochically the totality of Christian piety (as in Romans X, 10)", but should be taken in the sense by which "it indicates the mere assent given to the truth revealed by God.. which assent can be without profession, and hence without the pious works from which it is here distinguished..":

"And this is no wonder, for what the Spartans said of the Athenians often happens, *that they knew what was right but did not want to do it*. Thus Medea at Ovid

'I see and praise what is better,  
But I follow what is worse.'

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<sup>80</sup> *De iure belli* II, IV, iii: "Iuris effectus qui ab animo pendent, non possunt tamen ad solum animi actum consequi, nisi is actus signis quibusdam indicatus sit. quia nudis animi actibus efficientiam iuris tribuere non fuerat congruum naturae humanae."

<sup>81</sup> *Idem* II, VI, i, 1: "In dante, non sufficere actum internum voluntatis, sed simul requiri, aut verba, aut alia signa externa: quia actus internus, ut alibi diximus, non est congruens naturae societatis humanae. [...paragraph 2:] Actus autem voluntatis quae signo exprimitur, intelligi debet voluntatis rationalis." See also II, XX, xviii.

<sup>82</sup> Cf. Aquinas, *Summa Th.*, I-IIae, q. 17, art. 1: "Command is an act of reason [Imperare est rationis], presupposing, however, an act of the will. In proof of this, we must take note that, since the acts of the reason and of the will can be brought to bear on one another, insofar as the reason reasons about willing and the will wills to reason, the result is that the act of reason precedes the act of will and conversely. [...] Now the first mover among the powers of the soul to the doing of an act is the will [...]. Since, therefore, the second mover does not move save in virtue of the first mover, it follows that the very fact that the reason moves by commanding, is due to the power of the will." *Id.*, q. 13, art. 1: "... Choice is substantially not an act of the reason but of the will: for choice is accomplished in a certain movement of the soul towards the good which is chosen." *Id.*, q. 12, art. 1: "... It is evident that intention, properly speaking, is an act of the will."

The same in the Greek tragedy:

'Nor do I feign ignorance of my blood-thirstiness,  
But ire conquers the sanity of heart.'

This comes about because the will reigns over the subservient faculties - in part even over the intellect itself by willing the intellect to consider this or that, and by willing the intellect to direct itself to something; it acts by rule of domination and makes them [the subservient faculties] entirely obedient to itself. But the intellect works on the will like the orators in a free republic through persuasion and does not always obtain the requested obedience because of the liberty which is agnate and proper to the will. Hence the clearer the knowledge, the severer the punishment if the will be not obedient."<sup>83</sup>

So the intellect and the will are juxtaposed in the sense that each has its own essence and its own rôle to play in action; yet precisely in action there is an interplay between the two and in virtuous action there is, moreover, an order (which is not spontaneous) proper to them, the will obeying the intellect, once the intellect has been set and directed by the will to grasp a particular good.

#### - De iure belli ac pacis I,I

The juxtaposition of will and intellect is reflected in the division Grotius makes between natural and volitional law in *De iure belli ac pacis* I, I. Now, I should like to point out that the order between intellect and will

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<sup>83</sup> De fide et operibus, Op. Th. III, 521 a 8 - 42: "Concedit Iacobus hoc ab aliquibus vere dici, fidem se habere, etiamsi opera non accedant, non eo sensu quo fides totam pietatem Christianam, metonymikoos aut synekdogikoos, per transnominationem aut complexionem, significat, ut Roman. X, 10. Sed illo quo assensus veritati a Deo revelatae praebitum indicat & a poenitentia distinguitur, Marci I, 15. item a dilectione I Cor. XIII, 2. Galat. V, 6. Ephes. VI, 23. I Timoth. I, 14. II Timoth. I, 13. & II, 22 & puritate Actor. XV, 9. & bona conscientia I Timoth. I, 19. qualem assensus esse posse sine professione, ac proinde & sine piis operibus, a quibus hic distinguitur, ut & Tit. III, 8. docemur, Iohan. XII, 42. neque id mirum, cum saepe locum habeat illud quod de Atheniensibus dicebant Spartani, scire eos quid rectum esset sed facere nolle. Sic Medea apud Ovidium,

[...]Video meliora proboque,

Deteriora sequor.

Eadem in Graeca tragoedia,

Nec me latet nunc quam cruenta cogitem,

Sed vincit ira sanitatem pectoris.

Id eo evenit, quod voluntas in facultates ministra, imo & in ipsum intellectum ex parte aliqua, nempe ut hoc vel illud consideret, atque in id se intendat, agit dominatus jure & obtemperari sibi omnino facit. At intellectus, ut in libera republica Oratores, persuasionibus agit in voluntatem, neque semper impetrat obsequium, ob eam libertatem quae agnata ac propria est voluntati. Hinc fit, ut quo cognitio est lucidior, eo, si voluntas non obsequatur, poena sit gravior, Lucae XII, 47,48. Roman. II, 21."

sketched above in general terms, is not reversed by the mere introduction of the concept of a *volitional* law, notwithstanding the fact that Grotius describes the latter as the law '*quod ex voluntate originem ducit*'<sup>84</sup>. For in the *ius voluntarium* the intellect does not cease to operate, but rather it grasps a good not as a good necessarily, but as a good amongst other alternatives which depending on circumstances may also be goods. Hence the particular good grasped by the intellect and made law voluntarily might also be otherwise. It is precisely with respect to necessity and changeability that Grotius distinguishes volitional law from natural law. The latter is concerned with acts which on the basis of a "*dictate of right reason*" have a "*moral necessity or turpitude*" (I,I, x,1) - acts which, therefore, are owed or illicit *per se ac suapte natura* (I,I,X,2). Because the intellect grasps the goods of natural law as goods which are necessarily goods, natural law is unchangeable. Grotius expresses this very forcefully:

"Natural law is so immutable, that even God cannot change it. Immense as is the power of God, yet it can be said that there are some things over which it does not extend; for the things of which this is said are spoken only, having no sense in reality and being self-contradictory."<sup>83</sup>

The distinction between natural law and volitional law, is that the latter

"does not describe or forbid what is owed or illicit *per se ac suapte natura*, but in forbidding and in prescribing makes something illicit or owed"<sup>84</sup>.

And he repeats this when speaking of divine volitional law:

"In this law takes place what Anaxarchus too indistinctly said, that God does not will something because it is just, but something is just - that is to say obligatory - because God has willed it."<sup>85</sup>

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<sup>84</sup> De iure belli I,I, xiii.

<sup>83</sup> De iure belli I,I,x,5: "Est autem ius naturale adeo immutabile, ut ne a Deo quidem mutari queat. Quanquam enim immensa est Dei potentia, dici tamen quaedam possunt ad quae se illa non extendit, quia quae ita dicuntur, dicuntur tantum, sensum autem qui rem exprimat nullum habent; sed sibi ipsis repugnant."

<sup>84</sup> Id. I,I,x,2: "Qua nota distat hoc ius non ab humano tantum iure, sed et a divino voluntario, quod non ea praecipit aut vetat quae per se ac suapte natura aut debita sunt aut illicita, sed vetando illicita, praecipiendo debita facit."

<sup>85</sup> Id., I,I,xv, 1: "In hoc iure locum habere potest, quod nimium indistincte dicebat Anaxarchus, non ideo id Deum velle quia iustum est, sed iustum esse, id est iure debitum, quia Deus voluit." Cf. Defensio fidei, Op. Th. III, p. 315 b 31 ff.: "...humanae voluntatis causas hominibus indagare ob communitatem naturae non sit adeo difficile: Divinae autem voluntatis causae ipsa sui sublimitate saepe nos lateant. [...] Addi poterat, saepe voluntatem Dei ipsam sibi pro causa sufficere. Nam his exemptis quae certam & ad unum determinatam rectitudinem in se continent, quae Deus vult quia iusta sunt, hoc est, quia naturae suae congruunt; in caeteris omnibus quae vult, iusta efficit volendo."

If such is the state of affairs as to the essence of natural law in its strict sense, then it is entirely consistent to say what Grotius said in the prolegomena paragraph 11, i.e., that natural law is what it is "even if we would concede - which cannot be conceded without the utmost wickedness - that there be no God, or that human affairs are of no concern to him."

- some conclusions

Having thus placed the 'etiamsi' hypothesis in its proper context, i.e. of the distinction between natural and volitional law as further developed in the first chapter of *De iure belli*, and having described Grotius' general position on the relative rôles of will and intellect, we can already draw some conclusions.

Firstly it must be said that the 'etiamsi'-hypothesis is not exclusively - and not even primarily - to be seen as a battlecry in the controversy whether natural law should be understood in a voluntarist or in an intellectualist sense but takes a place in the discussion whether there is a natural law at all. The question whether there is a natural law at all cannot by itself prejudice the question whether it is intellectualist or voluntarist in nature once we assume that there is such a thing as natural law. Strictly speaking the hypothesis that there would be natural law even if God did not exist or did not care about the world, does not necessarily prejudice the last question either. For even if the veracity of the hypothesis were granted, the question is still unanswered whether the natural law of Godless people consists in the grasping of something through the intellect as a good to be pursued or primarily in an appetite (or 'appetition') of the will.

Nevertheless, and this is a second conclusion, Grotius does not stop short at arguing that there is natural law, but goes on to say that there is also volitional law. And it is from this distinction between natural and volitional law that the suggestion arises that if the latter is primarily dependent on the will (as Grotius does in fact say) the other (natural law) is therefore intellectualist. But this is not what Grotius actually says in any of his works. The characteristic which he does emphasize is the necessity and (consequently) the immutability of natural law.

It can, indeed be concluded that the concept of natural law which Grotius develops hinges on the *perseitas boni et iusti* (Chroust). But this does not mean that Grotius goes "beyond moderate intellectualism" - as St.Leger subsequently claimed.

Nor does, thirdly, the foundation of natural law on rational nature imply extreme intellectualism, because according to Grotius' express words the very act of the intellect presupposes an act of the will.

## God's will and the existence in man of natural principles

Having reached these conclusions, we must return to the original question the context of prolegomena paragraph 11 gave rise to. The context suggested that natural law as it is in man involves man's intellect (albeit, we can now say, not exclusively), but as concerns its origin in God it suggests that it flows from His will, "for he has willed such [natural] principles to exist in us"(par. 12).

Why would Grotius insist on attributing the existence in man of natural principles to *God's will*?

Perhaps one can approach this question by taking into consideration the rhetorical character of the prolegomena to *De iure belli*, which are much less generally dogmatic in character than, and have therefore a different preambulatory status from e.g. the prolegomena (i.e. chapter II) of *De iure praedae* or from the first chapter of *De iure belli*. If we attach, then, a greater rhetorical than dogmatic importance to the words chosen by Grotius, we might consider the reference to God's will to be merely rhetorical compensation for the relative independence and autonomy of natural law suggested by the 'etiamsi' hypothesis. To say that it is indeed God's will that natural principles be in man, just after saying that they would be what they are "*etiamsi daremus non esse Deum*", is an emphatic denial of the veracity of the hypothesis, i.e. a denial of His non-existence or non-providence.

This approach, however, can provide no more than a partial explanation. If Grotius wished only to deny the veracity of the hypothesis, it could have sufficed him to say that God does exist and is provident; had he wanted to express himself by using a hyperbole, he could easily have chosen a different one.

I suggest that Grotius' ascribing natural law to God's *will* and not merely to God, ties in with the specific normative character which natural law has for Grotius. Natural law as defined in *De iure belli* indicates the rectitude of something, but is not merely indicative. It is a *ius indicans, ac consequenter vetans aut praecipiens*<sup>86</sup>, and is moreover a *ius* in the sense of a *lex obligans ad id quod rectum est*<sup>87</sup>. It is this imperative nature of natural law in the sense of *lex* which is expressed by reference to the will of its legislator. This can also be inferred from

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<sup>86</sup> *De iure belli* I, I, x, 1; I, II, i, 2: "Sequitur in examinando iure naturae primum videndum quid illis naturae initiis congruat, deinde veniendum ad illud, quod quanquam post oritur, dignius tamen est; neque sumendum tantum, si detur, sed omni modo expetendum."

<sup>87</sup> *Id.* I, I, ix, 1; in a letter which we will adduce presently, Grotius goes so far as to say "facile pios omnes Molinaeo concessuros arbitror, non agere Deum meris suasionibus, neque tantum in mentem operari, sed et in voluntatem, inspirando scilicet affectus salutaris, non autem immutando concreatam voluntati proprietatem." This is not said specifically about natural law but generally when treating of the saying (not rejected by Grotius) 'penes hominem esse sequi Deum vocantem aut non sequi', *Briefw.* I, p. 437.

**De imperio** where Grotius gives a brief description of the kinds of judgment preceding action.

"Judgment precedes our own actions, or through our own actions it refers at those of others. Or actions refer to others in either of two ways, either *per modum intellectus* or *per modum voluntatis*. Hence the judgment concerning others' actions is either a directive judgment [*iudicium Directivum*] or an imperative judgment [*iudicium Imperativum*]; and the imperative judgment Aristotle has distinguished into legislative or judicatory, the former concerning things in general, the latter concerning definite and single things."<sup>88</sup>

A legislative act is therefore an imperative judgment concerning others' actions, contained in an act of the will. Again, the rôle of the will in an act of legislation does not exclude the importance of the intellect, for as we saw, Grotius stated that in order for a judgment to be right, the will needs to conform to the intellect and the intellect to the thing itself<sup>89</sup>.

What is true of the legislative acts of worldly sovereigns (that is what this passage of **De imperio** is aimed at) is also true of natural law, as is clear from what Grotius says in **De iure belli**: natural law is an imperative judgment concerning man's actions contained in an act of God's will.

And just as the rôle of the will with regard to natural law is analogous to that of human laws, so also will the rôle of the intellect in God's natural legislation be analogous to that in human legislation; that is to say, God's will in making natural law conforms to His intellect. The difference in the relation between will and intellect in God as compared to that in man is that man's will does not always obey the intellect whereas God's will necessarily conforms to His intellect. The human free will is the source of evil because it will not always want to act according to what the intellect persuades man of; just as the orators in the free republic will not always be able to convince their oratorium. But whatever God wills must needs be right, i.e. conforming to what is pointed out by His intellect.

The things we said concerning God's intellect and natural law follow as such from the analogy between God's and man's being with regard to law, but they are not merely a matter of conceptualization. At several places in Grotius' works it is evident that Grotius stood for these views, which clearly imply a rejection of a voluntarist concept of natural law.

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<sup>88</sup> **De imperio** V,i,2, Op. Th. III 222 a 30-42: "Circa agenda iudicium ita universaliter sumptum duplex est: aut enim propriis actionibus praeit, aut per actiones proprias referatur ad alienas: idque rursus dupliciter; nam actiones nostrae ad alienas referuntur, aut per modum intellectus, aut per modum voluntatis. Nec fit ut iudicium ad actiones alienas tendens, sit aut Directivum, sive per declarationem, sive persuasionem, aut Imperativum: Imperativum iudicium distinxit Aristoteles in legislationem & sententiae dictionem, quorum illud esse ait de universalibus, hoc vero de definitis & singularibus."

<sup>89</sup> **De imperio**, V,i,1; *supra* note 79 at page 121.

This we can see when Grotius was criticized by Salmasius for the use of the word 'voluntarium' to designate divine law that was not natural. Salmasius thought the word 'voluntarium' in this context implied that God was not free when promulgating natural law. Grotius answer to this criticism was based on the premiss that indeed "God was free not to create man". So according to Grotius, God could have created only brutes and then there would not have been a natural law in the sense in which Grotius wishes to understand that term. This freedom of God as concerns his absolute power, however, is reconciled with the necessity and immutability of natural law, by distinguishing God's *potentia absoluta* from his *potentia ordinata* - or as Grotius would rather have it, by distinguishing God's power (*potentia*) from the manner in which it is exercised (*modus agendi*)<sup>90</sup>. Much as this distinction might seem to neo-Thomists to smack of Ockhamism, the very wording in which Grotius couches the distinction dispels any suspicions of nominalism:

"God was free not to create man. But man having been created, that is, a nature using reason and being eminently sociable, he necessarily approves actions in harmony with such a nature and disapproves of the opposite."<sup>91</sup>

Unlike what seems to be the case with Ockham, this distinction does not allow for the interpretation that God could at any time order what he has actually forbidden<sup>92</sup>; the necessity of natural law exists because of the *essential* nature of man. Were God to create a being in which the principles of what we now consider natural law were absent, then the principles which are inherent in that creature would not be natural law (and the creature would not be a man<sup>93</sup>). So we can say of Grotius,

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<sup>90</sup> De imperio VI, 13: "Notandus hic obiter eorum error, qui duplicem faciunt potestatem, absolutam & ordinariam: confundunt enim potestatem & agendi modum. Sicut autem in Deo una eademque potentia est, sive agat secundum ordinem a se constitutum, sive extra eundem ordinem: ita potestas quoque sive jus Summi Imperantis idem est, sive agat secundum ordinem a se positum, sive aliter" (Op. Th. 233 a 19-26).

<sup>91</sup> Briefw. IX, no. 3586, 21 May 1638: "Deo liberum erat hominem non condere. Conditio homine, id est natura ratione utente et ad societatem eximiam conformata necessario probat actiones tali naturae consentaneas, contrarias improbat."

<sup>92</sup> F. Copleston, vol. 3, part I, ch. 7, par. 6, p. 117.

<sup>93</sup> When in the Inleidinge treating of the essential (substantiale) as distinguished from the accidental (accidentale) traits of the human being which are relevant for the iur personarum ("de rechtelijke gestaltenisse der menschen") Grotius distinguishes between unborn and born persons and remarks that "one considers as born human beings only those who have a body capable of containing a rational soul. Other deformed offspring are not held to be human beings; in these countries one is much rather wont to suffocate them at birth" [I, 3, 5: "Voor gheboren menschen houden alleen zodanighen, die 't lichaem hebben bequaem om een redelike ziel te vatten. Andere wanschapene gheboorten (Latine: monstra) houd men voor geen menschen, maer veel eer is men in deze landen ghewoon de selve terstond te smooren"]. From the absence of further comment, we may assume that the latter practice (footnote continued)

unlike what is said of Ockham<sup>94</sup>, that he does not abandon a universal idea of man according to which man is created. The necessity by which God can but approve what is in harmony with a created essence (as distinguished - in the quotation above - from the freedom of God to create or not to create) implies a different answer from that given by the Ockhamists to the question *de odio dei*. Ockham cum suis answered the question whether it is in God's power to will man to hate him affirmatively. The importance of this matter in the present context is, that it raises in acute form the issue whether some evil can be willed by God which contravenes the order of natural law. Thus the question became the litmus test of voluntarism. In *De iure belli ac pacis* Grotius writes:

"In the same manner as God could not make two times two not be four, he could not make something which is intrinsically evil into something which is not evil. This is what Aristotle means when he says: 'Indeed the very names of some things directly imply evil [e.g. adultery, theft, murder (N.E. 1107 a 10-11)]'. For just as the being of things from the moment they exist and in the manner they exist, is not dependent on something else, so also with the properties which necessarily attend this being. And such is the wickedness of some acts when considered according to the standard of nature by somebody with sound reason. Thus God suffers himself to be judged by this norm, as may be seen in Gen. XVIII, 25; Isa. 3; Ezek. XVIII, 25; Jer. II, 9; Mic VI, 2; Rom II, 6 and III, 6."<sup>95</sup>

This passage may seem to limit itself to the existent order, for it considers "the being of things from the moment they exist and in the manner they exist". But the negative answer to the question whether God can ordain what is by natural law an evil, reaches further than the existent order only, as is already intimated in a letter of Grotius to Andreas Walaeus of 29 June 1615.

In this letter Grotius answers the hesitations Walaeus expressed as to the use Grotius made of natural reason in his *Defensio fidei catholicae*

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(footnote continued)

was not considered to be against natural law by Grotius. It may be added that in the dedication to *Mare liberum* Grotius says on the innate natural principles: "Haec [...] homo nullus nescire potest nisi homo esse desierit..." (Ed. Carnegie Endowment 1908, p. 20).

<sup>94</sup> Copleston, *idem*, p. 116.

<sup>95</sup> *De iure belli* I, I, x, 5: "Sicut ergo ut bis duo non sint quatuor ne a Deo quidem potest effici, ita ne hoc quidem, ut quod intrinseca ratione malum est malum non sit. Et hoc est quod significat Aristoteles, cum dicit: 'enia eithys onomastai syneilemmena meta tes phailotetos'. nam ut esse rerum postquam sunt et qua sunt aliunde non pendet, ita et proprietates quae esse illud necessario consequuntur. Talis autem est malitia quorundam actuum comparatorum ad naturam sana ratione utentem. Itaque et Deus ipse secundum hanc normam de se iudicari patitur, ut videre est Gen. XVIII, 25. Esai. V, 3. Ezech. XVIII, 25, Ierem. II, 9. Mich. VI, 2. Rom II, 6. III, 6." The last sentence is absent in the edition of 1625 and present in all later editions.



de satisfactione Christi adversus Faustum Socinum Senensem<sup>96</sup>. Socinus denied that Christ's death was a satisfaction for our sins consisting in a *peccatorum translatio*, because such would conflict with reason; against this Grotius maintained that Christ's oblation is an expiation of the sin of mankind which does not oppose natural reason<sup>97</sup>. Walaëus agrees in general with Grotius' vindication of the natural arguments against Socinus but he adds:

"And yet there will perhaps be some, who will judge it better advised to reject all this, because Christian faith must not rest on nature but on Scripture: which is undoubtedly true, but it should be acknowledged that faith is greatly assisted when reason concurs with Scripture, or at least can be demonstrated not to undermine it. Yet there is one question which is in great need of further reflection, to wit, whether there is not some divine justice [...] which is not to be referred to anything else but to God himself, insofar as the divine nature and wisdom would very much impede the granting of forgiveness to sinners without some intervening satisfaction."<sup>98</sup>

Grotius answers in a letter of 29 June 1615:

"I am most certain that they argue in vain who go about proving the Mysteries of Faith with natural arguments. But I am with you of the opinion that by faith reason is perfected, not destroyed; surpassed, not undermined. [...] There are some who deem themselves to have settled the matter excellently when they have said that to God no law is set, and they therefore repeat time and again that to him things are just that by natural notions are unjust. But this way of arguing I dislike, because methinks they undermine all the more both the human and the divine nature: the

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<sup>96</sup> This book appeared in 1617, see TMD 922; Walaëus commented on a manuscript version.

<sup>97</sup> Gerardus Vossius in the preface to the *Defensio fidei*: "Nimirum, certissimum ei [i.e. Grotio] erat, quam Socinus oppugnat sententiam, clarissimis Scripturarum verbis contineri: neque minus certum, Dei dona, verum scilicet juris naturalis lumen, & augustius lumen Fidei minime inter se pugnare. Itaque existimavit, facturum se rem christiano Iuris-consulto non indignam, quae a jure petuntur arma, Catholicae fidei adversario extorqueret"; Op. Th. III, p. 295.

<sup>98</sup> *Briefw.* I, Walaëus to Grotius, June 1615, no. 411, p. 398: "Ut vero de re ipsa aliquid dicam, argumenta nostrorum a violentis torsionibus Socini egregie vindicas, et ea quae a natura et autoritate humana petuntur meo iudicio satis plene refutas: etsi fortassis erunt, qui totum hoc reiici consultius sunt iudicaturi, quia fides Christiana non natura sed Scriptura niti debet: quod licet verum sit et indubitatum, tamen negari non potest, quin fides non parum iuветur ubi ratio cum Scriptura conspirat, aut saltem eam non evertere demonstrari potest. Unum tamen est quod ampliore meditatione omnino opus habet, utrum sc. Deo, quem ut supremum rectorem in toto hoc negotio non male consideras, non sit congenita aliqua iustitia quae non refertur ad alium quam ad ipsum Deum, qua divina natura et sapientia omnino impeditur ad veniam dandam peccatori citra satisfactionem intercedentem."

human, in denying that these notions are imprints of the divine mind; and the divine, in not acknowledging in God the properties, for instance, of good, just and the like, by which he is described to us in scripture. Wherefore it must be powerfully asserted by all, that clearly in the things we believe there is nothing that disagrees with right reason."<sup>99</sup>

This shows that according to Grotius one cannot make the presumption of a possible act of God contrary to natural justice, because that would not only be against created human nature, but also against the divine nature. As a matter of fact, the natural principles are not merely existent but 'imprints of the divine mind' and have therefore an ontological meaning which transcends mere contingent being. Contravening the natural principles of the existent order would consequently involve a denial of the divine being. If this is granted, then saying that God cannot command an evil within the natural order (i.e. command something contrary to existent natural principles), is only an instance of the more general impossibility of God to command evil (i.e. also apart from the existent order)<sup>100</sup>.

Such an ontological approach is evident in a letter Grotius wrote later in the same year and which concerns some aspects of the predestination controversy raging at the time. In it, he asserts that God is not free not to be good. In arguing this he takes issue with Pierre Du Moulin,

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<sup>99</sup> Briefw. 1, to Walaëus, 29 June 1615, no. 412. The integral answer to the passage in the letter of Walaëus, is as follows (p. 400): "Rationis naturalis argumenta facile perspectu est, non in hoc a me adduci, ut nobis fidem faciant eius veritatis, quam Divina oracula et satis et sola persuadent; sed ut pateat, in ea interpretatione, quae scripturae verbis optime congruit et in Ecclesiis semper retenta est, nihil contineri absurdi aut iniqui, quod maxime contendit Socinus, ut hoc evicto liberius deinde sacrae scripturae verba a genuino nativoque sensu detorqueat. Certissimum mihi est, operam eos ludere qui Fidei Mysteria demonstratum eunt argumentis naturalibus. Sed tecum sentio, fide rationem perfici, non destrui; superari, non everti. Neque enim pugnant Dei dona, et si alia sint aliis praestantiora. Quare si Pontificos in Coenae controversia recte urgemus deductione ad absurda, non est nobis in defendenda veritate eadem conditio defugienda. Sunt quidam qui egregie se defunctos putant, cum dixerint, Deo legem non esse positam, ideoque in ipso iusta esse quae alioqui notitiae naturales iniusta esse dicunt. Sed haec agendi ratio mihi non placet, ut quae et humanam et divinam naturam mihi videatur haud paulo minus evertere: humanam quidem dum notitias illas negat esse divinae mentis ektipomata; divinam vero, dum Deum non agnoscit sub illis proprietatibus, puta boni, iusti, ac similibus, ex quibus eum nobis describit scriptura. Quare omni ope contendendum est, ut appareat, in his quae fide credimus nihil esse quod a recte ratione dissentiat." Cf. Remonstrantie, ed. Meijer 1949, p. 110: "T'geloof, twelck is boven de natuijr, neemt nijet wegh t' gunt dat is van de natuijre."

<sup>100</sup> In the published edition of the Defensio fidei Grotius was to write: "Sicut enim dicimus Deum non posse mentiri, Hebr. VI, 8, aut semet abnegare, II Tim. II, 13, ita non minus recte dicemus, Deum non posse actiones per se pravas facere, aut approbare, aut jus ad eas concedere", Op. Th. III, 310 b 46-51.

who had said that it is a point of greatest certainty that "many things are done necessarily which are done freely":

"I think not so. 'God', says he, 'is necessarily good'. This is true; 'yet freely'. But this I cannot acknowledge. For that is free which is indeterminate to either side. But God is determined by his nature, that is, by his very Deity to goodness, so that it involves a contradiction so say that he is God and that he can be not good. The Apostle says: 'God cannot lie' [Hebr. VI,18]; he is, therefore, not free not to lie. True, God is spontaneously [*spon- te*] veracious; but not all things that are done spontaneously are done freely [*libere*], as the Philosophers note correctly. But many are deceived in that they do not discern the difference between the quality or genus of actions and the single species thereof. God freely created man, freely redeemed him, and freely reveals his goodness in this way or that. But his is not to be freely good, but to demonstrate freely his goodness so or so."<sup>101</sup>

The essential goodness of God from which cannot be departed from leads Grotius to consider the command to Abraham to kill his son Isaac and the despoliation of the Egyptians (nb. events occurring before the Ten Commandments were given) as something not evil:

"If God commands somebody to be killed, or somebody's goods to be taken away, this shall not make homicide or theft licit, which words involve vice; but what the sovereign lord and maker of life and of all things does, shall not be homicide or theft."<sup>102</sup>

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The development of the above arguments can be well understood against the background of politico-theological controversy that played a decisive rôle in Grotius' life. For it was one of the major objections of the

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<sup>101</sup> Briefw. I, to G. van den Boetzelaer, December 1615, p. 433-4: "Ponit hoc tanquam certissimum 'multa fieri necessario quae fiant libere'; quod mihi secus videtur. 'Deus', inquit, 'est necessarius bonus'. Fateor. 'Et tamen libere'. Hoc vero non possum agnoscere. nam liberum est id quod indeterminatum est ad partem utramvis. Deum autem natura sua, hoc est, ipsa Deitas ad bonitatem determinat, ita ut contradictionem involvat dicere, Deum esse, et posse bonum non esse. 'Non potest Deus mentiri', inquit Apostolus; non est igitur liber in mentiendo. Verum quidem est, sponte esse Deum veracem; sed non omnia quae sponte fiunt, libere fiunt, ut recte notant Philosophi. Sed hoc multos fallit, quod qualitatem aut genus actionis a speciebus singulis non discernunt. Libere Deus creavit, liber redemit, atque ita libere hoc et illo modo bonitatem suam exseruit. Sed hoc non est libere bonum esse, sed libere sic aut sic bonitatem demonstrare."

<sup>102</sup> De iure belli I, I, x, 6: "Ita si quem Deus occidi praecipiat, si res alicuius auferri, non licitum fiet homicidium aut furtum, quae voces vitium involvunt; sed non erit homicidium aut furtum quod vitae et rerum supremo domino auctore fit." Cf. Meletius, par. 11: "Deus autem justus est et juste agit."

Remonstrants - whose ideas Grotius had come to share - against the strict predestinarian doctrine, that it made God the author of evil. Typically, when it concerns ideas Grotius developed against this background, we can find in Grotius' work some passage which expresses that this question too has for Grotius a general political significance. We find it in *De imperio*:

"So even the Philosophers teach that no evil deed is to be committed, because God is everywhere present: and because God knows all that shall come to pass, they show that nothing shall befall good men, but what shall turn to their benefit. Tiberius was the more negligent of his religious duties (according to Suetonius) being persuaded that all things were carried by Fate. And it was not in vain that Plato said 'if you would have the state go well, you must not suffer any one to teach that God is the cause of evil deeds', which to say is impious, and therefore to the commonwealth most pernicious."<sup>103</sup>

It would involve a contradiction to say that God is good and God can ordain evil, given God's essence which is necessarily good<sup>104</sup>; and on this basis Grotius is able to agree with Du Moulin that "the man is deservedly condemned who abuses the seeds naturally sown in him and

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<sup>103</sup> *De imperio*, Op. Th. III, p. 207 a 40 -52: "Sic ex eo quod Deus ubique praesens est, nihil turpe esse committendum etiam Philosophi docent: ex eo quod Deus futurorum omnium est praescius, ostendunt nihil bonis posse accidere quod non sit ipsis salutare. Tiberium Suetonius religionum negligentiorum fuisse ait, quippe persuasionis plenum cuncta fato agi. Neque frustra dixit Plato a Christianis quoque Patribus in hac parte laudatus, in Republica, quam recte se habere cupias, non esse ferendum ut quisquam doceat Deum malorum actionum causam esse, quum hoc ipsum non possit nisi impie dici, ac proinde Reipublicae sit damnosissimum." Similarly *De dogmatis quae reipublicae noxia sunt aut dicuntur*, Op. Th. III 754 a 10 ff.: "Haud dubie opera danda est, ne qua dogmata irrepant aut moribus aut Reipublicae noxia. Inter ea duo a quibusdam praecipue notari solent, dogma contra liberum arbitrium, & dogma contra bona opera. Liberum arbitrium si qui plane tollunt, evadere vix possunt quin Deum omnium scelerum causam faciant, quod in Republica minime esse tolerandum dixit Plato. nec temere suetonijs tiberium ideo ait religionem fuisse contemptorem, quod omnia fato agi crederet, assentiente ad Timaeum Proclo." Plato's opinion is motto of Grotius' Decretum illustrium a potentum ordinum Hollandiae et Westfrisiae pro pace ecclesiarum, munitum sacrae Scripturae auctoritate, & conciliorum, antiquorum Patrum, Confessionem publicarum, & recentiorum Doctorum testimoniis; in which the relevant authorities for the theological view are cited, Op. Th. III, 155 b 20 - 158 b 41.

<sup>104</sup> This is also clearly to be found in the *Meletius*, paragraph 8: "Deum autem nisi bonus est, Deus non est." *Id.*, paragraph 24: "Cum vero intellectus sit perfectio scire quam plurima, voluntatis autem virtus optima velle atque operari, sequitur Deum sapientia esse omniscium, virtute optimum, ac proinde quae mala sunt scire quidem, non tamen aut velle proprie aut facere, quod maximum pietatis fundamentum est. Abeant igitur poetae, soli olim theologiae magistri, quos Plato, Varro alique summo iure reprehenderunt, quod ea quae hominibus quoque foeda essent, de diis suis narrant, pugnas, adulteria aliaque facinora."

does not use them in what manner and how far he might have done" <sup>105</sup>. But it should be emphasized that Grotius still insists on the pure contingency of man's existence and its absolute dependence on God's free will. This is a position which is a direct consequence of Grotius' rejection of the doctrine of divine predestination, as Grotius further on in the letter on Du Moulin's opinions makes clear:

".. And methinks they labour in vain who study to reconcile things essentially [kat'ousian] differing such as are 'necessary' and 'free' (for liberty is the mother of contingency). That indeed seems to me most true, especially if we speak of the ordinary way of divine providence: 'In whatever manner God moves our wills, yet the will retains its liberty, and things retain their contingency', as Molinaeus excellently says. But he that says so must at the same time conclude that the will is not moved by God by way of predetermination. For that cannot be free which is limited and predetermined in a certain direction by any cause, and the more so when it is [limited and predetermined] by the first cause upon whose efficacy depend all inferior causes in their working. Nor can something be contingent, which can impossibly not be. But predetermination being granted, it is impossible for the predetermined effect not to be." <sup>106</sup>

So we must conclude that Grotius' position is that if man is created by God he must necessarily be created according to the idea of the essence of man as existing in God's mind. As this essential nature of man is created by God who is necessarily good, while man is an *imago Dei* and in man's nature there is an *analogia entis Dei*, God cannot fail to approve of actions agreeable to man's nature and forbid those which go against this nature.

But if we were to ask why God should create man at all, then the only answer which is possible is that God has willed freely to create man, just as he was free not to create man. And as God has willed from his free decision to create man, it is implied that he has willed natural

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<sup>105</sup> Briefw. I, p. 434: "Probo etiam illud, quod ait D. Molinaeus, 'damnari hominem merito, quod abutatur seminibus naturaliter insitis, neque iis utatur quomodo et quousque potuisset'".

<sup>106</sup> Ibidem: "Ac frustra mihi videntur laborare qui res kat'ousian dissidentes, qualia sunt necessarium et liberum - est enim libertas mater contingentiae - student conciliare respectibus. Illud mihi verissimum videtur, praesertim si de ordinario providentiae divinae modo agamus: 'quocunque modo Deus moveat voluntates, manere tamen voluntati suam libertatem, et rebus suam contingentiam', ut praeclare asserit D. Molinaeus. Sed id qui statuit, simul statuatur necesse est, non moveri a Deo voluntatem praedeterminando. Nam liberum esse non potest, quod ab ulla causarum, multoque magis a prima, a cuius efficacia pendent in agendo omnes causae inferiores, ad alteram partem praefinitur atque determinatur. Neque potest quid esse contingens, quod impossibile sit non esse. Posita autem praedeterminatione impossibile est, ut effectus praedeterminatus non existat."

principles to exist in us. This is precisely what is said in the prolegomena (paragraph 12).

It is obvious from what was said above that this conception of the will of God with regard to natural law is not a specifically Protestant doctrine, as is often claimed. It might still be argued, however, that Grotius developed and articulated his conception against the specific background of the controversy over the doctrine of predestination within Protestantism during the Twelve Years' Truce in the United Republic, and is in that sense closely wedded to protestantism. But saying this is not very convincing either, inasmuch as a similar controversy arose in Roman Catholic circles at the end of the 16th century, leading to somewhat similar positions and arguments, between on one side Jesuits (with Molina, Bellarmine and Suárez as protagonists) and Dominicans (led by Báñez) on the other. [Incidentally, this controversy was ended in a manner which must have charmed Grotius by the *Congregatio de auxiliis*, set up by order of Clement VIII. It decided in 1607 that both opinions were permitted, provided that the Jesuits would not call the Dominicans Calvinists, while the Dominicans were forbidden to call the Jesuits Pelagians<sup>107</sup>.]

Also it has been shown that it is illegitimate to infer a rejection of the *analogia entis* from Grotius' saying that the existence in man of natural principles is to be attributed to the will of God. Such an inference ignores the distinction between being and existence. It is precisely because these natural principles are an analogy of the being of God, *divinae mentis ektypomata*, that it cannot be said that Grotius' concept of natural law is a reversion to voluntarism or nominalism. It is in this vain, then, that Grotius must be understood when, speaking of man, he praised

*"ipsa creaturae istius nobilitas ac eminentia, ut quae sola ad imaginem Dei condita dicatur, hoc est, mente liberoque arbitrio praedita."*<sup>108</sup>

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<sup>107</sup> Cf. *Oratio ab Hugone Grotio [...] vernacula habita in Senatu Amstelredamensi nono Cal. Maji, M DC XVI*, Op. Th. III, 181 b 47 ff.. On the controversy generally Copleston, op. cit., vol. 3-II, 21, 4, pp. 160-163.

<sup>108</sup> *Defensio fidei*, Op. Th. III, p. 302 a 34.

### From voluntarism to intellectualism?

We have established that the 'etiamsi daremus'- hypothesis which Grotius coined in paragraph 11 of the prolegomena to *De iure belli ac pacis* should not be taken to express extreme intellectualism, nor should it be associated with voluntarism or nominalism. If we count the letter of 1615 as belonging to Grotius' more mature period, in which he began to express the ideas he was to adhere to during the rest of his life, then the conclusion just mentioned could be said to be primarily based on texts he wrote in this later period. However, some of the conclusions we drew were adumbrated in the earlier poetry we adduced. Now we can also add that the Meletius of 1611 supports our conclusions. So all in all it would seem highly conjectural to suppose that in *De iure praedae* Grotius adhered to quite different views on voluntarism than in *De iure belli*.

Nevertheless a number of authors have contrasted Grotius' anti-voluntarist position (which they sometimes sketch in more intellectualist terms than I have done) with the voluntarist position which he is said to have propounded in *De iure praedae*<sup>109</sup>. Although some of these authors seem to be inspired by a misconception concerning Grotius' religious affiliations<sup>110</sup> - which may serve as a *caveat* for accepting their interpretation of Grotius' thought - their view has now become so

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<sup>109</sup> Jules Basdevant, 'Hugo Grotius', Paris 1904, pp. 230-232; he somewhat modifies the voluntarism attributed to *De iure praedae* in 'La théorie générale de droit de Grotius', 1925, pp. 25-26; G. Fassò, *Storia*, 1968, vol. II, p. 97; G. Ambrosetti, *I presupposti*, 1955, pp. 93-105; the latter also adduces E. Wolf, Di Carlo and Ottenwälder; St. Leger, *op. cit.*, pp. 137-142, where the change from voluntarism to intellectualism is, highly speculatively, connected with an intervening lecture of G. Vázquez by Grotius; Berljak, *op. cit.*, pp. 78-81, mentions the alleged development and the rejection thereof by F. De Michelis, *Le origini storiche e culturali*, 1967, p. 96-97 (see text to note 104 infra), but refrains from giving an articulate judgment even if he seems to grant that there is such a development. Equally undecided is Haggemacher, *Grotius et la doctrine*, 1983, infra note 111.

<sup>110</sup> Ambrosetti, *op. cit.*, pp. 95-6: "Siamo qui di fronte a una chiara impronta di carattere calvinistico"; G. Fassò, *op. cit.* p. 97: "Nelle sue prime opere giuridiche appare .. una concezione del diritto chiaramente volontaristica, attinta con ogni evidenza al calvinismo ortodosso in seno al quale egli era cresciuto.."; Berljak, *op. cit.*, p. 84 (when speaking of Gregory of Rimini): "Il suo intervento è decisivo, almeno per quanto ci interessa, perchè viene ripreso poi da Gabriel Biel, uno dei maestri di Lutero, al cui movimento protestante apparteneva anche Ugo Grozio."

commonplace<sup>111</sup> that we need to discuss the arguments which have not yet explicitly been dealt with. The main argument these authors use to substantiate the alleged adherence of Grotius to voluntarism in *De iure praedae* is the very wording of the nine *regulae*, concerning the sources of law, in chapter II ('Prolegomena, in quibus regulae IX et leges XIII') of *De iure praedae*:

- I *Quod Deus se velle significaret, id ius est.*
- II *Quod consensus hominum velle cunctos significaverit, id ius est.*
- III *Quod se quisque velle significaverit, id in eum ius est.*
- IV *Quidquid respublica se velle significavit, id in cives universos ius est.*
- V *Quicquid respublica se velle significavit, id inter cives singulos ius est.*
- VI *Quod se magistratus velle significavit, id in cives universos ius est.*
- VII *Quod se magistratus velle significavit, id in cives singulos ius est.*
- VIII *Quidquid omnes respublicae significarunt se velle, id in omnes ius est.*
- IX *In iudicando priores sint partes eius respublicae, unde cuiusve a cive petitur - quid si huius officium cesset, tum respublica, quae ipsa cuiusve civis petit, eam rem iudicet.*

It is impossible to ignore the fact that the will is given a central place each time, each rule (with the exception of *regula IX*) stating that law is a signified will, and all of them flowing from the first rule, i.e. from God's signified will. As we saw above, however, this will is promulgated "through oracles and extra-ordinary signs, but above all through the intention of the Creator, wherefore we speak of the *law of nature*"<sup>112</sup>. Fiorella De Michelis concludes from this sentence that the first *regula* does not express pure and simple voluntarism, because the will of God is manifested through nature. She grants that in this manner there is no longer any distinction between natural law and divine law, but remarks that that is so because the latter has been reduced to and absorbed into the former.

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<sup>111</sup> Even one of the most thorough studies of Grotius' thought (almost 700 pages and more than 3000 footnotes) that of P. Haggenmacher, *Grotius et la doctrine*, Paris 1983, suffers under the assumption of the said reversal from voluntarism to intellectualism. Haggenmacher begins to present his treatment of natural law in *De iure belli* as the great debunking of the idea of Grotius' about-face from voluntarism (*De iure praedae*) to intellectualism (*De iure belli*) [pp.468-470], but next unconvincingly speaks of "la relativité du revirement grotien en matière de droit naturel" [pp. 496 ff.] and ends up by speaking of "l'option volontariste du jeune Grotius" which later underwent "une correction intellectualiste bien réelle" [pp. 517 -521].

<sup>112</sup> *De iure praedae*, p. 8: "Dei voluntas non oraculis tantum et extraordinariis significationibus, sed vel maxime ex creantis intentione apparet. Inde enim *jus naturae* est."



"Non di volontarismo giuridico bisogna quindi parlare a proposito di Grozio, bensì di una sorta di razionalismo naturalistico che si collega strettamente alle dottrine Stoiche. La giustizia infatti e il diritto in generale, che ne è l'espressione, hanno il loro fondamento non nell'arbitraria volontà di chichessia, bensì nella natura delle cose e degli uomini (e per questi ultimi si tratta di natura razionale) e la volontà è sì creatrice del diritto, ma solo in quanto espressione adeguata di principi insiti nella natura."<sup>113</sup>

This view is correct, I believe, and agrees with what we have said concerning the concept of natural law Grotius develops. It is quite compatible with the kind of non-exclusive rôle which Grotius attributed to the divine will in the later works, as described in the pages above. After all, the specific manner in which God in *De iure praedae* is said to promulgate natural law, is formulated thus:

"Since God has made and has willed creation to be, he has given each created thing certain natural properties by which its being is preserved and by which each thing is led, as if by the law of its first origin, to its own good."<sup>114</sup>

So the things of nature are led by a number of innate natural principles given them by God at their creation; they are not led by a will of God which might at any moment intervene and might by mere command turn those natural principles into their contraries. The rôle of the divine will, then, is the same as in the later works: he has willed the things of creation to be and has willed natural principles to exist in them.

A further argument in support of this interpretation of *De iure praedae* is that the *regulae* concern the *formal sources* of law and not so much the content of law, the main principles of which we find outlined in the XIII *leges* of the same chapter. These formal sources merely indicate the instances which legitimately promulgate laws, quite apart from the specific content such laws may have. The legislative character itself of these *regulae* agrees in its emphasis on the will with the legislative theory as it occurs in *De imperio* and is at the basis of the prolegomena, paragraph 12 of *De iure belli* - and this legislative theory did not imply strict voluntarism as we saw above<sup>115</sup>.

This having been said, there remains one argument which would appear to be of central importance for saying that Grotius adhered to voluntarism when he was writing *De iure praedae* which has not been treated by De Michelis. It is contained in the passage immediately following the coining of the first *regula* and preceding the sentence in which Grotius

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<sup>113</sup> F. De Michelis, op. cit., p. 96-97.

<sup>114</sup> *De iure praedae*, c. II, p. 9: "Cum igitur res conditas Deus esse fecerit et esse voluerit, proprietates quasdam naturales singulis indidit, quibus ipsum illud esse conservaretur et quibus ad bonum suum unumquodque, velut ex prima originis lege duceretur"; also adduced by De Michelis, p. 97, nt. 39.

<sup>115</sup> *Supra*, p. 126-127.

says that the will of God is revealed above all through nature. I quote it in full:

"This sentence [i.e. *regula* I] points to the very cause of law and has deservedly been given the position of first principle. And it would seem that the word *ius* is derived from *Iovis*, and hence *iurare* and *iusiurandum*, *Iovisiurandum*; alternatively, it is because the ancients called *iussa*, commands, what we call *iura*. Commanding belongs to power. The first power in all things pertains to God, as the power over a work to the artificer and the power over inferiors to the superior. Ausonius says: law is the unerring [*certa*] mind of God. This is what Orpheus and after him all the old poets understood, when they said that Themis and Dike were Jove's assessors, from which saying Anaxarchus gathered rightly that it is not so much that God wills something because it is just, but something is just because God wills it; although he put the saying to an improper use. Plutarch, however, with somewhat more subtlety does not merely will these Goddesses to be seated next to Jove, but rather that 'Jove is himself both Themis and Justitia and the most ancient and perfect law'. Chrysippus assented to this when he said 'the power of the perpetual and eternal law, which is as our guide of life and master of our duties, is called Jove'."<sup>116</sup>

The crux of this passage is Anaxarchus' inference that God does not will something because it is just, but something is just because God wills it. In *De iure belli*, Grotius associates this Anaxarchian point of view with divine *volitional* law and it is used to contrast the latter kind of law with natural law, which is so "immutable, that even God cannot change it"<sup>117</sup>. In the previous quotation from *De iure praedae*, however, Anaxarchus is adduced in the context of the legislative will of God which is associated with the law of nature. Judging on the basis of the treatment of Anaxarchus in the two works, the most obvious conclusion would be that in *De iure praedae* Grotius adhered to a voluntarist conception of natural law, whereas in *De iure belli* he moved to an intellectualist position.

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<sup>116</sup> *De iure praedae*, p. 8: "Haec sententia ipsam iuris causam indicat ac merito primi principii loco ponitur videturque ius a Iove dictum, unde et iurare et iusiurandum, Iovisiurandum: aut quia veteres quae nos dicimus, iussa, hoc est iussa dixerunt. Jubere autem potestatis est. Prima potestas in omnia Dei, ut artificis in opus et ut dignoris in minus dignum. Ausonius: Ius certa Dei mens. Hoc est quod Orpheus et post Orpheam veteres poetae omnes senserunt, cum dicerent Iovis adsessores esse Themis et Diken, unde recte Anaxarchus colligebat non tam ob id deum aliquid velle, quia iustum est, quam iustum esse, quia Deus vult: etsi ille eo dicto abutebatur. Plutarchus autem paulo subtilius non tam Deas illas vult Iovi adsidere, quam Iovem ipsum et Themis esse et Iustitiam et legum omnium antiquissimam atque perfectissimam; quae et Chrysippi fuit sententia dicentis legis perpetuae et aeternae vim, quae quasi dux vitae et magistra officiorum sit, Iovem dici."

<sup>117</sup> *supra*, p. 124 note 83 & p. 129 note 95.

This fixation on Anaxarchus, however, does little justice to other things which are said by Grotius in *De iure praedae* in the same context. Thus, he explicitly says that Anaxarchus put the poets' saying that Themis and Dike are assessors to Jove to an improper use (*abutebatur*). If Anaxarchus abused the saying, it is reasonable to suppose that it lends itself both to a proper and to an improper interpretation; in other words the saying is true only in one sense and not in another. Moreover, Grotius mentions another "more subtle" opinion of Plutarch's which identifies law and God [Themis, Dike and Jove], which he further supports by adducing Chrysippus who called God *legis perpetuae et aeternae vim*. This view, which Grotius suggests is the better view, is not so concerned with the order and rank of God and law, and would seem to consider law to be connected with and dependent on God in a more essentialist way than only through his will. Perhaps, then, the *proper* use of the saying concerning the order relating God and law, and Anaxarchus' inference concerning God's will and the justice of the law based on God's will, lends itself to an interpretation which makes it compatible with the other "more subtle opinion". In order to arrive at a correct understanding of the saying referred to, we must examine to what concrete use Anaxarchus had put it. The source for the story of Anaxarchus is Plutarch's *Life of Alexander*. In a fit of rage Alexander kills Cleitus, who has spoken his mind concerning some of Alexander's achievements, but has done so a bit too freely. Alexander comes to his senses and, realizing what he has done, wants to commit suicide, from which he is prevented by his bodyguards. He spends the night and following day in bitter lamentations. Callisthenes and Anaxarchus come in to cheer Alexander up:

"Of these, Callisthenes tried by considerate and gentle methods to alleviate the king's suffering, employing insinuation and circumlocution so as to avoid giving pain; but Anaxarchus, who had always taken a path of his own in philosophy and had acquired a reputation for despising and slighting his associates, shouted out as soon as he came in: 'Here is Alexander to whom the whole world is now looking! He has thrown himself down prostrate and is weeping like a slave, fearing the law and the blame of people - he who should be for them the law and rule of justice, since he has conquered in order to command and be master instead of submitting like a slave to the mastery of a vain opinion. Knowest thou not', said he, 'that Zeus has Dike and Themis as assessors seated at his sides, in order that all that is done by the master of the world may be lawful and just?' By using arguments like these Anaxarchus succeeded in lightening the suffering of the king, it is true, but rendered his disposition in many ways more vainglorious and lawless."<sup>118</sup>

Anaxarchus seems to infer from the poets saying that God (Zeus) has Justice and Law (Dike and Themis) as his helpers, that *because* the master does something, *therefore* that thing will be lawful. Grotius

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<sup>118</sup> *Plutarch's Lives*, part VII, Loeb vol. 99, "Alexander and Caesar", 695 [paragraphs L-LII], pp. 368-377.

infers in his turn: God is the master of the world and what God wills is *therefore* just. The next step which Grotius takes in *De iure praedae* is that he denies the inversion of this; so Grotius position is that 'it is not so that God wills something *because* it is just'. Now this last conclusion which Grotius links up with Anaxarchus is not really contained in his story, nor is it to be found elsewhere in Plutarch's account. In fact I think that in *De iure praedae* Grotius wanted to state the first inference which is clearly implied in the story - because God is master of the world, what he wills and does is right; and while making the last inference ('God does not will something because it is right') he clearly warned for the abuse which can be made of the statement by carrying it to its extreme voluntarist conclusion. Precisely this must be deduced from Grotius saying that Anaxarchus put the saying of the poets to an improper use.

For as to the improper use to which Anaxarchus puts the saying of the poets, two points can be mentioned. Firstly, it would be improper to equate Alexander with Zeus, which is tantamount to *laesae majestatis Dei*; this is what Plutarch must have meant by the 'vaingloriousness' of Alexander. Secondly, and more importantly, the statement is abused because it is used to legitimate the manslaughter perpetrated by Alexander. Legitimizing this crime by reference to the almightiness of Zeus is tantamount to attributing manslaughter to the highest God. This is the *abusio* to which Grotius alludes in *De iure praedae*: saying that 'something is just because God has willed it' does not extend so far that God wills things which are unjust. Hence Plutarch could already speak of Alexander's 'lawless disposition'.

In the interpretation proposed here, strict voluntarism is not what Grotius adheres to in *De iure praedae*. Much rather, there is an essentialist view expressed: God is not subjected as an inferior to the rule of what is just, but all God does is just because - to speak with Plutarch and Chrysippus as adduced by Grotius - he "is himself Law and Justice", God himself is called "the power of the perpetual and eternal law".

As no strict voluntarism is implied in the use Grotius makes of Anaxarchus' words in *De iure praedae*, it is difficult to speak of a development from voluntarism in *De iure praedae* to intellectualism in *De iure belli*. Although the will of God is a significant feature in the earlier work, we saw above that it remained of importance also in *De iure belli* and the other later works. Whether the will of God was in all respects understood in precisely the same sense in both works, is difficult to establish mainly because in *De iure praedae* it is not dwelt upon. The presence in *De iure praedae* of a vocabulary not linked with voluntarism<sup>119</sup> should lead to great caution in assuming the adherence to a voluntarism which Grotius renounced in later works. Much rather should one assume that the distinction between natural and volitional law which Grotius was to make in later works, was quite as articulate

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<sup>119</sup> p. 8: "Dei voluntas .. maxime ex creantis intentione apparet. Inde enim ius naturae est..."; "[homo] cui .. peculiariter concessa sit ratio illa imperatrix: cui scilicet ab ipso Deo principium, qui mentis suae imaginem homini impressit" (pp. 11-12).

when he was writing *De iure praedae*. This relative inarticulacy sometimes leads to differences between *De iure praedae* and later works, but then again we have found that also in the later works Grotius' aim was not to sever every tie between volitional and natural law. Again, there is sometimes a significant conformity between the later and earlier works which prevents the interpretation of *De iure praedae* in a strictly voluntarist sense. A good example of the latter point is the following distinction between natural law and civil law in *De iure praedae*:

"While natural rights, as they have a perpetual cause, therefore last perpetually, these [i.e. civil] rights change with their cause, that is to say with the human will."<sup>120</sup>

An example of a difference between *De iure praedae* and later works is the use just analysed which Grotius made of Anaxarchus' words and the use he made of them in *De iure belli*. We can say that Anaxarchus' view is used to illustrate the proximity of law and God, and this in the context of the *regula* that what God signifies to be his will is law. It might still be suggested that from the sentence which follows the passage in which Anaxarchus is adduced (- "The will of God does *not only* appear through oracles and extra-ordinary signs, but above all through the intention of the creator, wherefore we speak of the law of nature" -) one could conclude that the inference from Anaxarchus concerns divine *positive* law (the 'oracles and extra-ordinary signs'); still it might of course just as well refer to *natural* law ('the intention of the creator'). In *De iure belli* on the contrary the inference "non ideo id Deum velle, quia iustum est, sed iustum esse quia Deus voluit" (I,I,xv,1) is explicitly mentioned as a characteristic of *volitional* divine law, a characteristic which distinguishes this law from natural law.

As a final remark it should be added that in *De iure belli* Grotius suggests that the words just quoted are a formulation used by Anaxarchus himself ("quod nimium indistincte dicebat Anaxarchus"). Even if we take into account that according to Grotius Anaxarchus said it "nimium indistincte" the attribution is mistaken - as we saw the inference is Grotius's. That Grotius attributed it to Anaxarchus may be explained from the probable fact that Grotius when writing *De iure belli* was making use of *De iure praedae* or the notes which were at the basis of *De iure praedae*<sup>121</sup>. It is most plausible to assume that Grotius did not

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<sup>120</sup> *De iure praedae*, p. 23: "[A]ut cum iura naturalia, ut quae causam habeant perpetuam, ipsa etiam perpetuo durent, ista iura mutari cum sua causa, hoc est cum hominum voluntate."

<sup>121</sup> On the probability of the hypothesis of *De iure praedae* as source for *De iure belli* see R. Fruin, 'An unpublished work of Hugo Grotius', in *Verspreide Geschriften III*, The Hague 1901, pp. 428 ff.; he refers to Vissering as the first to come up with this hypothesis, id. pp. 368-9. In the correspondence we find a letter to Willem from 20 June 1622, i.e. from after deciding to write *De iure belli* in which Hugo thanks his brother "pro illis puerilibus quibus valde opus habebamus" (*Briefw.* II, no. 767). Haggenmacher, *Grotius et la doctrine de la guerre juste*, p. 386 note 1871 takes the *puerilia* to refer undoubtedly to *De iure praedae*.

check Plutarch's text when he attributed his own inference to Anaxarchus in De iure belli<sup>122</sup>. We now come to the point where we discuss the issue of Grotius' sources.

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<sup>122</sup> Nevertheless the reading of De iure praedae may still have awakened in Grotius' memory the setting and gist of Anaxarchus' exhortations addressed to Alexander, if we may understand the "nimium indistincte" as a reference to Anaxarchus' failure to distinguish between Alexander and Zeus and to his attribution of murder to Zeus; "nimium indistincte" of De iure belli is on this understanding equivalent to the "abusio" of De iure praedae.

## The sources

When discussing the *status questionis* we saw that a fair amount of effort has been put into answering the question of which source Grotius used for his *etiamsi* hypothesis. The number of possible sources is very large indeed, ranging from Duns Scotus<sup>123</sup> via several other authors to Vásquez<sup>124</sup>, Suárez<sup>125</sup> and Bellarmine<sup>126</sup>. If we extend our search to sources in which the counterpart of the commonplace '*etiamsi daremus non esse Deum*' occurs in one form or another, i.e. '*non id Deum velle quia iustum est, sed iustum esse quia Deum vult*', the list of possible sources becomes very much longer and will include Plato<sup>127</sup> and Anselm of Canterbury<sup>128</sup>.

St. Leger singled Gabriel Vásquez out as the most likely source for the *etiamsi*-hypothesis. His major argument is the fact that Vásquez carried his views to such an extreme that he says "if God did not judge as He does now, and if there remained in us the use of reason, sin would remain"<sup>129</sup> and that therefore the reason that something must be judged sinful is not that God has understood it to be sinful ("*non quia intelligitur a Deo ut tale, sed potius contra*"). It would seem that the argument for assimilating Grotius' view to that of Vásquez is found in that element of Grotius' hypothesis which concerns the non-existence of God. When we limit ourselves to this element and look at what Grotius said in the first edition of *De iure belli*, then it sounds indeed like Vásquez:

"What we have said would take place [or: would be true] even if we would concede ... that there is no God."

["*Et haec quidem quae iam diximus, locum haberent etiamsi daremus... non esse Deum*"]

<sup>123</sup> Reportata Parisiensis, II, 27; the counterpart of the '*etiamsi*' in the form '*prohibita sunt mala non quia prohibita, sed prohibita quia mala*' is in Opus Oxoniense III, dist. 37, no. 2. In a note to De iure belli I, I, 10, 1 in the editions of 1642 and 1646 Grotius refers to this distinctio.

<sup>124</sup> Commentariorum ac disputationum in I-IIae S. Thomae, disp. 97, 1,3.

<sup>125</sup> De legibus ac deo legislatore, vide supra.

<sup>126</sup> De membris Ecclesiae militantis, III, 11.

<sup>127</sup> Eutyphro, 10 a - e; Grotius quotes from Eutyphro 9, when defining the desert of punishment.

<sup>128</sup> Proslogion, IX - XI.

<sup>129</sup> "Si [...] intelligeremus Deum non ita iudicare, et manere in nobis usum rationes, maneret etiam peccatum."

Of course Grotius grants the veracity of this hypothesis as little as Vázquez does; conceding its truth, i.e. conceding that God does not exist, cannot be done without the utmost wickedness, Grotius says in one breath ("quod sine summo scelere dari nequit"). Connected with this last point is the plain fact that Grotius does not use the grammatical form of a conditional clause in the *realis*, for which he would have had to use the *modus indicativus*, nor yet does he use the *coniunctivus potentialis* (nor does Vázquez). Instead, the hypothesis is written in the *coniunctivus irrealis imperfecti*, which implies the impossibility of the condition being fulfilled<sup>130</sup>. But even if all this is taken into account, what the hypothesis expresses - if taken strictly - is still somewhat out of tune with Grotius' position that *de potentia absoluta* God could have willed not to create man and therefore could have willed no natural law.

Perhaps this is the reason why Grotius in the next edition moderated the hypothesis, an amendment he retained in all later editions:

"What we have said would have *some* place [or: would have a *degree* of validity]..."

["..quae iam diximus, locum *aliquem* haberent etiamsi daremus..." ]<sup>131</sup>

Whatever the precise reasons may have been behind it, this very amendment must in any case mean that Grotius' position is no longer in perfect harmony with Vázquez.

If Vázquez was the source in the first place, then ultimately he was the source only by contrast<sup>132</sup>. Now it is itself entirely hypothetical (as St. Leger admits) to suppose that Vázquez was the original source, but once he is a possible source because of the contrast in his position as compared to Grotius', then any of the authors who used an 'etiamsi'-hypothesis in any manner whatever are potential sources. Thus it is

<sup>130</sup> Adding something like 'per impossibile' to the hypothesis as most of the scholastics did, would certainly not live up to Grotius' standards of the correct use of the Latin language; the insertion of 'per impossibile' would not only lead to an unnecessary pleonasm but would also be a linguistic anachronism, which Grotius was always anxious to avoid. Hervada's conclusions based on the absence of the words 'per impossibile' are therefore unfounded. Also W.J.A.J. Duynstee, 'Geschiedenis van het natuurrecht en de wijsbegeerte van het recht in Nederland', p. 25 seems to overlook the use Grotius makes of the *irrealis*, when he calls Grotius' formulation "not very fortunate" because it supposes something that could not be: the *irrealis* always supposes something that is not.

<sup>131</sup> H. Fortuin, De natuurrechtelijke grondslagen van De Groot's volkenrecht, The Hague 1946, p. 130 suggests that Grotius realised himself that the statement as he had formulated it in 1625 was "crass", and therefore modified it in subsequent editions so as "to moderate it slightly but definitely". Fortuin does not elaborate on the question in which sense it was too crass.

<sup>132</sup> Curiously, St. Leger mentions the difference between the first edition and the later ones (at p. 25, note 16 of his work), but does not consider the possible implications of this at all when he compares Vázquez and Grotius (at pp. 129-142).



perhaps more likely that Soto, whose work Grotius was acquainted with earlier, and whose work is quoted more often than Vázquez's, was a source<sup>133</sup>, or even Suárez.

The last mentioned has most often been considered the proximate source for Grotius' *etiamsi*-formula. This frequency may well be explained from the fact that Suárez is most elaborate in his discussion, not only with respect to the doctrinal scrutiny of it, but also because he mentions the largest number of older authors taking a stand on this matter. In doing so he provides modern scholars with a practical guide for further research on the *etiamsi*-hypothesis<sup>134</sup>. But this research interest does not coincide with the interest such hypotheses may have had for Grotius. So if we establish that Suárez is the most important author for discussions of the hypothesis to us, we must be cautious in assuming that Suárez was also, on this score, the most important author to Grotius. Moreover, as was pointed out at the outset of this chapter, the rôle of the hypothesis in Grotius' prolegomena to *De iure belli* is not *prima facie* the same as in Suárez' discussion.

Nevertheless, the position Suárez takes as to the concept of natural law in *De legibus* II, c. 6, which is where the hypothesis is treated, is entirely consistent with Grotius' position on natural law: natural law is not merely indicative but genuinely prescriptive as it expresses the will of God; God's precept or prohibition is not what constitutes the goodness or malice of acts, but God's will presupposes the goodness or malice of acts (Suárez, paragraph 11); because of God's essence and providence God cannot but prohibit what is evil and command what is good, yet the divine liberty is not thereby excluded (Suárez, paragraph 23).

With few exceptions, this general agreement between the Suarezian and Grotian conceptions of natural law is scarcely developed beyond literary similarities by those authors who assert the Suarezian origin for Grotius' '*etiamsi daremus*'; the same authors do, however, make an effort<sup>135</sup> to explain the scarceness of references to Suárez in *De iure belli*.

<sup>133</sup> Soto's *De iustitia et iure* was one of Grotius' books he was allowed to use at Loevestein; a list of Grotius' library at the moment of its confiscation, and of the books he had sent for while at Loevestein has survived and was published by P.C. Molhuysen, '*De bibliotheek van Hugo de Groot in 1618*', in *Mededelingen der Nederlandsche Akademie van Wetenschappen*, Afd. Letterk., N.S. vol. 6, 1943, p. 62, item 308. In Soto the *etiamsi*-formula is found in lib. I, q. IV, a. 2. In *De iure belli* Soto is referred to 30 times, Vázquez 3 times, Suárez 4 times, Molina 21 times, Lessius 34 times, Vitoria 56 times.

<sup>134</sup> St. Leger, *op. cit.*, p. 122: "Did we not have the remarks of Suárez, it would be a tedious job to trace this opinion in the Scholastics." Ibid., note 14: "There is no reason to believe that Grotius could have traced the notion of '*etiamsi daremus*' through the Scholastics without the help of some summary such as Suárez provided." Even if it were clear what St. Leger means with 'tracing the notion through the Scholastics', there remains a simple reason why Grotius would use any such notion: the notion is a commonplace both in scholastic and in ancient sources.

<sup>135</sup> Basdevant, *op. cit.* 1904, p. 264; J.B. Scott, *The Catholic Conception of Interna-*  
(footnote continued)

The explanation they put forward was first developed by J.B. Scott. He pointed out it would be inopportune for Grotius to quote Suárez, because the *Defensio fidei catholicae adversus Anglicanae sectae errores* (1613) was forbidden and publicly burnt not only in England but also in France, where Grotius lived while composing *De iure belli*. *De iure belli* was, moreover, to be dedicated to Louis XIII, who had awarded Grotius a stipend on his arrival in France. In addition it is emphasized that Grotius mentions Suárez a few times in his correspondence and always in a positive manner (while, we may add, at other places he expresses his severe distrust of Jesuits, which contributed to the placing of the posthumously published *Annales et Historiae* on the index)<sup>136</sup>. Feenstra is not convinced by these arguments<sup>137</sup>. When Grotius refers to *De legibus ac deo legislatore*, he remarks, it is not to parts concerned with natural law; most of the time in the correspondence Grotius is speaking of and referring to Suárez's treatment of theological problems. That is the case in the letter from 1633 and also in a letter from 27 March 1618 when he asks Gerardus J. Vossius to send him a copy of

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*tional Law*, 1934, 269-271; Ben P. Vermeulen, 'God, wil en rede in Hugo de Groot's natuurrecht', pp. 54-9; J. St. Leger rehearses similar arguments as in the works just mentioned, but thinks there is no more than a literary dependence, pp. 96-112. G. Ambrosetti, *op. cit.*, pp. 109-127 strongly insists on the literary dependence of Grotius on Suárez, and illustrates this with the similarity of a number of passages. The only author I have found who offers a substantive comparison of Suárez and Grotius and recognizes the strong similarities is P. Haggenmacher, *Grotius et la doctrine*, 1983, pp. 503-505.

<sup>136</sup> *Briefw.*, V, no. 1884, 5 October 1633, p. 194: "...[Suarezius], hom[o], si quid recte iudico, in philosophia, cui hoc tempore connexa est scholastica, tantae subtilitatis, ut vix quenquam habeat parem"; vol. VI, no 2207, 1 August 1635, p. 121: "...non ignobilis quidam Franciscus Suárez...". A good impression of Grotius' attitude towards the Jesuits can be gained from the records of his conversations with Guy Patin (Pintard, *La Mothe*), p. 71, 82, 83: "[Janus Hautenus] estoit un Gentilhomme Flamand qui haïsoit Scaliger et qui s'en moquoit ou en disoit du mal a toute heure. Il estoit escolier des Jesuites et poussé par eux a cela. [...] On ne peut pas nier que parmy les Jesuites il n'y ait eu quelques scavans hommes, [...] mais c'est chose remarquable et fascheuse pour eux qu'ils sont tousiours meslez dans les conspirations qui sont faites contre les personnes de Roys [...] Ces grandes et frequentes conspirations tesmoignent l'ambition interne de la Société et font cognoître a un chacun de quel esprit est poussée et de quel genie est animée cette troupe de gens. [...] [Cassander] haïsoit les Jesuites et aujourd'huy les Jesuites l'haïssent fort aussi et parlent de luy et de ses livres avec beaucoup de mespris, combien qu'il fust un fort scavant homme, mais c'est la coustume de Jesuites de mesdire et de mespriser. Hoc est Loyoliticum. [...] Henry 4. estoit un grand Capitaine et un bon Prince ... Neantmoins il a fait de grandes fautes: il a fait revenir les Jesuites qui estoient fort bien chassez ...". The tenth remark of the Congregation of the Index concerning the *Annales et Historiae de rebus Belgicis* is: "De Sancto Ignatio et ejus Societate male loquitur. [...] sunt impiae et manifestae calumniae, praesertim cum institutum Societatis tangant a Sede Apostolica approbatum", Vatican Library, Barberiniana Latina vol. 3146, quoted in J.D.M. Cornelissen, 'Hugo de Groot's *Annales et Historiae de rebus Belgicis* op den Index', pp. 165-8.

<sup>137</sup> R. Feenstra, 'Quelques remarques sur les sources utilisées par Grotius dans ses travaux de droit naturel', pp. 78-80.

*De praedestinatione* and *De auxiliis liberi arbitrii*<sup>138</sup>. As I have tried to make clear in the previous discussion, however, there is an important theological component in the discussions concerning the nature of natural law, particularly as regards its dependence on God. The question whether God can command something against natural law is not only one of interest for Grotius the natural law theorist, but one which was a fundamental bone of contention in the predestination controversies in which Grotius the politician and theological pamphleteer was involved. If one can at all legitimately distinguish these personalities in Grotius - which I doubt very much - yet one cannot easily disentangle this very same question as it appears in the theological debate from the way it appears in the passages in the legal works concerning natural law. Feenstra's counter-argument is therefore not very convincing either.

I believe that although it is still possible to say that on the whole and in a number of significant respects the ideas of Grotius and Suárez were entirely in harmony with each other<sup>139</sup>, there is insufficient reason to believe that Suárez was a more important and more specific source for Grotius than other authors from that period.

For this point of view we can now find a new argument in the *Meletius*. There Grotius derives from God's perfection and superiority that He is not only an intelligent being but also that he has a free will and that therefore he is creator and ruler. From God's and man's free will, together with God's superiority over man as His inferior, Grotius deduces that God must rule over man as a true legislator<sup>140</sup>. Now, this is in a

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<sup>138</sup> *Briefwisseling*, I, no. 567, p. 611. It may be added that there are letters from Willem Grotius to Vossius, in which reference is made to books by Domingo Báñez and Suárez which Hugo wished to return to Vossius; it concerns again the *Opuscula theologica* of Suárez; see C.S.M. Rademaker, 'Books and Grotius at Loevestein', pp. 21-2 (the text of the letters in question), notes 4 and 5 and pp. 26, 28.

<sup>139</sup> E.g. with regard to the concept of *ius gentium*; the rôle of the will of God with regard to natural law and with regard to (at least some of the aspects of) the predetermination controversy; some divergence is perhaps present concerning the *ratio formalis* of natural law as being identical to human rational nature itself, or rather as it is given to the rational nature understood as the faculty capable of judging the conformity or non-conformity of acts with human nature (treated in *De legibus* II, c. 5). Grotius' position on the matter is probably not as Vasquezian as St. Leger makes it out to be, but the language which Grotius employs is not always compatible with the Suarezian position either.

<sup>140</sup> *Meletius*, paragraphs 7-11: "Nec intellectum tantum, sed et voluntatem, et quam vocant *proairesin* habere debet Deus. Sunt enim quae haec habent non habentibus perfectiora. [...] Statuendum praeterea Deum curare res a se factas nec tantum coelestes, ut quidam voluerunt, verum etiam humanas. [...] Nunc foedissime lapsi sunt [Epicureos], putantes usum intellectus ac voluntatis molestum esse, quo tamen nihil est suavius, praesertim si omnipotentiam addideris. [...] Adde quod ordo universi admirabilis non conditorem modo, sed et rectorem Deum loquitur. Nihil autem minus regium quam viliora regni curare, partes autem nobilissimas extra curam ponere. [...] Sequitur porro ut Deum esse legislatorem fateamur. Nam si *proairesin* (praelectionem) habet Deus, habet et homo. Deus autem superior est, homo inferior. Et superiora agunt in inferiora, prout superiora agere et inferiora pati

(footnote continued)

nutshell the crux of the whole of Suárez's *De legibus ac Deo legislatore*. However, the latter work was published only in 1612, whereas the *Meletius* dates from 1611<sup>141</sup>. Grotius' particular understanding of the legislation of natural law<sup>142</sup> is clearly based on a view which he already held before Suárez's book even appeared. This makes it unlikely that Grotius depended on Suárez for related points on which their views agree<sup>143</sup>.

As to the specific point of the 'etiamsi'-hypothesis this may just as well be true as not; however, there is actually no clue whatsoever to suggest that Grotius did derive it from Suárez and not from another author.

In the section in which I reported on the *status quaestionis* we saw that Berljak believed Marcus Aurelius to be a direct source for the etiamsi-phrase. Both the general agreement of his Stoic ethics and of this specific formulations in *Meditations* II, 11 and VI, 44 with Grotius' natural law theory and the 'etiamsi' hypothesis constitute the reasons for Berljak's conclusion.

As to paragraph VI, 44 it would seem that the thought there expressed is quite similar to that of the 'etiamsi' hypothesis: "Even if it be that they [the Gods] care nothing for our mortal concerns, I am still able to take care of myself and look to my own interests; and the interest of every creature lies in conformity with its own constitution and nature."<sup>144</sup>

Berljak, however, adds as more important evidence paragraph II, 11. There Marcus Aurelius first comes with the hypothesis "if there are no Gods or if they have no concern with mortal affairs", followed by "... Gods, however, do exist and do concern themselves with the world of men"; and further on he says that every man has been given the faculty to avoid evil. Finally, Berljak says it is implied that the Gods reward good men when Marcus says that it is impossible that they "allow good and evil to be visited indiscriminately on the virtuous and the

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(footnote continued)

nata sunt. Consequens est Deum kat proairesin (secundum praelectionem) agere in hominem. Haec autem actio proairetikou (praelectivi) superioris in proairetikon (praelectivum) inferius, qua tale est, utcumque nihil aliud est quam lex sive imperium. Verum autem hoc esse sensus conscientiae omnibus argumentis validius convincit."

<sup>141</sup> See Posthumus Meyjes' introduction to *Meletius*, pp. 10-15.

<sup>142</sup> *Supra*, pp. 126-127.

<sup>143</sup> I tend to disagree with Haggemacher, 1983 p. 615, when he concludes that, as compared to *De iure praedae*, the topic of the sources of natural law in *De iure belli* is "manifestement réorganisé et 'mis à jour' sous l'influence des derniers Espagnols", intending mainly Suárez; cf. *ibid.*, p. 523 where he writes on Grotius redefinition of *ius gentium* in *De iure belli* as compared to that of *De iure praedae*: "Notre réponse sera analogue à la précédente... Sans doute est-ce là aussi la lecture de Suarez qui est à l'origine du changement."

<sup>144</sup> Cf. *supra* p. 97 ff..

sinful alike". Berljak emphasizes that the structure of this argument is identical to that of prolegomena paragraph 11.<sup>145</sup> Hervada objects to Berljak, that Marcus Aurelius is not dealing with natural law, but rather with the question of how to live philosophically. But this begs the question whether living philosophically is not living according to the law of nature. It would have been a more relevant objection that when Marcus Aurelius mentions the non-existence or non-providence of the Gods, he is not coining a hypothesis the consequences of which he explores for ethical behaviour generally. What he does is firstly, to say that if the Gods exist one has nothing to fear in departing from life through one's own decision. And he continues: "But if there are no Gods, or if they have no concern with mortal affairs, what is life to me in a world devoid of Gods or devoid of providence?" Then he says that the Gods do indeed exist and are concerned with human affairs. Only on this presupposition does he say that each man possesses the faculty to avoid evil. So the most obvious function of the conditional clause 'if the Gods do not exist or are not provident' is to show that even then there is no reason to fear committing suicide. The innate faculty to avoid evil is mentioned only on the presupposition of the existence of the Gods; and this is precisely the opposite of what Grotius does with his 'etiamsi' hypothesis. The only relevance Meditations II,11 can have is, then, that the impious hypothesis is mentioned at all for its possible consequences. But this happens also elsewhere, e.g. in Meditations VI,44: "If, of course, they [the Gods] took no thought for anything at all - an impious thing to believe - why then, let us make an end of sacrifice and prayer and vow, and all other actions whereby we acknowledge the presence of living Gods in our midst." And Grotius himself, when he argues that those who abolish the *notitiae maxime communes* concerning God's existence and providence can legitimately be punished in the name of human society, quotes Cicero: "There are and have been philosophers who think that the Gods take no care for the affairs of men. But if their view is correct, what piety can there be, what holiness, what religion?"<sup>146</sup> There remains, of course, the possibility of the next sentence in Meditations VI, 44, which I have already mentioned. But Grotius does not refer to this paragraph when he presents his version of the impious hypothesis.

Intriguing as are all the suggestions for the source from which Grotius got the 'etiamsi daremus' formula, a *non liquet* is not out of place. Notwithstanding the fact that for some of the suggestions a number of *rationes probabiles* can be given, the very fact that such counterfactual assertions are commonplace in antiquity, the middle ages and later,

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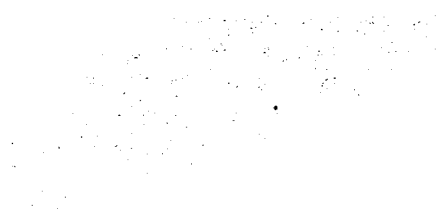
<sup>145</sup> Berljak, pp. 97-99.

<sup>146</sup> *De iure belli*, II,XX, xlv, 2: "Similiter Cicero: 'Sunt Philosophi, et fuerunt, qui nullam habere censerent humanorum rerum procurationem Deos, quorum si vera sententia est, quae potest esse pietas, quae sanctitas, quae religio?'...4. Has igitur qui primi incipiunt tollere, sicut in bene constitutis civitatibus coerceri solent,..., ita et coerceri posse arbitror nomine humanae societatis quam sine ratione probabili violant."

makes it impossible to attribute to any single one of them the status of the source from which Grotius drew his one sentence. It is at least equally reasonable to suggest that the notion was already commonplace in Grotius' mind which it was convenient to use in writing the prolegomena, as it is to suggest a particular place in a particular author. Perhaps it is more important to see what Grotius meant to say with the hypothesis, than to hunt for its origin, particularly because different authors have had different purposes for using it.

## **Conclusion**

To resume the conclusions we arrived at in the previous paragraphs, Grotius' intention was not intellectualist or voluntarist: classifying him as either would do little justice to his ideas on the matter. The hypothesis should much rather be understood to express the necessity and above all the unchangeability of natural law. Although natural law both involves the will of God and concerns the human will in the manner set out in the previous paragraphs, its validity and content cannot, as long as we speak of natural law proper, be changed by a change in the will either of God or man. This is precisely the quality by which natural law is contradistinguished from both divine and human volitional law.



## **CHAPTER IV**

**"...AN APPEARANCE OF CHANGE DECEIVES THE  
UNWARY..."**





#### IV "...an appearance of change deceives the unwary"

The previous chapter led us to the conclusion that Grotius places great emphasis on the essential immutability of natural law. This emphasis seems to form a complete antithesis to the Heraclitan flux and to Aristotle's statement that "there is something that is just even by nature, yet all of it is changeable".

Two questions arise: first, whether changeability is a distinguishing point on which Grotius' natural law theory differs from the more classical philosophical tradition, and second whether the assertion of the immutability of natural law should be interpreted as a fundamentally conservative approach to order, a "powerful mechanism for resisting change" as has been said of the natural law doctrine of the Salamanca School<sup>1</sup>.

If we limit our discussion of change to cover only changes in the laws themselves, then indeed a certain conservatism can be traced in Grotius' works, especially where institutions of political society are concerned<sup>2</sup>.

It is more interesting, however, to broaden the discussion of law and change so that it covers not only the set norms themselves which are set, but also the sphere of application of those norms. One ought also to consider change in situations where in a certain case a thing happens in accordance with a specific norm as it is formulated at that moment, whereas at another moment, in a case which *prima facie* is covered by that same norm, something happens which is not in conformity

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<sup>1</sup> A. Pagden, 'The Preservation of Order: the School of Salamanca and the *Ius Naturae*', Medieval and Renaissance Studies on Spain and Portugal, Oxford 1981, pp. 155-166.

<sup>2</sup> The major reproach Grotius directed at his prosecutors in his Apology written after his escape from Loevestein, was that they had changed the constitution. However, a conservative attitude can be traced from Grotius' earliest writings until at least a work from the 1630's, the Observationes in aphorismos politicos Campanellae (infra note 94); De republica emendanda, paragraph 49, p. 110: "Sunt sui populis mores, sua ingenia; quibus propria instituta respondent, quae si in alio velis imitari saepe rem efficias in simili dissimillimam. Praeterea, ubi in mutatione non magnum est commodum, ipsa mutatio magnum incommodum est"; De antiquitate, c. VII, in fine: "Sed et consuetudinis magna habenda est ratio. Nam quod de legibus in universum proditum est, id maxime de illis legibus verum est quibus summa imperii continetur: melius esse non optimis uti quam receptas mutare, cum legibus itidem ut plantis ad figendas radices longo temporis spatio opus sit, quod si crebro transferas vis atque robur omne evanescat"; Observatio in T. Camp. Aph. pol., [Firpo no. 16]: "Leges ad imperium pertinentes non mutandae nisi cogat necessitas; aliae nonnisi utilitas et evidens et grandis." For a negative appreciation of the "studium novitatis", also De veritate, Op. Th. III, 4 a 54.

with that norm but which is nevertheless considered legitimate. In other words, we should not only discuss change in relation to law in the sense of *lex*, but also discuss change in relation to *ius* in the broader sense of the word. We will then find that Grotius holds much more subtle opinions, and political conservatism as the explanation for Grotius' emphasis on the unchangeability of natural law will then recede into the background.

If the problem is formulated so as to cover change in the broader sense, as indicated, we should study the cases in which derogation from rules and laws can, for Grotius, be legitimate and in order to find answers to the questions posed we need to study what rôle natural law plays in this matter.

This study is facilitated by a short tract of uncertain but probably early date which has recently become available in a critical edition, in which Grotius makes precisely the problems just formulated his theme: *De aequitate, indulgentia et facilitate*.

Given the importance for our purposes and as it is relatively unknown, I will summarize the content of the tract. In order to assess its value for our research, I discuss the extent to which it can be considered representative for Grotius' position on the subject-matter by comparing it with Grotius' other works. This will require an examination of terminological developments, and also a fairly technical and close scrutiny of one of the doctrines implicit in *De aequitate*, viz., that of punishment. Afterwards, I will analyse the text interpretatively in order to discuss the rôle of natural law with regard to change.

## De aequitate, indulgentia et facilitate

In *De aequitate, indulgentia et facilitate* Grotius undertakes a powerful but subtly discriminating synthesis of various theories of equity which take their point of departure in Aristotle's *epieikeia*<sup>3</sup>. The form of the essay is sober and clear and it is impressive in its conciseness.

The date of this short treatise is uncertain. Evidence based on external elements such as the early editions and two manuscript versions provide few clues.

The early editions (1656 and 1680) are based on a manuscript which was in the possession of Nicolaas Blanckaert, but which is no longer extant. A comparison of the editions of 1656 and 1680 with the two extant manuscripts shows that the Blanckaert manuscript was not identical to either of these<sup>4</sup>.

One of the extant manuscripts, which has been in the Herzog August library at Wolfenbüttel since 1663, was previously in the possession of Grotius' friend Petrus Scriverius. It is a copy made by a scribe and bears the title *Prolegomena Juri Hollandico Praemittenda*. This title had led Feenstra to the initial hypothesis that *De aequitate* was written around the same time as the *Inleidinge*, i.e. in the Loevestein-period - a hypothesis which Feenstra came to consider less probable<sup>5</sup>.

The other manuscript is the autograph which is now in the University Library at Leyden<sup>6</sup>. The editors of the critical edition of this manuscript, Feenstra & Scholtens, felt tempted to identify the manuscript with a text to which Grotius refers in his well-known letter of 18 May 1615 to Willem. There he writes - after having treated of natural law -

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<sup>3</sup> For a clear analysis of humanist theories of *aequitas* and a description of the classical origins of the concept see G. Kisch, *Erasmus und die Jurisprudenz seiner Zeit*, 1960. In a number of articles and contributions which at the time aroused controversy F. Pringsheim discussed the rôle of *aequitas* in Roman law, denying it an important rôle as integral part of law in the period before Constantine. He explains this by referring to the Greek origin of the concept: until post-classical times the concept of *bona fides* fulfilled the tasks which later were taken over by and which submerged in *aequitas*, *Gesammelte Abhandlungen* I, Heidelberg 1961, pp. 131-235.

<sup>4</sup> J.E. Scholtens and R. Feenstra, "Hugo de Groot's *De Aequitate*; tekstuitgave en tekstgeschiedenis met bijdragen over Nicolaas Blanckaert en over de voorrede tot de *Inleidinge*", *Tijdschrift voor Rechtsgeschiedenis*, vol. XLII, 1974, pp. 209-215.

<sup>5</sup> R. Feenstra, "Een handschrift van de *Inleidinge* van Hugo de Groot met de onuitgegeven *Prolegomena juri hollandico praemittenda*", *idem*, vol. xxxvii 1967, pp. 444-484; cf. Feenstra/Scholtens, op.cit. (nt. 2) pp. 218-221. Amongst the various considerations which are taken into account by Feenstra and Scholtens, there lacks the consideration that the subject-matter of *aequitas*, *indulgentia* and *facilitas* would seem to be particularly pertinent to be reflected on by somebody sentenced to life-imprisonment.

<sup>6</sup> Signature hs. B.P.L. 921.

"I remember having dealt with the question *peri epieikeias* in a number of theses, of which I believe father has a copy. If he does not have it, I will go through my papers. For it is, a wide and far reaching subject-matter which you should not ignore."<sup>7</sup>

Feenstra & Scholtens, however, caution that there are few positive clues to substantiate the link between the manuscript and the text referred to in the letter<sup>8</sup>; the reference in the letter may be to a much earlier and very different version of the Leyden manuscript. All in all, the history of the extant manuscripts and editions shed little light on the date of composition of the tract.

Judging by the contents of *De aequitate*, however, there is some reason to date the treatise quite early. Firstly, Grotius uses in *De aequitate* the term *ius gentium primum*<sup>9</sup> which he does not use in any other works except *De iure praedae*<sup>9</sup>. Secondly, Grotius argues in *De aequitate* (par. 31) that from some punishments dispensation cannot rightfully be given, because they are by nature commensurate to a delict. This theory of a necessary relation between delict and punishment Grotius abandoned in the *Defensio fidel catholicae adversus Socinum* (begun in 1614) and later works.

A critical edition with the variant readings of the little studied text of *De aequitate*, has become available fairly recently<sup>10</sup>. I will first give a summary of this text.

#### - contents

The essay opens with a formulation of the problem: it is generally said that justice exists in the observance of the laws, whereas equity (*aequitas*), indulgence (*indulgentia*) and ease or facility (*facilitas*) would seem to exist in the non-observance of laws and would therefore

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<sup>7</sup> Briefw. I, p. 391: "*Qaestionem peri epieikeias memini me quibus thesibus complecti, quarum exemplum apud Patrem puto exstare. Si is non habet schedas meas percurram. Est enim argumentum late patens et quod ignorare non debeas.*"

<sup>8</sup> Feenstra & Scholtens, op. cit., p. 204-205. They read into the passage from the quoted letter that Grotius distances himself from ("neemt afstand van") his earlier theses, which contrasts with the importance Grotius later possibly attached to the piece by considering it to form the preface to the Inleidinge (if that is what may be legitimately concluded from the title appearing above the Wolfenbüttel manuscript). In my opinion, however, the letter plainly considers the subject-matter important; were Grotius dissatisfied with the things he had written in the piece he referred to, then he would not have recommended it to his brother Willem. Only a time distance is traceable in the letter.

<sup>9</sup> This terminological argument is also presented by Feenstra & Scholtens, p. 204 note 17. In a letter to his brother Willem, though, Grotius speaks of "*Gentium iure primario, non positivo*", Briefw. I, p. 500.

<sup>10</sup> Feenstra & Scholtens, op. cit., pp. 222-228.

seem to be incompatible with justice. It is necessary for the good man - and for the jurist in particular - to know how these three concepts should be understood in terms of what they have in common and in what they are to be distinguished (paragraph 1)<sup>11</sup>.

Grotius recognizes that the term *aequitas* is used in a variety of senses. Sometimes it is used to describe the whole of law (as in the expression which calls "iurisprudentia" the "ars aequi et boni"), sometimes it signifies natural law, and sometimes matters which are not defined exactly in a legal rule but left to judgment in the particular instance. Sometimes the term is used in the context of a civil law which is closer to natural law than some other law, such as praetorian law and jurists' interpretations ("et quaedam iurisprudentium interpretationes") (paragraph 2).

Then Grotius gives a definition of equity:

"But properly and more specifically speaking, equity is a virtue of the will correcting where a rule is deficient because of its universality."<sup>12</sup>

*Aequum* is that in which a law is corrected ("Aequum autem est id ipsum quo lex corrigitur")<sup>13</sup>. For something which is always the same cannot suit unequal things; and as the matters of reality are always unequal and the law is always the same, it must be the work of another virtue to render to unequal things their equality ("...alia virtute opus esse quae inaequalibus rebus suam praestet aequalitatem"), which is *aequitas* or *epieikeia* (paragraph 3).

*Aequitas* is a virtue of the will, while the virtue to understand what is *aequum* is called *eugnomosyne*, or *aequiprudentia*. The latter relates to the former as *iurisprudentia* to *iustitia* (paragraph 4)<sup>14</sup>.

That we really need this virtue Grotius demonstrates as follows. The uncertain and lubricious character of man could not direct him to the end to which true nature leads without strict rules which are taken from the principles of this nature itself ("ex ipsis naturae principiis desumerentur"). these rules are limited in scope in order to force men to observe them, while the subject-matter of things and actions is unbounded ("regulae ad coercendos homines finitae esse deberent, materia

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<sup>11</sup> I follow the paragraph numbering of Feenstra & Scholtens; their critical edition of *De aequitate* with the variant readings is in *op. cit.*, pp. 222-228.

<sup>12</sup> Par. 3: "Proprie vero et singulariter aequitas est virtus voluntatis correctrix eius in quo lex deficit ob universalitatem." Cf. Aristotle, *Nic. Eth.*, 1137 b 2-8, quoted by Grotius amongst other places in *Annotationes ad Matthaeum xii, 3*, Op. Th. II-1, 123 a 51.

<sup>13</sup> Cf. Aristotle, *Nic. Eth.*, 1137 b 27-28.

<sup>14</sup> Cf. *De iure belli* II, XVI, xxvi, 1: "Diudicandae voluntati ex naturali ratione Aristoteles, qui hanc partem accuratissime tractavit, propriam virtutem in intellectu *gnomen*, sive *eugnomosyne*, id est *aequiprudentiam*, in voluntate vero, *epieikeian*, id est *aequitatem*, quam sapienter definit, correctionem eius in quo lex deficit ob universalitatem."

autem ipsa rerum atque actionum *infinite*"). From this it follows that much can occur which does not fit the rules. In these cases we ought not to follow the rules but the envisaged intent and purpose ("mentem atque propositum") of whomever made the rules, i.e. we must order everything according to the principles of nature ("quod quidem erat omnia dirigere ex naturae principiis")<sup>15</sup>. Recourse is made to the principles of nature to supplement from the infinite what the finite lacks ("unde ad ipsa naturae principia recurrendum fuit, ut ita suppleretur ex infinito id quod finito deerat"); for the finite rule of infinite things cannot be perfect ("perfecta enim norma infinitae rei finita esse non potest") (paragraph 5).

After thus describing the nature of equity, Grotius deals with the question to which rules it applies.

It applies - says Grotius - not only to civil laws, but also to rules of the law of nations (*ius gentium*) and the very notions of natural law which, even if neither written nor formulated by law, are conceived of in a general way, such as "one should return what has been entrusted to one's care" - which does not apply to a madman depositing his sword (paragraph 6)<sup>16</sup>.

Even divine prescriptions and forbearances do not escape from the working of equity; and this is not because of some failure on the part of the author of the rule, as happens so often in human laws, but because of the faultiness of the subject-matter ("ex materiae defectu") which does not suffer definite regulation:

"Wherefore it is in no manner absurd to say that even the divine laws are supplemented through notions impressed by God himself in nature; thus 'thou shalt not kill' is supplemented with 'unless to protect life or to serve the public cause'". (paragraph 7)

Only to the first principles of nature (*prima naturae principia*) and to laws which merely enjoin a virtue and forbid a vice, does equity not apply: the former, because what is supplemented must come from a higher ranking law, while the first principles of nature are the highest ranking; the latter, because the virtues and vices are infinite and in that sense do not lack because of their universality (paragraph 8). Furthermore, equity applies to legal rules of lower jurisdictions, within the family, the commands of masters, to contracts, testaments and even oaths. It does so in two manners: 1) by correction of the words through reference to the presumed intention of parties ("ex praesumpta mente"), and 2) where the intention is clear, the rule that 'commands,

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<sup>15</sup> Cf. Aquinas, Summa Theol. II-II, quest. 120, art. 1.

<sup>16</sup> Cf. De iure belli II, XVI, xxvi, 2. This example can be found in Aquinas, Summa Th., II-II, q. 120; and II-I, q. 94, 4. Feenstra & Scholtens p. 235, note 40 remark that Grotius need not have taken this example from Aquinas II-II, 120, because "it can be found at many other places, which all go back to Cicero, De officiis III, 25". This does not mean that Grotius took it from Cicero. It is found in the famous passage in Plato's Republic (I, 331 c) on Simonides' definition of justice, - which Grotius refers to regularly (e.g. De iure belli II, XVI, i, 5 & II, XI, i, 5, De iure praedae p. 19, Briefw. I, p. 500) and also in Xenophon, Memorabilia IV, 2, a caput referred to twice in De iure belli.

oaths, contracts and testaments are to be observed' does not apply in so far as the intention goes against a law of higher rank and order (paragraph 9). Grotius points out that equity can also be applied to punishments; and not (as some maintain) only to diminish them but also to increase a punishment (paragraph 10).

Equity is of no help for laws which prescribe what is unjust ("quae inhonestum quid simpliciter praecipiant") or forbid what is an imperative duty ("quod ex officio necessario faciendum est"), for laws without binding force have no need of a remedy. If doubt has arisen as to the compatibility of a legal rule with natural law (given the evident intention of the legislator), equity is not an applicable solution either, since such a rule is not deficient because of its universality (paragraph 11).

The specific operation of equity is such that a legal rule is not nullified by equity but only declared inapplicable in a particular instance. The peculiarities of a specific case can entail that two contradictory rules may seem to be applicable. Which of the two will outweigh the other cannot be easily defined; that will depend on the natural principles which teach that rules which enjoin something have priority over rules which permit something; that rules which forbid have priority over rules that enjoin; that criminal laws have priority over other laws; that special rules have priority over general rules; that rules which require immediate action have priority over rules which tolerate postponement in their implementation; that with divine laws, those that concern our neighbours have to yield to those concerning God; that those which concern ceremony have to yield to ethical rules; with human laws, those which concern the private interest have to yield to those which concern the public interest <sup>17</sup>.

Thus, the rule that certain crimes deserve capital punishment, must so be understood that this punishment is not executed if a substantial part of the population, or someone extremely useful to the nation ("unus eximie necessarius") has transgressed the law (paragraph 12) <sup>18</sup>.

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<sup>17</sup> Cicero, *De inventione* II, 145 ff. gives a similar summing up of rules of priority; priority lies, according to him, with the law dealing with the more important matters "hoc est, ad utiliores, ad honestiores ac magis necessarias res pertineat"; then with the more recent law; then with the law which enjoins; with the law which carries the greater punishment; the law that forbids is to be preferred over the law which enjoins; the special law over the general law; the laws which require immediate action over the laws which suffer postponement. In *De iure belli* II, XVI, xxix Grotius says that these "regulas quae spernendae neutiquam sunt" but prefers to order them differently: "Ut quod permittit cedat ei quod iubet [...]. Ut quod faciendum est certo tempore ei praeferatur, quod quovis tempore fieri potest: unde sequitur ut plerumque pactio vetans vincat iubentem [...] nisi aut tempus sit expressum, aut iussio tacitam prohibitionem contineat. Inter eas pactiones quae supradictis qualitatibus pare sunt, ut praeferatur quod magis est peculiare, et ad rem propius accedit: nam solent specialia efficaciora esse generalibus, et in prohibitionibus, ut quae poenam adiunctam habet ei quae poena vacat, et quae maiorem poenam minatur ei quae minorem, praeferatur. Tum vero ut superet quod causas habet, aut magis honestas, aut magis utiles." Cf. also *De iure praedae*, p. 29.

<sup>18</sup> If the hypothesis of *De aequitate* being written at Loevestein is borne in mind this (footnote continued)

Whereas this specific operation of *aequitas* is explained by the fact that nobody can be bound to do contrary things, Grotius says that it can also be explained from the fact that nobody can will contrary things to be done. And the *vis obligandi* does not come from words, which are only signs of the mind, but come *ex ipsa mente et voluntate*; hence it must be the legislator's will to have his laws observed only to the extent possible (paragraph 13).

For this reason *ius strictum*, to *akrobodikaion*, can in so far as it is opposed to equity not be called "law"; it can only be called 'law' in the equivocal sense in which we call a man on a painting a man (paragraph 14)<sup>19</sup>. Equity can be applied by all and everyone, for it is part of justice - albeit with some distinction. For if a case does not suffer delay, while there is doubt whether equity is to be applied, the letter of the law must be followed if ratiocination does not clarify the matter; if the case tolerates delay, the legislator must be consulted (paragraphs 16-18).

Grotius continues with a discussion of *indulgentia* which is commonly called *dispensatio* or in Latin *lege solutio*.

Dispensation is a virtue of the will of him who has the capacity to remove the binding power of the law with respect to single or specific persons, actions or things in so far as this is possible without impairing justice or the public interest (paragraph 19). This virtue is distinct from equity, because it lifts the binding force from an otherwise binding law, while equity establishes that a law was not binding in the first place (paragraph 21)<sup>20</sup>. Following the "subtiliter loquentes"<sup>21</sup>, he

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(footnote continued)

last sentence may perhaps be taken to refer to the events which brought Grotius to Loevestein - the execution of Oldenbarnevelt and the life sentence of Grotius. A similar idea is expressed in the last sentence of paragraph 12 is found in *De iure belli* II, XX (on punishments), xxxvii, where Grotius says: "Nam persona eius qui fecit [sc. peccatum] ad aptitudinem illam [sc. poenae, L.B.] iudicandi maxime pertinet, et persona eius qui partitur interdum aliquid confert ad aestimandam culpae magnitudinem." The public interest outweighing the private is not mentioned explicitly here.

<sup>19</sup> Haggenmacher (1983), p. 584 is incorrect in his remark: "Contrairement à l'opinion de C. van Vollenhoven ['Framework', pp. 128-129], l'expression *ius strictum* et ses équivalents ne désigne jamais la *iustitia externa* par opposition à la *iustitia interna* [...]. Ce n'est qu'à partir de la fin du XVIIe siècle, avec Pufendorf, puis surtout Thomasius, que le droit 'strict' est peu à peu identifié avec un ordre de contrainte 'externe'."

<sup>20</sup> Grotius adds that this distinction "a viris doctis quibusdam non recte negatur". Probably he referred to Fernandus Vasquius, whose *Controversiae illustres* I, c. 24 et seq. Grotius mentions at the end of *De aequitate* amongst the authors who "tractarunt locum de aequitate"; see Feenstra & Scholtens, p. 236. In *De iure belli* II, XX, xxvii Vasquius is censured by name for saying "iustam causam dispensandi .. esse eam tantum, de qua legis auctor consultus dixisset, extra mentem suam esse eam observari. Non distinguit enim inter epieikeian quae legem interpretatur, et inter relaxationem. [...] Aliud enim est legem aut probabili aut etiam urgente causa tollere, aliud declarare factum ab initio mente legis non fuisse comprehensum."

(footnote continued)



distinguishes dispensation and equity in their operation as "cessare negative" and "cessare contrarie"; for legislative intent may conflict with a case which according to the letter of the law comes under a rule, which consequently ceases to operate (cessare contrarie), or it may cease without such a conflict between a case at hand and the *mens et ratio legislatoris* (cessare negative). The example Grotius gives of the former is the rule "who kills a man shall be killed by the sword", which will cease to apply for conflicting with the legislator's intention in the case of killing in legitimate self-defense; the example given of the latter is the rule "no person shall be magistrate before the age of twenty-five years", the reason of which ceases to apply in the case of a young man who does not lack the prudence and authority of persons older than twenty-five years of age. "Yet nothing forbids that this young man be excluded when there are older men of equal capacity. Even if the legislator did not have this young man in view or write the law for him, yet he would rather comprehend him than abstain from giving a useful law, for [otherwise] an anxious inquiry into the wisdom of individuals would be needed, which would render legislation superfluous." In the former case (cessare contrarie) there is no obligation, whereas in the latter case (cessare negative) the obligation of the law remains; to the former applies equity, to the latter dispensation (paragraph 22)<sup>22</sup>.

Grotius adds that legislative intent and the reason of a law can cease to apply, yet without being in conflict with the concrete case ("sine pugna tamen"), in two manners: *specialiter*, if in some specific case the

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(footnote continued)

<sup>21</sup> Feenstra & Scholtens, op. cit., p. 231 nt. 12 point out that Grotius most probably derived his distinction of cessare contrarie et negative from the commentary of Caietan in the latter's edition of Aquinas' *Summa Th.*, II-II, q. 120, and not from Suárez as H. Schotte, *Die Aequitas bei Hugo Grotius*, 1963, p. 81 nt. 25, had suggested.

<sup>22</sup> In de Inleidinge I, 2, 23 Grotius brings up the same question as in effect is at the basis of De aequitate: "As it was said before, obligation is amongst the effects of the law, and civil laws are usually framed in general terms, although the reason (of such laws) does not always seem to apply equally well to specific cases; which is to be explained from the diversity of human affairs which renders them quite uncertain, whereas the law has to establish something for certain; hence, it follows that dispute often arises over whether such a law is always binding; which should be answered with some distinctions." Firstly, Grotius says, laws of which the ratio adaequata has ceased to exist, must be understood to have ceased to exist as such "for the legislative intent has ceased"; but if the reason has not ceased in general, then Grotius distinguishes between the case of cessatio per contrarietatem and the cessatio negativa. In the last case, "it should be seen whether the law judged by standards of prudence has [the avoidance of] a general danger in view, or whether the law assumes that something has been done for certain which has in reality not been done." In the first case the law is binding on everyone, in the second it binds those who have no certain knowledge of the actual facts, but does not bind in conscience those who do have certain knowledge of the actual facts, "which distinction should be observed not only for the instruction of an upright conscience, but also for the settlements of many disputes". Equity and dispensation are not used as terms in this connection.

proper motive of a law is absent; or *promiscue*, if the requirements of legislative intent are fulfilled when the law is observed not in all cases but in most. Examples are the rule that "all citizens have to stand on guard", in regard of which it is not very important if a few citizens are exempted from this duty; and the rule that "foreigners cannot fulfill the office of a magistrate", "for it will not do great harm if on occasion a competent foreigner is nevertheless admitted" (paragraph 23)<sup>23</sup>. Yet in most cases the rule should be observed, for removing its binding force in general (*in universum*) is the abrogation of a law; indulgence is the removing of binding force *particulariter aut singulariter* and is therefore sometimes considered a privilege. Properly speaking *lex* and *privilegium* relate to each other in the same manner as abrogation and dispensation (paragraph 26)<sup>24</sup>.

Grotius emphasizes that indulgence is a virtue which shares some traits with beneficence, because it delivers man from a certain not entirely necessary burden (paragraph 24).

Indulgence may concern human and divine laws, but there can be no dispensation from the first principles of nature and what follows from these necessarily (*naturae prima principia et quae inde necessario fluunt*), such as the moral precepts of the decalogue - for the *mens et ratio* of these laws do not cease in any respect (*in nullo*). Grotius emphasizes that God does not grant dispensation of these laws: "in his Deum dispensare negamus unquam"; when he commanded Abraham to kill Isaac and when he commanded the Israelites to spoliates the Egyptians, this was not by way of dispensation. The justification which Grotius offers for this view is substantially the same as he gives in *De iure belli* I, I, x, 6: "For this was not theft, but to receive from the Lord. And the law not to kill contains in itself the exception of the just authority."<sup>25</sup>

Grotius further adds that the ratio of the law forbidding fornication (*rationem legis prohibentis inuuptos concubitus*) cannot cease in special cases<sup>26</sup>. The same is true for the law not to lie - "even if many think differently". In the margin of the Leyden manuscripts Grotius remarks,

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<sup>23</sup> A corrupt version of *De aequitate* has misled Schotte, p. 80, to interpret the distinction of *cessare specialiter* and *promiscue* along the lines of the distinction between equity and dispensation; in the edition added to *De iure belli ac pacis*, Amsterdam 1735 (TMD 605) - based on Blanckaert's edition of 1680 (*supra* note 3) - the words 'sine pugna tamen' are missing.

<sup>24</sup> Cf. *Inleidinge*, I, 2, 23: "Want indien de eenige ende wel-bekende reden des wets in 't algemeen ophoud, zo moet de wet verstaen werden dood te zijn, also des wet-gevers wille alsdan ophoud. Over-sulcks alle wetten alleen op oorlog gegrond, houden op in tijd van vrede, oock sonder wederroeping."

<sup>25</sup> *Supra* note 102 at p. 132.

<sup>26</sup> In *De iure belli* II, XX, xlii, Grotius says that one should not arbitrarily enumerate amongst the things forbidden by nature "ea de quibus id non satis constat, et quae lege potius divinae voluntatis interdicta sunt, in qua classe forte ponere liceat *inuuptos concubitos* [...]"; it will, of course, also in *De iure belli* nevertheless by nature (in a larger sense) have remained an objectionable thing for Grotius.

moreover, that the rules on the undivorcibility and unity of matrimony could indeed be dispensed from by God. (paragraph 25). Dispensation can only be granted by one who has legislative power (paragraph 27). God has this power in all kinds of laws; in the divine and natural laws no man (*nemo*) has this power, nor in rules concerning primary international law (paragraph 28). In secondary international law dispensation is rare because dispensation can hardly appear from the consensus of nations ("In iure autem gentium secundario vix est ut dispensetur, quia de consensu gentium in hoc ipsum apparere vix potest", paragraph 29)<sup>27</sup>.

Dispensation can be granted from civil laws by the sovereign and also by lower magistrates in so far as the latter can make and abrogate laws; in domestic laws the *paterfamilias* has the dispensatory power (paragraph 30).

Dispensation is used very much *circa leges poenales*. It is therefore - says Grotius - important to know that dispensation cannot be rightfully given with regard to delicts which have a punishment which is by nature commensurate to the offence ("quae poenam ex natura sua commensuratam habent") such as the death penalty in cases of murder. With regard to other naturally illicit delicts, their punishment can be changed in so far as the principle of equitable proportion and the *ratio* of the public example is not neglected; but punishment cannot be set aside altogether ("tolli autem omnino non posse"). Similarly, the punishment of acts which are *civiliter illicita* can be dispensed from, "si scilicet non sint tales quae semper et in omnibus necessario servandae sunt" (paragraph 31). Dispensation granted without rightful ground ("non iusta de causa") has no force if it is granted in contravention of the *ius naturae, gentium aut divinum*; yet judges cannot enforce the law from which the sovereign has dispensed, for all coercive force depends on the sovereign and cannot be exercised against his will. But dispensation granted against civil or domestic law is valid and is to be considered as a law issued with an exception; however, the person who consciously induces or asks for an unrightful dispensation commits a sin (paragraphs 31-32).

Grotius next discusses *facilitas*.

*Facilitas* (ease, gentleness) is a virtue of the will inclining to not using a power, competence or right granted by law, for the sake of peace and humanity. Men who do not rigidly insist on their rights are therefore called gentlemen (*faciles*) (paragraph 35).

This virtue is fitting for everyone having a creditor *ex contractu aut delicto*. But it is most fitting in cases of those laws which are furthest removed from natural equity ("circa leges longius recedentes ab aequitate naturalis"), such as the law of war, prescription etc. (par.36).

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<sup>27</sup> Cf. *Inleidinge* 1, 2, 12.

<sup>28</sup> Cf. Aristotle, *N.E.*, 1137 b 34 ff. where he defines the equitable man, *epieikes*, as the "one who by choice and habit does what is equitable, and who does not stand on his rights unduly, but is content to receive a smaller share although he has the law on his side".

*Facilitas* in connection with punishment ("circa poenas alicui debitas") is called *clementia* (paragraph 37).

Having arrived at the end of his exposition, Grotius returns to the original statement of the problem and concludes that none of the virtues discussed stand in opposition to justice: equity not, because justice means obeying the laws, not according to the letter of the words but according to the spirit (*mens*) of the legislator and the true order of the laws ("iuxta verum ordinem legum"); indulgence and dispensation neither, because the obligation of the law yields where the legislator has dissolved; *facilitas* not, because what the law permits, it does not command (paragraph 38).

- the relation of *De aequitate* to Grotius' other works

In order to assess the extent to which *De aequitate* is a representative tract for Grotius' position on the matter we are investigating, it is necessary to establish whether Grotius adhered to different views concerning equity, indulgence (dispensation) and *facilitas* in other works.

- terminology

In his study of *aequitas* in Grotius' works, Schotte has remarked that the concept of *facilitas* as it is distinguished from *aequitas* in *De aequitate* is not used in any other of Grotius' works; "aequitas" and "aequum" are the terms used instead<sup>29</sup>. I may add that the term *facilitas* is used in a different sense and in a pejorative context in *De iure belli* when he says that *facilitas* and *consuetudo* are the *invitamenta praecipua ad peccandum*<sup>30</sup>.

One exception to this state of affairs as concerns the term *facilitas* is to be found in Grotius' annotation to 2 Cor. 10, 1<sup>31</sup>:

"*Epieikeia hic bonitatem significat [...], quomodo & epieikeis sunt viri boni et faciles.*"<sup>32</sup>

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<sup>29</sup> H. Schotte, p.49; e.g. *Adamus* vs. 1959-60: "praetuli clementiam/ iuris rigoris" to which Grotius refers in the Index under 'Aequitas rigori iuris praeferenda'.

<sup>30</sup> *De iure belli*, II, XX, xxxiv and xxxv.

<sup>31</sup> Schotte, *op. cit.*, p. 48 mentions this annotation in passing but does not relate it to Grotius' use of the term *facilitas*.

<sup>32</sup> *Op. Th.* II-II, 851 b 47-50.

Yet this use of *faciles*, which agrees with *De aequitate*, paragraph 35, is not so decisively specific and dominant that it recurs elsewhere in the *Annotationes* at places where it would seem to be appropriate<sup>33</sup>. For the term *indulgentia* Grotius uses in other works different terms as well. Preference is generally given to the term *relaxatio legis* - a preference witnessed particularly in the *Defensio fidei*, but also in *De iure belli*<sup>34</sup>. Other words which are used are, of course, *dispensatio* and *dispensare*, which - as Grotius says - are synonym to "legibus

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<sup>33</sup>Ann. ad 1 Pet. 2, 18. The verse reads: "Servants, be subject to your master with all fear, not only to the good and gentle (*agathois kai epieikesin*)..." The Vulgate, which Grotius presents, renders "non tantum bonis et modestis"; Grotius adds by way of elucidation, "*bonis ac lenibus, ἐπιόις*, ut Homerus loquitur" (Op. Th. II-II, 1101 b 53-55). In Ann. ad 1 Tim. 3, 3 where in the Epistle it is said of a bishop that he should be *μη πλεκτο* all' *epieikē* (Vulg. 'non percussorem sed modestum'), Grotius quotes Aristotle's description of the *epieikes* (N.E. 1138 a 1) as "one who does not stand on his rights unduly, but is content to receive a smaller share although he has the law on his side" (Op. th. II-II, 966 b 31-35). This annotation compares curiously with Ann. ad Phil. 4, 5: "*To epieikes id est, epieikeia* Actor. XXIV, 4. 11 Corinth. X, 1. In Glossario: *epieikeia*, *mansuetudo*, *clementia*, *modestia*. Non enim hic sumitur tam arcto significatu haec vox, quam eam sumit Aristoteles, sed *bonitatem* denotat, partim cedentem multum de suo jure, partim occasiones quaerentem bene faciendi aliis" (Op. Th. II-II, 919 a 13-20). The discrepancy between the two latter annotations can be explained away by distinguishing between Aristotle's definition of *epieikeia* (N.E. 1137 b 27 ff., "a correction of law where the law is deficient because of its universality") and his definition of the *epieikes* (N.E. 1137 b 35 - 1138 a 1 ff., "one who by choice and habit does what is equitable, and who does not stand on his rights unduly, but is content to receive a smaller share although he has the law on his side"). Also it should be noted that modern scholars consider *aequitas/epieikeia* in the sense of *bonitas* to be of Byzantine and christian origin, as distinguished from a Roman origin, see Pringsheim, 'Bonum et aequum', pp. 173-223; yet Pringsheim does not consider it impossible to say: "Die Linie, die von der griechischen Philosophie zur byzantinischen Lehre führt, ist deutlich erkennbar", p. 151. Schotte, pp. 47 ff., however, considers *aequitas/epieikeia* in this sense - quoting Grotius' annotation to Phil. 4, 5 - 'unAristotelian', and leaves the discrepancy which this view would seem to create with the Ann. ad 1. Tim. 3, 3 unclarified. Schotte's somewhat schematic distinction of the various meanings of *aequitas/epieikeia* according to their historical origin is unconvincing when he gives as one of "die zahllosen Beispiele, in denen der Niederländer die Bedeutungen miteinander vermengt oder wahllos aneinanderreicht", the annotation to the word *iustus, dikaios* in Matt. 1,19: "Propius autem huc pertinet, quod Aristoteles ait [...] aequum [...] esse iustum aliquod melius iusto altero". Schotte reproaches Grotius (p.56-7) "dass er an einer der klarsten Stellen byzantinischen Aequitaseinflusses anschliessend ohne Zögern auf Aristoteles hinweist"; perhaps Schotte overlooked that the description of *aequum* in the annotation is an actual quotation from N.E. V,x,8, while it seems quaint to consider the word *iustus* in Matthew a clear example of Byzantine *aequitas*-influence.

<sup>34</sup>E.g. *De iure belli* II, XX, xvii; chapter III of the *Defensio fidei* (concerning Christ's satisfaction) bears the title "Qualis sit Dei actus in hoc negotio, & ostenditur esse legis relaxationem, sive dispensationem". In the chapter Grotius speaks of "indulgentia seu temperamentum legis, quam indulgentiam hodie dispensationem vocamus" (Op. Th. III, 310 a 61-62).

solvere"<sup>35</sup>. The term *clementia*, in *De aequitate* associated with *facilitas* and not with *indulgentia*, is in other works used in a less specific or in a different technical sense which also covers cases of *dispensatio*<sup>36</sup>. In *De iure belli* clemency in its widest possible sense is sometimes associated with *poenam ignoscere* and *veniam dare*<sup>37</sup>. Perhaps we ought not to linger over questions of terminology too long. Grotius reproached the Stoics for the artificial distinction they made between 'parcere' and 'ignoscere':

"Here as elsewhere [...] a great part of the Stoics' disputations is spent over words - which a philosopher ought especially to guard against."<sup>38</sup>

Taking Grotius' advice to heart, it is more important to see whether there exist substantial differences between *De aequitate* and other works by Grotius.

There is one area in particular where this seems to be the case. This concerns the *maximus usus dispensationum*, that is, with regard to penal laws, *circa leges poenales*.

In *De aequitate*, paragraph 31, Grotius states that no dispensation can be given rightfully ("dispensationem iustam esse non posse") in delicts which carry a naturally commensurate punishment, such as the death penalty in case of murder. Punishment can be mitigated in other cases of delicts *naturaliter illicita*, however, punishment can never be dispensed with entirely ("tolli autem omnino non posse"). So there are two things here argued, firstly, that there is in some cases a necessary relationship between a delict and the measure of punishment thereof; secondly, that all natural delicts must necessarily be punished in some manner or other, even if in mitigated form.

These points contrast strongly with Grotius' views on punishment as expounded in the *Defensio fidei*, and sustained in the *Inleidinge* and *De iure belli ac pacis*.

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<sup>35</sup> *De iure belli* II, XX, xxvi and xxvii.

<sup>36</sup> *Defensio fidei*, Op. Th. III 309 a 19-22: "At virtus quo de dominio aut de credito nostro cedimus, liberalitas vocatur, non clementia: illa vero quo impunitas conceditur, non liberalitas, sed clementia." Cf. *De iure belli* II, XX, xxii and xxxvi.

<sup>37</sup> *De iure belli* II, XX, xxi; nevertheless it may be said that in *De iure belli* clementia is used more in relation to the mitigation of punishment rather than to the entire dispensation of punishment.

<sup>38</sup> *De iure belli* II, XX, xxiii: "Nimirum hic et alibi [...] magna pars Stoicarum disputationum citra voces consumitur, quod Philosopho apprime cavendum est."

- Punishment in the *Defensio fidei*

As I mentioned before<sup>39</sup>, Grotius' aim in writing the *Defensio fidei* was to refute Socinus' claim that Christ's death in satisfaction for men's sins is an idea repugnant to reason. In the course of this refutation, Grotius considers first what God's rôle is in accepting Christ's satisfaction, and next what the nature of God's action is in this whole matter (chapters II and III).

In the discussion of God's rôle, Grotius rejects the view that God as offended party is creditor of the punishment, and is for that reason the one to punish or to remit punishment. The right to punish does not belong to the competence of the offended party as such<sup>40</sup>, although with princes (or God) it may be that a prince (or God) is both the person who punishes (or remits punishment) and the offended party, e.g. in case of lese-majesty - but then the prince (or God) still does not punish *qua* offended party, but as prince<sup>41</sup>. Moreover, the offended party cannot even properly be said to be the creditor of the punishment<sup>42</sup>. A creditor must in this context be defined as a 'person to whom something is owed for whatever reason'<sup>43</sup>. But what by nature is owed *ex delictis* is quite different from punishment<sup>44</sup>:

"For the natural cause of a *debitum* is not primarily and per se the wickedness of an act, but that I am wanting in something

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<sup>39</sup> *Supra* pp. 129-130.

<sup>40</sup> Cf. also *De iure belli* II, XX, iii, 1: "Sed huius iuris subjectum id est cui ius debetur, per naturam ipsam determinatum non est. dictat enim ratio maleficum posse puniri, non autem quis punire debeat: nisi quod satis indicat natura convenientissimum esse ut id fiat ab eo qui superior est: non tamen ut omnino hoc demonstrat esse necessarium."

<sup>41</sup> *Defensio fidei*, Op. Th. III, 307 a 44 ff.: "Si punit Deus & poenam tollit ut Princeps, non ergo ut pars offensa. Non potest enim idem duobus diversis tribui quae talibus. Interim non negamus Deum, qui peccata punit, vel impunita dimittit, recte dici partem offensam; sed punire, aut impunitum dimittere, ei tribui quae pars offensa est, negamus. Notissimum enim est, posse aliquid de aliquo dici quod ei non conveniat quae tali: sicut Iuriconsultus canit non quae Iuriconsultus sed quae Musicus."

<sup>42</sup> *Id.*, 307 b 57-61: "Nec negamus jus aliquod ipsi competere, non modo ad actum per se exercendum, sed etiam ad obligandum alterum ut exercent: hoc est, partem offensam non esse in poena vere creditorem."

<sup>43</sup> *Id.*, 308 a 2-3: "Creditores sunt quibus ex qualibet causa debetur."

<sup>44</sup> *Id.*, 308 a 6 ff.: "Ius naturale consistit in ipsa rerum inter se adaequatione; tale ergo est & naturale debitum. [...] Natura vero ex facto tuo mihi nihil aliud debetur, ac ne deberi quidem potest, quam aequalitas secundum rem, hoc est, ut quantum mihi per te abest, tantumdem reddatur. [...] Sicut enim reddere teneris mutuum aut depositum, ita & rem furto sublatam. Et hactenus naturaliter etiam ex delicto creditores fieri possumus. [...] Ex quibus omnibus apparet id quod ex delictis naturaliter debetur diversum esse poena."

("quia mihi aliquid abest"); for even if something is wanting without any wickedness, for example because it has been given in deposit, it must no less be restored to me. And the cause of punishment is the wickedness of an act, and not that I am wanting in something. For even if nobody is wanting in anything, still an act is punished rightly which is unaccomplished and only inchoate, as is the case with grave offences. A no less significant difference is that the manner and quantity of a restitution is determined by the nature of the thing involved; but a punishment, even if it has its own kind of natural cause, can nowise be determined but by an act of free will. Moreover, without condemnation thereto, a punishment consisting in giving or doing something is not ordinarily owed; but restitution is always owed. The restitution of a debitum is inheritable, but punishment is not."<sup>45</sup>

The nature of punishment is further explicated when Grotius next comes to consider the nature of God's action with regard to Christ's satisfaction, and this action - says Grotius - consists in a *relaxatio seu dispensatio legis*. This is argued as follows.

On the basis of Genesis II, 17 and Deuteronomy XXVII, 26 (to which Galatians III, 10 refers) one could formulate God's sanction in the form of the following law: "Every man that sins suffers the punishment of eternal death."<sup>46</sup> But this law is not always applied, because we know from the revelation contained in the Gospel that the faithful are not condemned but liberated from death and are redeemed from the curse of the law (Rom., VIII, 1, 2 and Gal. III, 13). The older law, however, is not abrogated, for the unfaithful still suffer the sanction of that law (John II, 36; I Thess. II, 16). Nor yet are we dealing with an interpretation *kal' epieikan* of the law, for that would mean that a certain fact or person was not comprehended under the obligation of the law in the first place - in the manner that religious works and works of mercy are understood not to fall under the prohibition to work during the Sabbath - whereas all men (because they all are *conclusi sub peccatum*, Rom. XI, 32; Gal. III, 22) are still said to be 'children of ire' (Eph. II, 13), i.e. they are still bound by the sanction of the law. Hence,

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<sup>45</sup> Id., 308 a 43 ff.: "Causa enim naturalis istius debiti est primo & per se non vitiositas actus, sed quia mihi aliquid abest: nam etiamsi citra vitium absit, ut in deposito, non eo minus mihi restitutio debetur. Causa autem poenae est ipsa actus vitiositas, non autem quod aliquid mihi absit. Nam etiamsi nihil absit cuiquam, recte actus punietur, ut in gravibus delictis, quae inchoata tantum & non consummata sunt. Est & aliud discrimen non minus insigne, quod restitutionis modum & quantitatem ipsa rei natura determinat: poena etsi in genere suo causam habet naturalem, aliquo modo (ut infra dicemus) determinari tamen non potest, nisi per actu liberum voluntatis. Adde quod ante condemnationem, poena, quatenus in dando aut in faciendo consistit, non debetur ordinarie: at restitutio omnino debetur. Restitutionis debitum in haeredem transit, poena non transit."

<sup>46</sup> Id., 310 b 11-13: "Perinde ergo se res habet, quasi in hunc modum lex esset concepta: Omnis homo peccans poenam ferat mortis aeternae."



says Grotius, we must conclude that in the evangelical liberation from death, we have to do with a relaxation or dispensation of the law<sup>47</sup>. Once Grotius has established this point he raises the question whether this penal law is *relaxabilis*,

"for there are laws which are *irrelaxabiles* either absolutely or hypothetically (*ex hypotheseos*). Absolutely *irrelaxabiles* are those in whose opposites inheres an immutable depravity by the nature of the matter, such as the law forbidding perjury or forbidding to bear false witness against relatives. Just as we say God cannot lie (Heb. VI, 18, or deny himself, thus we shall say correctly that God cannot undertake, approve of or legitimate wicked actions. Laws are hypothetically irrelaxable which carry an explicit clause of what Scripture calls an 'immutable or irredeemable counsel'. All positive laws can absolutely be considered *relaxabiles*. And one ought not rashly to suppose a hypothetical necessity where no explicit clause to that effect exists. [...] God seriously indicates that he wills the law to be valid and binding, yet *salvo iure relaxandi*, which is inherent in the nature of positive law and which cannot be understood to have been abdicated from by any sign of God."<sup>48</sup>

Concerning the hypothesis *ex definito decreto*, Grotius says that this can make dispensation impossible in two manners, to wit, if an oath is added to a law or if a promise is contained therein (cf. Heb. VI, 13-18),

"for an oath is a sign of the immutability of that to which it is added; and a promise gives a right to a party, which cannot be taken away from that party without injustice. Because although one is free to promise, yet one is not free to break a promise; for this must be referred to the things which contain in themselves an immutable depravity."<sup>49</sup>

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<sup>47</sup> Id., 310 b 14-39.

<sup>48</sup> Id., 310 b 40 ff.: "Quaeri hic possit, an lex ista poenalis sit relaxabilis. Sunt enim leges quaedam irrelaxabiles, aut absolute, aut *ex hypotheseos*. Absolute irrelaxabiles sunt, quarum oppositum immutabilem in se pravitatem continet ex rei ipsius natura, ut puta lex quae vetat pejerare, aut falsum testimonium contra proximum ferre. Sicut enim dicimus Deum non posse mentiri, Hebr. VI, 18, aut semet abnegare, II Tim. II, 13; ita non minus recte dicemus, Deum non posse actiones per se pravas facere, aut approbare, aut jus ad eas concedere. *Ex hypotheseos* vero irrelaxabiles sunt leges, quae feruntur ex definito decreto quod Scriptura vocat *tes boules ametatheton* (immutabile consilii), sive *ametanoeton* (non poenitendum), qualis est lex de damnandis his, qui nolunt in Christum credere, Hebr. III, 18. Leges autem positivae omnes absolute sunt relaxabiles: neque ad necessitatem hypotheticam ex definito decreto confutandum est, ubi nota talis decreti nulla exstat. [...] Serio enim Deus ostendit velle se, ut lex rata sit atque obliget, salvo tamen jure relaxandi, quod legi positivae suapte natura cohaeret, neque ullo signo a Deo abdicatum potest intelligi."

<sup>49</sup> Id., 311 a 11-21: "Aliud sane est, si legi positivae adhaereat aut juramentum aut  
(footnote continued)

Next Grotius discusses the objection "that it is right by nature that offenders be punished by such a penalty as will correspond to the delict; hence, a penalty is not subject to free will nor can it be dispensed from."<sup>50</sup> He answers it by distinguishing what is natural properly from what is natural only in a less proper sense<sup>51</sup>, and concludes:

"He who commits an offence is therefore punishable, as follows necessarily from the relation of the offence and the offender to a superior, and this is properly natural. But that all and every offender is punished with such penalty as corresponds to the guilt, this is not necessary *simpliciter & universaliter*; nor is it natural properly, but only rather befitting to nature (*natura satis conveniens*). Hence there is no obstacle to saying that the law which commands this is *relaxabilis*."<sup>52</sup>

The conclusion that this extensive discussion of dispensation leads up to is that God's granting of dispensation from his penal law is nowise repugnant to reason<sup>53</sup>. It is not repugnant because reason does not forbid the granting of dispensation, not even in respect of a law which imposes eternal death for the fall of man in sin - although only grave causes justify such dispensation<sup>54</sup>. In turn, dispensation is not

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(footnote continued)

promissio, quorum utrumque notatur Hebr. VI, 18. Nam juramentum signum est immutabilitatis rei cui adjicitur. Psalm. XCV, 11. CX, 4. Hebr. III, 11, 18. VI, 17. VII, 21; promissio autem jus dat parti, quod ab ea auferri sine injuria non potest. Quanquam ergo promittere est liberum, tamen liberum non est promissa frangere: ideoque id ad ea referri debet, quae immutabilem in se pravitatem continent."

<sup>50</sup> Id., 311 a 25-28: "Ac primo objici potest, justum esse naturaliter ipsos sote puniri poena tali, quae delicto respondeat: ac proinde id non subjacere libero arbitrio, neque esse relaxabile."

<sup>51</sup> Supra p. 59 note 77.

<sup>52</sup> Id., 311 a 45-53: "Quod ergo is qui deliquit poena meretur, eoque punibilis est, hoc ex ipsa peccati & peccatoris ad superiorem relatione necessario sequitur, & proprie naturale est. Ut vero puniatur quisque peccator poena tali quae culpae respondeat, non est necessarium simpliciter & universaliter: neque proprie naturale, sed naturae satis conveniens. Unde sequitur, nihil obstat quo minus lex hoc ipsum imperans sit relaxabilis."

<sup>53</sup> Id., 311 b 6 ff.: "Non est hic omittendum Philosophos veteres ex lumine rationes [my underlining, L.B.] judicasse, nullam esse materiam magis relaxabilem lege poenali. Itaque Aristoteles ton epieike ait esse syggnomonikon, virum aequum esse propensum ad ignoscendum."

<sup>54</sup> Id., 311 b 25 ff.: "Sed hoc non obstat quo minus rationes quaedam fuerint, quae hanc relaxationem possent (ut more humano balbutiam) dissuadere. Hae autem peti possunt aut a natura legum universalium, aut ex propria legis materia. Legibus omnibus commune est, quod relaxando aliquid videtur de autoritate legis deteri. Proprium hujus legis, quod etsi ea lex, ut diximus, inflexibilem rectitudinem non habet, est tamen ipsi rerum naturae atque

(footnote continued)

forbidden, because punishment of delicts is not necessarily and invariably to be inflicted, if we judge by the standards of natural law only<sup>55</sup>. It is this relation between dispensation and punishment, then, which leads to the conclusion that dispensation from punishment can in principle always be given<sup>56</sup>. This conclusion is in direct conflict with what Grotius said in *De aequitate*, paragraph 31.

- punishment in the *Inleidinge*

Grotius' theory of punishment as expounded in the *Defensio fidei* is also to be found in the *Inleidinge*. This may already appear from the manner in which punishment is mentioned as one of the effects of the law:

"The second effect is punishment, that is, if it is added to the law; and this carries with it the obligation to suffer when punishment has been judicially ordered, but not otherwise unless such has been specified by law."<sup>57</sup>

More explicitly it follows from what Grotius says on punishment when discussing the *obligatio ex delicto*:

"The obligation to punish follows from a certain law, and from natural law in a general sense, in so far as reason teaches that in the wickedness of this world one cannot prevent crimes but through terror, which terror cannot be brought about otherwise than by the affliction of some harm to the criminal; but the extent of the punishment must come from some positive law, because this needs

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(footnote continued)

ordini perquam conveniens. Ex quibus sequitur, non quidem omnino non relaxandam fuisse legem, sed non facile, neque levi de causa. Atque id secutus est solus ille pansophos nomothetes. Causam enim habuit gravissimam, lapso in peccatum genere humano, legem relaxandi; quia si omnes peccatores morti aeternae mancipandi fuissent, periissent funditus ex rerum natura duae res pulcherrimae, ex parte hominum religio in Deum, & ex parte Dei praecipuae in homines beneficentiae testatio."

<sup>55</sup> P. Haggenmacher (1983) p. 513, therefore misunderstands the *Defensio fidei* at a crucial point when he says that parallel to the distinction between the injustice which results from the nature of things and the injustice resulting from positive law or God's will, "Grotius parle [...] de lois pénales 'absolument irrelaxables parce que leur violation comporte un mal immuable dû à la nature même de la chose', au rebours des lois positive, 'absolument relaxables'".

<sup>56</sup> Cf., id., 307 b 24-27: "Quicquid autem de jure poenae irrogandae dicitur, id simul de jure dandae impunitatis necesse est intelligi. Haec enim naturali nexu inter se cohaerent."

<sup>57</sup> *Inleidinge*, 1, 2, 2: "De tweede werckinge is de straffe, te weten zoo wanneer die by de wet is gevoegt, ende dese brengt mede verbintenis om te lijden, wanneer de selve rechtelick werd gevordert, maer anders niet: 't en ware iet naerder in de wet werd bevonden."

the intervention of some will and intellect."<sup>58</sup>

Grotius emphasizes that God imposed penal laws on the Jews only<sup>59</sup>, and that peoples have not reached agreement amongst each other in penal affairs; hence, penalties are a matter of civil law only. He acknowledges that some crimes have received amongst most peoples the same penalty, such as the death penalty in cases of murder, but this concordance is improperly taken to be *ius gentium*<sup>60</sup>. Because this implies that the nature of the punishment need not necessarily be the death penalty, this statement contrasts strongly with the assertion in *De aequitate* that *homicidio deliberato* carries the "naturally commensurate" death penalty and cannot be changed into another penalty, nor be dispensed with altogether. In the same manner as in the *Defensio fidei* - though less elaborately argued - he contrasts punishment and the duty to even out inequalities *ex delicto*<sup>61</sup>.

#### - punishment in *De iure belli*

Similarly, in *De iure belli ac pacis* Grotius is very precise in saying that only the *desert* of punishment is natural (prol., par. 8, "poenae inter homines meritum"); as Grotius puts it:

"Among those things which nature itself declares permissible and not sinful [*licita et non iniqua*] is this that he who does evil

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<sup>58</sup> Id., III, 32, 7: "De verbintnisse tot straffe spruit uit eenige wet, ende uit de aengeboren wet wel in 't gemeen, alzoo de reden ons leert datmen in deze boosheid des werelcs de misdaden niet en kan verhinderen, ten zy dan door schrick, welcke schrick niet en kan te weghe ghebracht werden, anders als door eenig leed datmen doet aen de achterhaelde misdadighe: maer de bepalinghe moet komen uit eenige gegeven wet: want op wat wijze sulcs ofte sulcs zal werden gestraft, kan niet gestelt werden anders als door tusschenkomste van eenig verstand ende wille."

<sup>59</sup> This law - says Grotius in the *Inleidinge* as in *De iure belli ac pacis* - has been abrogated with the destruction of the Jewish polity. This seems to be somewhat at variance with a passage in the *Defensio fidei* which suggests that by divine law God has commanded men to punish certain crimes indispensably: "Quare quod minore Magistratus poenas corporales nequeunt remittere, non id evenit ob jus aliquod laesi in poena [...] sed quia lex superioris illam potestatem ipsis non concessit, imo expresse negavit: quod similiter intelligendum est de Regibus cum Deo comparatis, in iis delictis quae omnino puniri ab ipsis Lex Divina imperat."

<sup>60</sup> Id. III, 32, 7: "Doch is waer dat op eenighe misdaden by meest alle volckeren eenparighe straffe werd ghebruickt, als de dood over moetwillige doodslagen: welcke overeenstemminghe van wetten oneighentlick werd genomen voor volcker-recht."

<sup>61</sup> Id.: "Maer de schuld van weder-evening des onevenheids komt uit het aengeboren recht, hoe wel de zelve schuld naerder werd verklaert by de burgher-wet. Voorts het recht om te straffen kom toe de overheden: maer tot de weder-evening hebben recht die verkort zijn."

suffers evil."<sup>62</sup>

With 'licita et non iniqua' Grotius does not mean that punishment should always ensue after a delict, as is clear from his refutation of the view that pardon is never permissible. He claims that the Stoics, who entertain the latter view, do so only on the basis of a trivial argument, based on the equivocity of the word *debitum*:

"Pardon', they say, 'is the remission of an owed punishment (*debitae poenae*); but the wise man does what he ought to do (*quod facere debet*)'. The fallacy is in the word 'owed (*debitae*)'. For if it is understood that he who has sinned owes punishment, that is, can be punished without injustice, it will not follow therefrom that one who fails to punish does something he ought not to do. If it be supposed that punishment is owed to the wise man, that is, it ought by all means to be exacted, we shall say this does not always happen; and in this sense punishment can be not owed, but only permitted (*posse esse non debitam, sed licitam tantum*)."<sup>63</sup>

This view reflects again that punishment is generically different from a contractual *debitum*. This Grotius spells out in his rejection of those who consider punishment, because it would have the nature of a contractual *debitum*, part of commutative law:

"For they consider this a business transaction [*negotium*], as if something were given in return to the wrongdoer, as one is wont to do in contracts. They are deceived by the colloquial manner of speech, in which we say that punishment is due to him who sins [*poenam debere ei qui deliquit*], which is plainly misleading. For he to whom something is owed in a strict sense [*proprie debetur*], has a right against another. But when we say that punishment is due to some person, we mean nothing more than that it is right for him to be punished [*aequum esse ut poenatur*]."<sup>64, 65</sup>

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<sup>62</sup> *De iure belli* II, XX, i, 2: "Inter ea vero quae natura ipsa dictat licita esse et non iniqua, est et hoc ut qui male fecit malum ferat."

<sup>63</sup> *Id.*, II, XX, xxi: "Veniam, aiunt, debitae poenae remissio est: Sapiens autem quod facere debet facit. Hic fraus latet in illa voce *debitae*. Nam si intelligas eum qui peccavit poenam debere, id est sine iniuria puniri posse, iam non sequetur si quis non puniat, facere quod facere non debet. Si vero ita accipias debitam esse poenam a sapiente id est omnino oportuisse exigi, dicemus id non semper accidere, ac propterea hoc sensu poenam posse esse non debitam, sed licitam tantum."

<sup>64</sup> *Id.*, XX, ii, 2: "Nec tamen qui expletricem iustitiam, quam vulgo commutatricem vocant, in poenis exerceri volunt, magis se explicant. Ita enim negotium hoc considerant, quasi nocenti aliquid reddatur, sicut in contractibus fieri solet. Decepit eos vulgaris locutio, qua dicimus poenam debere ei qui deliquit, quod plane est *akryon*; Nam cui proprie debetur aliquid, is in alterum ius habet. Sed cum debere alicui poenam dicimus, nihil

(footnote continued)

Also the measure of the penalty is - according to *De iure belli* - a matter which cannot be considered to be sufficiently reigned by natural and necessary arguments (II, XX, xxviii-xxxvii). When discussing this matter, Grotius speaks himself of the "cognitio huius argumenti satis difficilis et obscuri"<sup>66</sup>.

And, finally, he repeats in *De iure belli* that "punishment is not by nature owed to certain persons"<sup>67</sup>.

- conclusion

The above shows up a marked contrast between *De aequitate* and the *Defensio fidei*, *Inleidinge* and *De iure belli* on the issue of the naturalness of imposing punishment and consequently on the possibility of dispensation with regard to punishment. In the first text it is suggested that some punishment must always follow a delict, whereas the latter imply this is not necessarily so.

There is reason to believe that *De aequitate* is of an earlier date than the *Defensio fidei*, and therefore, of course, also of the other two works, mainly because Grotius had no reason to revise his theory of punishment after the *Defensio fidei*. The theory of punishment which Grotius developed in the *Defensio fidei* was aimed to dispel charges of Socinianism - charges which kept recurring. To retract points in his refutation of Socinus' doctrine of the satisfaction, could only have further fuelled such charges<sup>68</sup>.

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(footnote continued)

volumus aliud quam aequum esse ut puniatur."

<sup>65</sup> Thus it seems also somewhat misleading to read the next paragraph, *De iure belli* II, XX, ii, 3, without reference to the passage quoted and conclude that punishment is quasi-contractually grounded on retribution, as is done by W.J.A. J. Duynstee, 'Geschiedenis', 1956, p. 16. II, XX, ii, 3: "...qui punit, ut recte puniat, ius habere debet ad puniendum, quod ius ex delicto nocentis nascitur. Atque hac in re est aliquid quod ad contractuum naturam accedit: quia sicut qui vendit, etiamsi nihil peculiariter dicat, obligasse se censetur ad ea omnia quae venditionis sunt naturalia, ita qui delinquit sua voluntate se videtur obligasse poenae, quia crimen grave non potest non esse punibile, ita ut qui directe vult peccare, per consequentiam et poenam mereri voluerit." Note that punishment in the indicated respect, only approximates ("accedit") the nature of contracts.

<sup>66</sup> II, XX, xxxvii.

<sup>67</sup> II, XX, III: "Poenam certae personae naturaliter non deberi."

<sup>68</sup> W.J.M. van Eysinga, *Huigh de Groot*, 1945, pp. 62-3 already emphasized the connection between the *Defensio fidei* and the penal theory of *De iure belli*. In *De iure praedae* precious little can be found that is conclusive with respect to the necessity always to impose punishment. On the whole *De iure praedae* - as will not be surprising in a book

(footnote continued)

The systematic analysis undertaken of the theory of punishment results in a fairly marked contrast of the earlier with the later works. However, it should be remarked that Grotius' interest was not always and exclusively systematic. Thus, leaving his important distinction between what is allowed and what is necessary for what it was, Grotius did pose himself the question whether it is really so that there are no crimes which *must* be punished. Already in the *Defensio fidei* Grotius mentioned in passing that if God gives the imperative command to punish certain crimes, then man cannot dispense with such punishment or grant pardon<sup>69</sup> (- Grotius does not give an example of such a command). Also in *De iure belli* Grotius states that "in pessimi exempli sceleribus" punishment should always be exacted, and provides - albeit in a footnote [added in 1642]- the example of parricide<sup>70</sup>. Only with this reservation, then, can it be said that paragraph 31 of *De aequitate* has been eclipsed by the *Inleidinge*, *Defensio fidei* and *De iure belli*.

Concerning the rest of *De aequitate*, no such evident material disagreements with other of Grotius' works exist.

All in all I conclude, therefore, that *De aequitate* can be considered sufficiently representative of Grotius' views to warrant an interpretation which could yield generally valid results for his position on natural law and change.

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(footnote continued)

aimed (at least in part) against moral scruples in the taking and selling of booty, considering the taking of booty as a form of punishment of the enemy - tends to stress the duty instead of the right to punish misdeeds; e.g. "Et jus esse gentium ut bene facientibus bene fiat Christus ostendit, qui et gladio ferientes gladio feriendos ait: quod ipsum in lege veteri eousque expressum est, ut destrictae prohibeamur nocentium miserescere" (p. 38); "Lex igitur illa quae maleficos punire jubet, cum ex jure naturae sive gentium descendat, civili societate et lege est antiquior"(p. 90); "Sed praeter damnum [...] illa culpa per se obligat, quia naturalis ratio malitiam impunitam esse non patitur [...] Verum quidem est poenas facinorum ex utilitate publica intendi et remitti. Sed tamen in his quae ex natura, non ab instituto, mala sunt et illicita ad verae proportionis normam etiam extra leges poena exigi potest." Nevertheless there are other phrases which offer some leeway for a different interpretation, e.g. p. 40: "Quod si poenas remittere non semper tenemur, multo sane minus id, quod nobis ex justitia commutative debetur. Nam quae praecepta etiam hoc videntur suadere, non id quod nostrum est remittere nos indistincte et quodammodo projicere jubent, [...] sed cedere potius quam peccatum subire aut publico esse offendiculo"; sometimes it seems to be suggested that the duty of punishment exists only for grave crimes e.g. p. 255: "Nam quisquis bellum gerit sciens injustum, cum delinquat gravissime merito puniri etiam debet, ne peccati magnitudo peccatori patrociniū praestet." At pp. 324-5 lenitas in the execution of punishment is rejected on exclusively utilitarian grounds.

<sup>69</sup>Supra, note 59.

<sup>70</sup>De iure belli, II, XX, xxiii. Note also the remark in De iure belli II,XX,ii,3 (quoted above) that "crimen grave non potest non esse punibile", which - were it not for the context - might seem to indicate in nuce the occasional reservation felt by Grotius. However, saying that something cannot be unpunishable is still quite different from saying something ought always to be punished.

The above also entails that, as long as we do not overlook the greater or smaller differences which do in fact exist, in offering an interpretation of *De aequitate* it is legitimate to make use of the later works for purposes of clarification. As we shall see, this procedure can greatly contribute to an understanding of *De aequitate*.



## Interpretation

-the limits and grounds of *facilitas* and dispensation:

the volitional and the natural

From the foregoing discussion on the permissibility as opposed to the necessity of the imposition of punishment, the conclusion emerges that *indulgentia* and *facilitas* (to which the theory of punishment is most strictly related) properly pertain to the sphere of what Grotius in his later works called *volitional* law. Such a conclusion transpires also from the final paragraph of *De aequitate*, where it is said of *facilitas* that it does not clash with justice "because the law which only gives somebody a right does not command him to make use of that right", whilst it is said that *indulgentia* or *dispensatio* does not clash with justice "because when the legislator has dissolved, the law ceases to be binding" (paragraph 38). Both dispensation and *facilitas* concern the intervention of the human will in an obligation which existed merely as a result of a previous intervention of the human will. In this sense the possibility of dispensation and *facilitas* follows from the very nature of the norms involved. However, the human intervention which in these cases causes something to be legitimate which is not in conformity with what the law had previously established, does not consist exclusively in an act of arbitrary volition in which considerations of what is natural play no rôle. This can be shown as follows.

*Facilitas* is a virtue the exercise of which is especially appropriate with regard to "the laws which are farther removed from natural equity" ("maxime versatur circa leges longius recedentes ab aequitate naturalium")<sup>71</sup> and is moreover exercised *pacis aut humanitatis causa*<sup>72</sup>. Here we see that the natural order, here formulated as the order of *aequitas naturalis*, breaks through into the sphere of law which is more purely conditional on acts of the free will.

The hierarchy of the natural and the volitional appears similarly in the limitations which are set to *dispensatio/ indulgentia*. Thus, there is place for the application of this virtue "quatenus id fieri potest sine imminutione iustitiae aut publicae utilitatis" (paragraph 19). By implication, dispensation can appropriately be applied only within the sphere of justice and the common good. And also by implication, the limit which dispensation finds in justice and the common good is at stake in the cases where dispensation is considered, impossible which are mentioned in paragraphs 25 and 28.

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<sup>71</sup> *De aequitate*, paragraph 36.

<sup>72</sup> *De aequitate*, paragraph 35.

The latter paragraph I interpret to mean that this limit would be at stake if *man* could grant dispensation from natural or divine law:

"Deus igitur in legibus omnibus hanc potestatem habet; in legibus autem Dei et naturae nemo." (paragraph 28)<sup>73</sup>

But when this paragraph is interpreted to mean only that *no man*, "nemo", can dispense from natural and divine law, then this should not be interpreted to imply that God *can* indeed grant dispensation not only from divine but also from natural law, lest the consistency and coherence of *De aequitate* itself and Grotius' thought more in general be severely distorted. For although it is clear that God can grant dispensation from his volitional law ("nam et Deus ipse lege sua quosdam solvit", paragraph 25), Grotius states with equal clarity in the very same paragraph that He cannot grant it from "the first principles of nature and the things that flow therefrom necessarily, such as are the moral precepts of the decalogue: *in his enim Deum dispensare unquam negamus*" (paragraph 25)<sup>74</sup>. This state of affairs can be expressed in

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<sup>73</sup> Cf. *De imperio*, Op. Th. III 246 a 9 ff.: "Reges Hebraeos facta quaedam ab ipsa Divina Lege quasi excepisse [...] Non quod Reges quemquam Divinae Legis vinculo solverint (id enim homini nefas est), sed quod kat'epieikeian, optimam Divini humanique juris interpretem declaraverint Legem Divinam tali rereum constitutione ex Dei ipsius mente non obligare" (my underlining).

<sup>74</sup> Schotte's wish to see Grotius as an early, pious rationalist of Enlightenment stamp prevents him from being able correctly to interpret paragraphs 25 and 28 and leads him to attribute to Grotius principles which are mutually contradictory, pp. 89-91: "Übersetzt man 'nemo' seiner sprachlichen Herkunft entsprechend mit 'kein Mensch', so ist es unverständlich, wenn Grotius an anderer Stelle ausführt (paragraph 25), bei den 'prima principia naturae' und bei den Gesetzen, die auf diese Prinzipien notwendigerweise aufbauen könne überhaupt nicht dispensiert werden. Dieser Widerspruch hat seine Ursache nicht in einer Ungenauigkeit oder Flüchtigkeit des Niederländers, so dass man ihn aus dem Zusammenhang seiner Ausführungen lösen könnte. Die Wurzeln liegen tiefer [...] Auf der einen Seite sieht er in den obersten Grundsätzen der Natur das letzte und höchste Rechtsprinzip. Auf der anderen Seite erkennt er die Allmacht Gottes uneingeschränkt an. Das führt dazu, dass er bei der Feststellung des höchsten und letzten Prinzips einmal hier und einmal dort Abstriche machen muss. Diese Widersprüche brachten ihm die Ablehnung fast aller christlichen Konfessionsrichtungen ein und führten auch dazu, dass seine Werke vom Papst zum Teil auf den Index gesetzt wurden [!] [...] In tiefer Frömmigkeit aufgewachsen und von der nicht immer grosszügigen Denkmethodik vorangegangener Geistesepochen geschult, gelang es ihm nicht, das richtige Verhältnis und den nötigen Abstand zu den oft übertriebenen Thesen der Aufklärung zu finden, mit der sich auch die 'ratio' als Urprinzip menschlichen Denkens und Handelns immer stärker in den Vordergrund schob [...]. Sein Versuch, die existenz Gottes mit menschlichen Massstäben zu messen, musste jedoch von vornherein zum Scheitern verurteilt sein. In diesem Ringen um die letzten Dinge liegt für den frommen Christen wie auch für den universellen Wissenschaftler Grotius eine gewisse Tragik." Not only the misconception of Grotius as aporetic, enlightened-rationalist Christian prevents an understanding of paragraph 28 in the light of paragraph 25. Haggenmacher, who considers Grotius as the crowning of the scholastic tradition of *ius belli*, also fails to understand the connection between these paragraphs; he overlooks the identity between paragraph 21 and *De iure belli* (footnote continued)

the terms of paragraph 27 of *De aequitate*, where it is said that "dispensare [...] is solus potest qui legis ferendae abrogandaeque habet potestatem": it can be said that God has the power to make natural law, but he cannot abrogate it. This, in turn, is quite in line with what we found was Grotius' position with regard to the question *de odio Dei*. There, the impossibility for God to derogate from natural law was put by Grotius on a par with the impossibility for God to deny himself<sup>75</sup>. To deny this impossibility would subvert God's nature in<sup>76</sup> so far as He is revealed to man in Scripture as a good and just God. When we relate this position to *De aequitate* paragraph 19, the limit which dispensation by God finds in justice and the common good, is also the limit of God's own being as a good and just God. Thus, in the face of natural law, justice and divinity become virtually coextensive - a conclusion which is quite understandable in the light of Grotius' considering natural law a divine law.

This 'ontological' boundary of dispensation - important as it is - is not the only limitation. Dispensation, says Grotius in paragraph 29, also hardly occurs in the secondary (=volitional) law of nations "quia de consensu gentium in hoc ipsum apparere vix potest". This explanation of why it hardly occurs, can best be understood by reminding ourselves that the secondary law of nations is made up of the agreement of nearly all nations. It is this agreement of nearly all nations which acts as legislator - this body of nations would (if we follow *De aequitate*) therefore also be the authority which is to grant dispensation. But this body was in Grotius' days even less likely to agree on specific cases than the United Nations now, if only for the fact that this body was less visible than the UN is. As Grotius put it somewhat differently in the *Inleidinge*:

"Although it [the law of nations] does not absolutely and necessarily follow from natural law, yet it approaches it quite nearly; for this very reason, and for reason of its extensive and longstanding use it can but be changed with very grave difficulty [werd zeer zwaerlick verandert]".<sup>77</sup>

It is for circumstantial, 'technical' reasons, then, that dispensation from the obligation of this kind of law can hardly be given. This is not to say that once we get to the sphere of the more easily dispensable laws this is to be granted lightly:

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(footnote continued)

1,1,x,6 and locates *De aequitate* somewhere along the 'oscillating' line of Grotius' 'relative evolution' from voluntarism to intellectualism, *Grotius et la doctrine de la guerre juste*, p. 509.

<sup>75</sup>Op. Th. II, 310 b 46-51, p. 131 note 100.

<sup>76</sup>Letter to Walaeus, 29 June 1615, supra p. 131 note 99.

<sup>77</sup>*Inleidinge* I, 2, 12, supra p. 43 note 26.

"Exemption from laws must be given only with great temperance, for it is the weighing of the necessity of the law on the one hand against the quality of a given state of affairs"<sup>78</sup>,

and hence it is best reserved for the *pansophos nomothetes*<sup>79</sup>]. Nevertheless, the work of a legislator who grants dispensation is like a work of beneficence ("beneficientiae speciem habet, quia sublevat homines onere non omnino necessario", paragraph 24).

*De aequitate* also says that the good which is bestowed in the act of dispensation is liberty the *dulcedo* of which is contrasted with the *acerbitas* of the *onus* of a law in so far as it impedes liberty ("leges omnes, quatenus libertatem impediunt, habent aliquid acerbi, contra iis liberare dulce est", paragraph 20). Dispensation, thus, is a restitution to that liberty which albeit not necessary, is yet so natural that not only man but "even wild animals" long for it<sup>80</sup>.

In conclusion, dispensation and *facilitas* concern situations in which a 'wise legislator' and 'gentleman' (*homo facilis*) are led by considerations of natural equity, of justice and the common good to act in such a manner that the specified rules are not followed in a specific case - an act, however, which the legislator and *faciles* are not by moral necessity bound to perform. Dispensation and *facilitas* concern a sphere where - to borrow the term Schotte coined in this context - the *mens generalis* of legislator and gentleman (as distinguished from the *mens generalis* as expressed in the specific *intentio* or *ratio legis*) is free<sup>81</sup>. This constitutes a crucial difference with *aequitas*.

- *aequitas*

- its sphere of application

Whereas with *facilitas* and dispensation the binding force of applicable norms is lifted by an intervention of the free will of the 'gentleman' and legislator, the nature of the situation to which *aequitas* refers is such that a norm does not bind *ab initio* in the specific unforeseen case as it occurs. The virtue of *aequitas*, then, strictly speaking does not effect the actual liberation of the bindingness of a rule. In establishing that in a particular case equity applies, it is declared that in that case the rule in question had never been binding. Once equity applies, there is

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<sup>78</sup> *De aequitate*, paragraph 20: "[E]xemptio a legibus magno temperamento fieri debeat, expensa hinc legis necessitate, inde qualitate propositae rei."

<sup>79</sup> *Supra*, p. 1170 note 54.

<sup>80</sup> *Briefw.* II, no 622, 26 March 1621, to Maurice of Orange; *id.*, no. 626, 30 March 1621 to the States General and no. 630, 16 April 1621, to Janus Grotius; *De iure belli* II, XXII, xi.

<sup>81</sup> Schotte, *op. cit.*, pp. 36-39.

no room for consideration to relax or not; there is no freedom in this respect - the rule simply is not binding.

In this subsection I will primarily describe the different types of situation in which such non-bindingness, which is strictly related to equity, occurs, and how these different types of situation relate to each other. The non-bindingness which Grotius associates with equity is a consequence of the incompatibility either of the intent of the rule with its wording when an unforeseen case actually occurring could be subsumed under the latter; or of a rule of higher order and priority with a rule as it is both phrased and intended and under which an actually occurring case could *prima facie* be subsumed.

In the first case it is legislative intent which by circumvention of the words of a rule provides that a rule is not binding; in the second it is the superior rules which do this (cf. *De aequitate*, paragraph 9).

With the first type of incompatibility it is implied that the intention of a rule is of higher order than its wording (cf. *De aequitate*, paragraph 13). Obviously it requires a judgment to assess whether there is in fact in a specific situation such an incompatibility. It should, moreover, be noted that this judgment involves an assessment of the legislative intent of the rule at issue not just as it was subjectively present at the moment of legislation, because at that moment the case which now occurs was unforeseen. In *De iure belli* Grotius states, under reference to Aristotle, that the assessment in this type of case is a judgment *ex naturali ratione*<sup>82</sup>.

Judgments of natural reason also play a rôle in the second type of incompatibility, as we will see presently. First, however, I will give a further analysis of this second kind of collision of norms, in order to account for the seeming contradiction between paragraphs 9 and 11<sup>83</sup>.

This contradiction arises from the fact that in the former paragraph it is said that one of the functions of equity is to establish that a rule is not to be followed because of some superior rule (paragraph 9); whereas in the latter paragraph it is said that equity does *not* apply to rules which simply command what is an evil and forbid what is a duty (paragraph 11).

I suggest in the first place that paragraph 11 is to be understood as the mirror image of paragraph 8. In paragraph 8 it is said that equity does not apply to laws which merely enjoin a virtue and forbid a vice ("quae leges nihil nisi virtutem ponunt aut vitium tollunt"), because "the virtues and vices are infinite, and therefore it is said of these

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<sup>82</sup> *De iure belli* II, XVI, xxvi, 1: "Repugnantia casus emergentis cum voluntate solet [...] referri ad eum quem dixi locum *peri rhetou kai dianoiias*. Est autem duplex: nam aut voluntas colligitur ex naturali ratione, aut ex alio signo voluntatis. Diiudicandae voluntati ex naturali ratione Aristoteles, qui hanc partem accuratissime tractavit, propriam virtutem tribuit in intellectu *gnomen*, sive *eugnemosynen*, id est *aequiprudentiam*, in voluntate vero *epieikeian*, id est *aequitatem* [...]" In this passage the word *voluntas* is equivalent to *mens*, as in *De aequitate*, paragraph 13. The *diiudicatio ex alio signo voluntatis* Grotius treats under the heading *ek peristaseos nomon machen*.

<sup>83</sup> Schotte, pp. 50-62, notices the seeming contradiction and elaborates on it without offering a clear explanation for it.

laws that they are not deficient in their universality". Paragraph 11 specifies the reason why rules that simply command a vice and forbid the performance of an imperative duty do not come under the working of equity: it is because equity is a correction of that in which a law is deficient because of its universality ("correctionem cum dicimus eius in quo lex deficit ob universalitatem"). Neither of the rules here discussed have a *deficiency* as a consequence of their universality; the norms which merely enjoin a virtue or forbid a vice (paragraph 8), because they are conceived universally without any reference to the matter to which they are to be applied and are in this manner universally valid - examples that Grotius gives of such norms are "thou shalt not steal", "thou shalt not commit adultery", "one is to live honestly, piously, soberly"<sup>84</sup>. And the norms which simply command a vice or forbid what is an imperative duty do not have a deficiency because of their universality, but are universally invalid; or, put differently, the scope of a rule is not restricted in this case because it was phrased too broadly: it is not binding in any respect and therefore it has no scope at all that can be restricted.

In this light it is significant that paragraph 9 formulates the case of non-bindingness of a rule because of a superior rule as the "restriction" of the former rule and as the "suffering of an exception" ("legem ipsam qua iussa vota pacta testamenta servari iubentur restringit ex legibus superioribus; ...lex ipsa quae pacta servari iubet exceptionem patitur"); here there is a sphere of application for the rule which in a specific case suffers a restriction and therefore does not apply in that case. The example which Grotius gives in paragraph 9 is of an agreement to exclude liability resulting from deceit ("ne quis de dolo teneatur"), and should be so understood that not the agreement suffers an exception but the rule that agreements ought to be kept; the actually occurring case is in this example the agreement, to which in principle is to be applied the rule that what one has agreed upon ought to be carried out. The latter rule is the object of equity, and not the agreement which is the case itself. The rule 'pacta sunt servanda' is in this example restricted because of a superior rule, which presumably holds one liable for deceit<sup>85</sup> and cannot contractually be excluded.

The kind of incompatibility just discussed (i.e. that of a law in which there is no incompatibility of intention with its wording, yet suffers an exception because of a superior law) can very easily lead to a situation which Grotius treats in paragraph 12, the situation where two laws do not clash with each other in their intention as such, but only because of the particularities of a case which happens to fall under both rules [*ek peristaseos nomon machen*]. Such an occasional incompatibility Grotius solves again by subordinating one rule to another, so that the

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<sup>84</sup> For a further discussion of *De aequitate*, paragraph 8, see *infra* pp. 187 ff..

<sup>85</sup> Such a rule may be a specification of the natural law principle of *damni culpe dati reparatio*, cf. *De iure belli*, prol. paragraph 8 and II, XVII, xvii.

subordinated rule suffers an exception because of the priority of the superior rule<sup>86</sup>.

Subordinating rules to each other is a process of which Grotius recognizes the varying degree of difficulty. Thus, it is fairly simple to decide, when a specific case occurs, that carrying out a natural or other divine rule is superior to carrying out a rule which finds its origin in an act of the free will - as is, for instance, the case with the example from paragraph 9 which we discussed, and where one is not to carry out the agreement excluding liability *de dolo*, but on the contrary one is to be held liable for *dolus malus*<sup>87</sup>. But it is more difficult to rank norms of similar kind; this ranking, says Grotius, "depends on natural principles" which provide him with the guidelines for an ordering according to the normative character of rules in terms of their relative urgency - the result of which he gives in *De aequitate* paragraph 12<sup>88</sup>. The context in which Grotius proceeds with this ranking, leaves the result surrounded with an air of tentativeness. Thus, Grotius opens the passage in which he gives his ranking with the statement that, faced with the problem in actually occurring cases, "quae [lex] cedere debeat, facile definiri non potest". And when in *De iure belli* he gives a very similar ranking in which he consciously diverges from the ranking which Cicero had given on the basis of older authors, Grotius still adds that Cicero's rankings "spernendae nequiquam sunt"<sup>89</sup>.

If we compare the two types of incompatibility distinguished by Grotius (and consider the *ek peristaseos nomon machen* as a subcategory of the incompatibility of a norm with a superior norm), then we can say that the position of the person faced with an incompatibility of the second kind, i.e. that between two norms, is in so far easier than the position of the person faced with the incompatibility of intention with the wording of one and the same norm, to the extent that the former has the choice of two more or less readily given norms, whereas the latter is

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<sup>86</sup> Thus also *De iure praedae*, p. 29: "Hactenus leges instituto convenientes praescripsimus: quae sunt omnes generales et necessariae, nisi quod una illis exceptio naturaliter inest, ut si quando aliquod factum eveniat in quo leges inter se confligere videantur, quam vocant rhetores *ten kata peristasin machen*, pugnam ex circumstantia, tum superioris ratio habeatur inferiore postposita. Legum igitur cunctarum quasi lex erit ista [lex XIII]: Ut ubi simul observari possunt observentur: ubi id fieri non potest, tum potior sit quae est dignior. Hoc ipsum vero, quae dignior sit, tum ex origine, tum ex fine intelligi potest. Ex origine enim jus divinum juri humano, jus humanum juri civili praestat. Ex fine id, quod ad bonum cuique suum pertinet, ei quod ad alienum praefertur, et bonum majus minori et mali majoris remotio minori bono."

<sup>87</sup> Cf. *De iure belli* II, XVI, xxvi, 2: "Certissimum indicium est [eximendi ex aequitate], si quo casu sequi verba illicitum esset, id est pugnant cum naturalibus aut divinis praeceptis. Talia enim cum obligationis capacia non sint, eximenda sunt necessario."

<sup>88</sup> Supra p. 159.

<sup>89</sup> Supra p. 159 note 17. ??

faced with the problem of how to relate the wording of a norm with something that previously (i.e. before the occurrence of an unforeseen case) had not existed: the presumed intention of the legislator. In the latter case one turns from the subjective legislative intent which had not foreseen the occurrence of a certain case, to the more objective standards of natural reason.

However, faced with the choice between two incompatible norms, difficulties of rather great magnitude may, as we saw, arise in deciding which norm is to be considered superior and which is to suffer a restriction. Also here recourse must be had to the nature of the case and of the rules concerned<sup>90</sup> - a judgment of natural reason will also in this case become decisive.

Before attempting to establish further what this operation of natural reason involves in the case of equity, I will first focus some more attention on a matter mentioned in passing, to wit, the application of equity to divine and natural law.

#### - the application of equity to divine and natural law

It is readily understandable that a divine or natural norm overrules a norm of human volitional law - so much follows from the distinction of these kinds of norms itself. In such cases natural and divine law are the sources of equity. Less self-evident is the applicability of equity to divine and natural law itself, an applicability which with great emphasis is asserted in *De aequitate*, paragraphs 6 and 7.

In paragraph 7, where Grotius speaks of the applicability of equity to divine law, it is made clear that divine *volitional* law is intended: equity applies to the law "*quae Deus extra ordinem vetat aut praecipit*" (my underlining). After remarking that, as regards this law, there may arise a deficiency not on the part of the author of the law but originating from the subject-matter which it tries to regulate, it is next asserted that natural law is also a kind of divine law. Hence it becomes possible to construct a hierarchy between the volitional and natural divine law to the effect that what volitional divine rules lack can be supplied from natural principles:

"Unde Dei etiam leges ex notitijs naturae impressis ab ipso Deo suppleri minime absurdum est..."<sup>91</sup>

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<sup>90</sup> In *De iure belli* Grotius grants the difficulties in assessing unforeseen cases in relation to norms, and allows the weight of the nature of the case (rather than the nature of the norm) to become decisive by introducing the possibility that equity applies in cases in which following the letter is not "*per se et omnino illicitum sed aequae rem estimanti nimis grave atque intolerabile: sive absolute spectata conditione humanae naturae, sive comparando personam et rem de qua agitur, cum ipso fine actus*" (II, XVI, xxvii, 1).

<sup>91</sup> The example which Grotius gives, "thou shalt not kill", is infelicitous in so far  
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When we turn, next, to the applicability of equity to natural law, then, on the basis of what we have seen so far, the applicability of equity is understandable in one type of case, viz. that of 'a conflict of rules arising from circumstances'. Thus on the basis of what Grotius had said on this type of norm-collision it can be concluded that something which is commanded by natural law takes precedence over something which is merely permitted by natural law. This follows from the principle described in *De aequitate*, paragraph 12,

"..fortiorem esse legem iubentem permittente.."

- a precedence which becomes a significant part of Grotius' natural law concept as set forth in e.g. *De iure belli*.

But it is not only a circumstantial collision of norms which gives reason to apply equity to rules of natural law. *De aequitate*, paragraph 6 formulates the case quite generally by saying equity applies to

"...ipsas iuris gentium atque naturae ipsius notitias, quae etsi nec scripto nec iure proprie constant, universaliter tamen concipiuntur."

This formulation should be seen in connection with the general definition of equity as the correction of that in which a law is deficient because of its universality. Just as is (although in a perhaps less obvious way) the case with divine volitional law, equity is applicable to rules of natural law in as much as they are conceived in a universal manner and because of this universality can be deficient in the face of the variety of practical cases arising in reality. Thus the reason which Grotius gives in the *Annotations* for equity being applicable to divine volitional law is that "when God speaks with man in the manner of man, then that is because he wills to be understood as well as the man is understood who is saying the same", that is to say, use must be made of generalizing statements<sup>92</sup>. And similarly rules of natural law are conceptualized by man in generalized statements. The necessity of generalization is inherent in the aim of leading man to his natural end, which, given his

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as it suggest that this would be a rule containing a divine prescription *extra ordinem* only, whereas it is of course also a postulate of natural law, as in later works is implicitly admitted.

<sup>92</sup> *Annotationes ad Matthaeum* xii, 3, Op. Th. II-I, 123 a 54 ff.: "Ea [sc. aequitas] nisi adhibeatur, jus illud summum, to akribodikaion, sit summa crux summaque injuria. Neque vero ea quae diximus in humanis tantum legibus locum habent, sed & in Divinis, ejus nempe generis quod non natura justum est, sed constitutione. Deus enim cum hominibus loquens humano more ita vult intelligi quomodo idem dicens homo intelligeretur." In this context it is significant that Grotius' son Peter, who edited the *Opera Omnia Theologica*, gives as a translation of Aristotle's definition of *epieikeia* Grotius adduced in this annotation "corrigere legem ea parte qua deficit ob locutionem universalem". For God's adapting to human ways, cf. also *Rivetiani apologetici*, Op.Th. III, 692 b 4: "Deus enim, ubi cum hominibus paciscitur, demittit se ad eos, eisque se humano quodam more accomodat: ita ut, quemadmodum Augustinus loquitur, faciat se promittendo debitorem: ideoque id quod Deus homini rependit, dicitur *Mischpat*, *Essaia* XLIX, 4. ea autem vox Hebraeis significat id quod proprie debetur."

"vaga atque lubrica ingenia", can but be achieved by setting him certain rules ("artis quibusdam regulis") which must be definite and clear, although this may mean that only a majority of cases are covered by such rules (*De aequitate*, paragraph 5).

The vantage point from which the universality problem arises which calls for the application of equity, then, is that of the human nomothetic situation. But some norms, as I interpret Grotius' position in *De aequitate*, could be considered without reference to the human condition and for equity there is then no need. These norms are according to Grotius the norms which merely enjoin a virtue and forbid a vice. They are not deficient *per universalitatem*, because "virtutes ipsae atque vitia infinita sunt", as it is put in *De aequitate*, paragraph 8.

I suggest that with the 'infinity' of virtues and vices Grotius means the virtues and vices as they are in themselves. The virtues as they are in themselves are inherently commendable, just as the vices are in themselves to be avoided, and this quite apart from actual circumstances - otherwise they would not be virtues and vices<sup>93</sup>. Viewed thus, each virtue enjoined and each vice forbidden is a statement which is universally valid; would there be scope to restrict these statements through equity, then a virtue would no longer be virtue and a vice no longer vice.

This view, however, loses sight of the human situation to an unacceptable extent, for it loses sight of the very end of the pursuit of virtues and avoidance of vices, which lies in the sphere of human action. Statements concerning virtues and vices only become meaningful when they come to refer to situations men find themselves in, and hence the meaningfulness of Grotius' statement in *De aequitate*, paragraph 8 is doubtful. Moreover, if normative statements are formulated universally without any reference to the foreseeable and unforeseeable actual situations in which they may or may not apply, then by definition the need for equity disappears. To do this, to paraphrase Aristotle, may be a meaningful thing among the gods, but not in our world<sup>94</sup>.

Yet, the thought remains an attractive one that in some manner it should be possible to conceive of (at least some part of) natural law in such a way as to obviate the possible necessity of correcting it by equity. At least the thought must have been an attractive one for Grotius, for we find a version of this idea in a probably much later work, the *Observata in aphorismos politicos Campanellae*<sup>95</sup>:

<sup>93</sup> This conception of virtue and vice is still, it would seem to me, at the basis of Grotius' criticism of Aristotle's concept of virtue and justice, given in paragraphs 43 and 44 of the *prolegomena* to *De iure belli*. To mention one point only, in paragraph 43 Grotius censures Aristotle for calling things a vice "quae vitia per se non sunt"; in the light of how Grotius continues in paragraph 44 the words 'per se' acquire the meaning of 'separate from the things to which they might apply'. See *infra*.

<sup>94</sup> M.E. v, vii, 3 (1134 b 28 ff.).

<sup>95</sup> Thus is the title in the manuscript Bibliothèque Nationale, coll. P. Dupuy, vol. ix, 512, fol. 59. The title of the printed edition in *Quaedam hactenus inedita* (1652, at

(footnote continued)

"Aequitas quam Graeci epieikeian vocant, in lege naturali locum habere non potest: neque enim natura universaliter loquitur quam res exigit. Sed lex naturae non ut in se est, sed ut ab hominibus nimis universaliter enuntiatur, opus habere potest interpretatione epieikeias."<sup>96</sup>

Again it is said here that natural law as it is in itself does not require correction by equity, but this time the reason given is not nature's infinity merely within itself, but nature's being adapted to the situation: nature does not proceed in a more universal manner than a matter requires. As opposed to our interpretation of paragraph 8 of *De aequitate*, nature itself is here seen in relation to its end in so far as the thing concerning which nature proceeds ("loquitur") is taken up in the statement concerning nature as it is in itself. Apart from this perspective of nature per se, there is again in the *Observata* also the perspective of natural law as it is enunciated by man. Of this perspective Grotius says that this enunciation can be "nimis universaliter". In the latter perspective equity is to be applied to natural law; in the former there is no place for equity<sup>97</sup>.

The reason for Grotius' repeated insistence that from the viewpoint of nature itself there is no need for applying equity to natural law - an insistence which in the *Observata* leads him to state quite boldly that "aequitas [...] in lege naturali locum habere non potest" - must be the avoidance of an infinite regression to norms which are vitiated by the universality problem; if one remains at the level of universally conceived norms, then the (superior) natural norm correcting another,

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pp. 88 -235, TMD 680) and of the edition which appears together with the various texts of Campanella Grotius may have been commenting on in L. Firpo (ed.), Tommaso Campanella aforismi politici con sommari e postille inedite integrati dalla rielaborazione latina del De Politica e del commento di Ugo Grozio, 1940, pp. 229 ff. (TMD 682), is *Observata in aphorismos Tommasae Campanellae politicos*. Firpo knew of the existence of the manuscript and knew its catalogue description, but due to the war was unable to consult it in the Bibliothèque Nationale (Firpo, p. 59). Apart from providing an introduction, an arrangement of the text in accordance with his Campanella editions, and some marginal annotations, Firpo for the rest follows the text of the Quaedam hactenus inedita. He suggests that the *Observata* were written "di poco posteriore al 1640". Given the date on the title page of the manuscript in the Bibl. Nat. (1638), this must be considered a wrong dating.

<sup>96</sup> Ms. Bibl. Nat. fol. 61 verso, ad 5 cap. 4; the Quaedam hactenus inedita and the Firpo ed., p. 233, paragraph 15, have instead of "nimis universaliter" (mistakenly) "minus universaliter".

<sup>97</sup> The distinction between natural law as enunciated by nature as distinguished from that enunciated by man is in so many words made already in the letter mentioned in note 7, p. 163?? above in a context implying the topic of aequitas: "Alia quaedam iuris naturalis videntur mutari cum non mutantur, quia praecepta non enunciata sunt ita ut a natura praeciuntur; quod si ita enunties apparebit non intervenire ulla mutationem. Leges superiores semper restringunt eas quae sunt ordinis inferioris. Redde depositum, nempe nisi certo nociturum sit ei cui reddatur, ut gladius furioso. nam lex quae personae consulit dignior est ea, quae de rebus disponit."

might be equally liable to the defects which by equity one was trying to correct. The most radical way to escape from this situation would be to have recourse to nature itself, to a sphere of natural principles to which - says Grotius - equity does not apply; had he said that also in that sphere equity applied, then this would have implied that there also there is a universality problem. According to Grotius, however, such a problem does not arise on that level because "natura [non] universalis loquitur quam res exigit".

Nevertheless, at the level of nature itself the sheer variety of things<sup>98</sup> forces one to search for a hierarchy, such as the one we found in *De iure belli* I,II,i,1, where Grotius distinguished between the *prima natura* and the *secunda natura* superior to the *prima natura*. But once a hierarchy is assumed in the things of nature, then the possibility of an infinite regression should again be excluded.

That Grotius was in fact trying to avoid the problem of an infinite regression - but without the distinction between such a regression in universally conceived norms on the one hand and in the hierarchy of nature itself on the other, which could only be made after arriving at the conception of nature as it is in itself which we encounter in the *Observata*, - we may find expressed in *De aequitate* paragraph 8 where Grotius says that the "prima naturae principia" cannot be subject to equity, because

"that which is supplemented must of necessity be supplied from more superior laws, but the first principles of nature are the very highest laws."<sup>99</sup>

The only example Grotius gives of such first principles does not greatly enhance our insight into their rôle within the whole of Grotius' moral theory, because it concerns religious norms, viz. that God must be obeyed and loved. Yet it may be of significance that the highest natural norms Grotius first thinks of are religious.

Something more, however, can be said of these highest norms of natural law, which are the ultimate sources of equity. It concerns the use Grotius makes of the ideas of the finite and the infinite, which I shall now discuss.

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<sup>98</sup> Cf. *Parallelon*, Cap. I, Meerman ed., vol. I, p. 13: "Cum enim vix unquam Natura tam sui similis fuerit, ut in immenso hoc universo binos vultus una signavit effigie, aut si quando id factum sit, miraculi loco inscribitur Annalibus; tum vero animorum quam corporum longe major est diversitas."

<sup>99</sup> "Sola prima naturae principia, et quae leges nihil nisi virtutem ponunt aut vitium tollunt, aequitatem non recipiunt; illa quia id quod suppletur necesse est ex legibus praestantioribus suppleri, principia autem prima naturae leges sunt praestantissimae, ut Deum esse colendum atque amandum." In Aquinas' *Summa Th.*, I-II, qu. 94, art. 2, what Grotius calls the "leges quae nihil nisi virtutem ponunt aut vitium tollunt" seem to be mere specifications of the first principle of natural law, which Aquinas formulates as "quod bonum est faciendum, et prosequendum, et malum vitandum"; the two different classes of rules merge.

- the finite and the infinite

In paragraph 5 of *De aequitate* we find a brief explanation of the need for and the nature of equity which both starts off and ends with a description of the essential character rules must have for men. As we saw, it is said that man must be led to his natural end by rules which are derived from natural principles, but in order to be able to force man,

[1] these *regulae* must be *finitae* while the subject-matter (*materia*) of things and actions is *infinita*.

The incongruence between rule and fact can be remedied by equity, which involves

[2] a recourse to the principles of nature "so that *ex infinito* is supplied what *finito* was lacking",

for

[3]"perfecta enim norma infinitae rei finita esse non potest";

hence, says Grotius, the philosophers and lawyers point out that the laws cannot regulate everything that may come to pass but are adapted (*aptari*) to what happens most often.

The use of the ideas of *finitum* and *infinitum* (and the Greek predecessors *peras* and *apeiron*), also in relation to laws, draws on traditions in which these terms did not have just one certain sense and stable meaning<sup>100</sup>. Something of a wavering between various meanings can also be seen in the three occurrences of these terms in paragraph 5 of *De aequitate*.

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<sup>100</sup> See L.C Winkel, *Error iuris nocet*, pp. 81-99, who studies the problem in relation to Digest 22.6.2, where it is said that, in contrast with the interpretation of facts, "ius finitum et possit esse et debeat". Winkel discusses the various Greek and Roman sources relevant to his topic, the knowability and determinability of law, as there are: Anaximander of Miletus' *apeiron* as the origin of things (Diels (12) B 1); the reported Pythagorean association of *peras* with the good and *apeiron* with evil (Aristotle, *N.E.* I, vi, 14 (1106 b 29-30); *Metaphysics* 986 a 22 ff.); Aristotle's assertion that the *apeiron* cannot be known in itself (*Physics* III, 6 (207 a 25)); a statement of Cicero's that a summing up of all laws would be something *infinitum* (*De legibus* 2, 18; in *De oratore* 1, 188 and 2, 83 there are statements to the opposite effect, see Winkel, pp. 87-89); (ps.-)Plutarch's statements that although things and events belong to the *apeiron*, the law, the *logos* and the divine do not (*De fato* 569 A).

In *De iure praedae* p. 12, Grotius says that "malum falsumque sit natura sui quodammodo infinitum" and refers to *N.E.* 1106 b 29-30. Cf. also Meletius, 35-188, where the same phrase occurring in Aristotle is rendered as "simplex est bonitas, at mala multis modis". Significantly, this quotation is used to describe the sinfulness, esp. "plurimae actiones vitiosae" of man as contrasted to God, who is described as "Deus unus simplicissimus, infinitus, optimus", paragraphs 20-21.

The infinitum which is mentioned three times refers to two different infinita: the infinite subject-matter of things and actions is not the infinite from which equity draws what the finite rule lacked ( - lest for no evident reason one is to attribute pan-materialistic ideas to Grotius). And in between these two infinita, i.e. the infinitum from which equity draws and the infinitum of matter, is interposed the finite which is supposed to bring order to the infinity of things and actions. The original source of this order is the infinite to which, ultimately, we turn when we have recourse to the principles of nature. Whenever a finite rule turns out to be imperfect, it is from this infinity that the finite rule is rendered its perfection.

Now the sentence quoted under [3] above (p. 209??) allows some latitude to speculation on the nature of the perfection brought about by equity. For it would seem that the finiteness of the rule in question is what causes its imperfection. And it could subsequently be argued that equity *ex infinito* provides a remedy for the finiteness itself. The rule would, in this view, come to partake of infinity through equity. The translation of the sentence under discussion when we first mentioned it, "the finite rule of infinite things cannot be perfect", would be suitable. But the order in which the words *perfecta* and *finita* are placed in the Latin original, make this translation less straightforward than it might seem - although, of course, it is not thereby necessarily a wrong translation.

In an alternative interpretation of the sentence under [3] - which would go with the translation "the rule of infinite things cannot be perfectly finite" - the perfection of the finite rule renders it more perfectly finite. Although it is paradoxical to say that something *ex infinito* becomes more perfectly finite, this is intelligible because the whole point of equity is to make a rule suit the single specific (and unforeseen) case.

A compromise formulation which comprises both views is conceivable. We could say then that the rule is the ordering instrument which must be perfected in its finiteness to allow the rule to be adapted to the circumstances of the case.

I have digressed on the possible interpretations of the sentence under [3], particularly (but not exclusively) because it opens the way for an interpretation in which equity can be understood to involve a movement where the turning towards the principles of nature is a process of perfection originating in the source of order in the infinite, leading via the finite decision to definitive justice in the concrete case.

Once this structure of equity is understood, it transpires that the infinite source of order to which the natural principles refer is divine in nature. This conclusion can be made plausible by reference to the manner in which Grotius speaks of perfection in the first book of *De veritate religionis christianae*.

After proving that there is a Deity and that it must be one, Grotius goes on to say that all perfections must be in God. For, says Grotius, in all things which had a beginning, i.e. had a cause from whence they began, the perfections which appear in the effects, must have existed in the cause, in order that the cause might be able to effect something according to those perfections - and consequently, the perfections

must all be in the first cause, which has no beginning and is God<sup>101</sup>; "and that, indeed, infinitely"<sup>102</sup>. Moreover, all perfections that can be found in things must derive from God's infinite perfection, because God is cause of all things<sup>103</sup>.

The manner of conceiving of the infinite as the divine and the rôle which the infinite plays in the structure of perfection revealed by equity, evokes the Platonic<sup>104</sup> and especially the Aristotelian developments of the dictum of Anaximander of Miletus, that the origin of things is in the *apeiron* into which all things must also perish<sup>105</sup>. Aristotle described the *apeiron* as the unlimited which has itself no beginning or limit (*peras*) but is the beginning of all things, embracing and governing all things, and is the divine<sup>106</sup>.

Although the pair *peras/apeiron* does not as such appear in the passage on *epieikeia* in the *Nicomachean Ethics*, the idea expressed in the example of the Lesbian rule is highly relevant. After describing the nature of equity as the correction of law where law is defective because of its universality, Aristotle continues:

"In fact this is the reason why things are not all determined by law: it is because there are some cases for which it is impossible to lay down a law, so that a special ordinance becomes necessary.

<sup>101</sup> De veritate I, iv, Op. Th. III, 4 b 60 - 5 a 2: "Quae non coepit, Dei est. Quae coepit, necesse est habuerit unde inciperet. Et cum a nihilo nihil fiat eorum quae sunt, sequitur, ut quae in effectis apparent perfectiones, in causa fuerint, ut secundum eas efficere aliquid possit, & proinde omnes in prima causa."

<sup>102</sup> Id. I, v, title; and 5 a 8 ff.: "Addendum es, esse has perfectiones in Deo modo infinito."

<sup>103</sup> Id., I, vii, 5 a 31 ff.: "Deum esse causam omnium. Quaecunque autem subsistunt a Deo existendi habere origine, connexum est his quae ante diximus. Concluserimus enim, id quod per se sive necessario est, Unum esse. Unde sequitur, ut alia omnia sint orta ab aliquo diverso a seipsis. Quae autem aliunde orta sunt, ea omnia in se, aut in causis suis, orta esse ab eo quod ortum nunquam est, id est a Deo, jam ante vidimus." Cf. Meletius, paragraphs 20-21: "Inter haec decreta primum merito locum obtinet Deum esse unum. [...] Omnia enim ab uno et propter unum; tum perfectissima Dei natura et beatitudo rerumque omnium regimen idem requirunt. [...] Asserit igitur Deum esse simplicissimum, infinitum, optimum; contra corporeum, compositum, mutabilem terminatum aut loco aut tempore destitute negat. Ita Plutarchus Iudaeos ait credere theon aptharton, agenneton, eupoietikon; Tacitus Unum numen, summum et aeternum neque mutabile neque interitum."

<sup>104</sup> Philebus, 16c-17a, in which Socrates speaks of the gift of the gods which is transmitted in the saying of the men of old that all things that exist have their being from the one and many and conjoin in themselves the finite (*peras*) and infinite (*apeirian*). For an exegesis of this complicated passage E. Voegelin, Order and History, vol. 4, 'The Ecumenic Age', 1974, pp. 183-187.

<sup>105</sup> Diels, Fragmente 12 B 1.

<sup>106</sup> Physics III, 4 (203 b 7 ff.).

For what is itself indefinite can only be measured by an indefinite standard, like the leaden rule used by Lesbian builders; just as that rule is not rigid but can be bent to the shape of the stone, so a special ordinance (*psephisma*) is made to fit the circumstances"<sup>107</sup>.

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If we try and summarize the interpretative analysis we undertook, we can say the following. The necessity of *aequitas* arises from the necessity which exists at the human level of universalizing statements. Particularly in the case of unforeseen circumstances these universalizing statements turn out to be deficient in not being able to provide the required justice. Two kinds of situations are distinguished as regards the application of equity. In the first kind of case one must turn from the words to the intention of the legislator, and from subjective legislative intent to the presumed intention of the legislator, i.e. to the principles of natural reason. In the second kind of case one must turn from an inferior to some superior norm; the decision which of two norms is superior depends on principles of natural reason. In any case the recourse one has to an each time higher norm must somewhere find an end (if only to avoid an infinite regression). The regression finds an end in what Grotius in *De aequitate* calls the "*prima naturae principia*"<sup>108</sup>. Except for indicating that these principles include the obedience to and the love of God, Grotius does not give them a fixed content. If, however, we take the liberty to associate these "*prima naturae principia*" with the very beginning (*principium*) of nature as Grotius must have conceived of it, that is to say, God - an association which is not arbitrary given Grotius' conception of natural law as a divine law - then also it becomes intelligible that according to Grotius in the application of equity, one must ultimately turn towards the infinite from which is supplied what the finite lacked. From thence, ultimately, must come the justice which the universally conceived rule could not provide in the specified instance. A different aspect of equity is shown in one of the *Observata in aphorismos politicos Campanellae*. There equity becomes fully associated with the problems caused by the human need to conceive of natural norms in universalizing terms. This is sharply contrasted with nature itself which never "*universalis loquitur quam res exigit*". Equity, by implication, must then be the turning one's eyes away from the universally conceived norm to the nature itself of concrete things and situations. This brings into relief the connection of equity with prudence, for Grotius says in his *Annotatio* to 1 Cor. 9, 22, that it is a matter of prudence not to remain on the level of general statements but to have in view the particular and concrete things:

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<sup>107</sup> M.E. 1137 b 27 ff..

<sup>108</sup> These should not be confused with the *primae naturae principia* of *De iure belli* I, II, i, 1.



"Prudentis est non inhaerere universalibus, *tois kath'holou*, sed spectare singula, *ta kath' hekasta*." <sup>109</sup>

This formulation of keeping in view the things of nature itself brings us back again to the function of equity, which is to provide to a particular case the justice which by nature belongs to it and which the universally conceived norm could not provide <sup>110</sup>.

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<sup>109</sup>Op. Th., vol. II-II, p. 798 b 40-42. This view is, of course entirely Aristotelian, cf. M.E. VI, vii, 7. Aristotle also attributes a greater truth value to the particular things in practical reasoning: M.E. II, vii, 1 (1107 a 29 ff.), where it is said that although universal statements have a wider application, those covering smaller parts possess a higher degree of truth, because in practical affairs we are concerned with particular facts, ta kath' hekasta, with which our statements must agree.

<sup>110</sup>What has here been said does not exclusively apply to aequitas in so far as the cause for the need of this particular virtue can also be considered a cause for the need of indulgentia and facilitas. That this is so appears at several places in Grotius' work of which I mention one, the Annotatio to Matt. I, 9, in which elements of all three virtues are related to the same cause, and where he says concerning the law of Deut. XXII, 24: "...ejus esse generis cujus sint pleraque legum, quae ita respiciunt id quod epi to pleiston accidit, ut tamen evenire possint facti species in quibus deficiat lex dia to katholou, eoque egeat epanorthomatos, etiam praeter vim multa alia possunt accidere quae culpam non tollant quidem sed minuant, in quam partem semper credula est bonitas. Adde quod Iosepho omnia benignius interpretandi causam praeberunt perspecti virginis mores. Deinde accusatae & convictae lex poenam irrogat, accusationem autem nemini imperat."

## Conclusion

The above makes abundantly clear that in some essential respects the structure of equity as described by Grotius accords with an older aristotelian tradition. But one capital question still deserves an answer: why does Grotius insist on saying that natural law is immutable? How does Grotius' insistence on immutability compare with Aristotle's statement that "there is something which is right by nature yet all of it is changeable [*kineton*]?"

Aristotle's remark may seem to contrast starkly with Grotius' conception of natural law as unchangeable<sup>111</sup>. However, if Aristotle's *kineton* is conceived of as the things which are moved by the unmoved mover of the *Metaphysics*, then some amount of the contrast with Grotius disappears, in so far as we have seen that what is expressed in the relation of the *kineton* to the *a-kineton* finds a parallel in the movement of recourse to the infinite which ultimately determines the justice of the finite case, as Grotius discerned it in the operation of equity.

One remaining difference is that when Aristotle speaks of what is 'right by nature', he has continually in view the particular things (*hekasta*) of practical reality, for it is these particular things which are the ultimate end (*eschaton*) of practical reason. He does so when practical reason relates to prudence as such, but also in relation to any of the other related faculties, such as the faculty to judge rightly what is equitable (*gnome*)<sup>112</sup>. But when Grotius speaks of 'natural law', he is speaking at the level of norms<sup>113</sup>, quite apart from the things to which they in practice apply (or do not apply).

This difference is an important difference for it seems to me to be at the heart of Grotius' criticism of Aristotle's theory of justice as a mean. In paragraph 44 of the prolegomena to *De iure belli* Grotius criticizes Aristotle for proceeding in such a manner that,

"being unable to find in the passions and subsequent actions the opposite of the too little and the too much, he has sought both in the very things with which justice is concerned. Firstly, this is leaping from one class of things to another, which he rightly censures in others. Next, to accept less than what is one's own, may happen to be a vice [*potest quidem adventitium habere vitium*] because of that which under circumstances [*pro rerum circumstantiis*]

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<sup>111</sup> The translation which H. Rackham provides in the Loeb edition of the *Nicomachean Ethics* makes the contrast even starker. He translates: "Among the gods indeed it is perhaps not true at all; but in our world, although there is such a thing as Natural Justice, all rules of justice are variable."

<sup>112</sup> See *supra* note 108; and *N.E.* VI, xi, 1 and 2 (especially 1143 a 29 ff.).

<sup>113</sup> The distinction between '*ius naturale*' and '*ius voluntarium*' is, after all, a distinction made within '*ius*' defined as '*lex*' or '*regula*'; see *De iure belli* I, I, ix, entitled "*Ius pro regula definitur, et dividitur in naturale et voluntarium*".

someone is due to himself and his family; but it certainly is not at variance with justice, which is entirely contained in the abstinence from that which belongs to another" <sup>114</sup>.

Whatever Hume may have thought of it, Grotius is clearly distinguishing here the norms by which something is a wrong from the facts according to which something may sometimes be wrong that at other times is not wrong. That it is this distinction which makes it possible for Grotius to speak of the immutability of natural norms becomes clear from the following passage in *De iure belli*, which immediately follows after Grotius has stated that natural law is so absolutely immutable that God cannot change it and suffers himself to be judged by it:

"Sometimes nevertheless it happens that in the acts in regard to which the law of nature has ordained something, an appearance of change deceives the unwary, although in fact the law of nature, being unchangeable, undergoes no change; but the thing in regard to which the law of nature has ordained, undergoes change. For example, if a creditor gives a receipt for that which I owe him, I am no longer bound to pay him, not because the law of nature has ceased to prescribe that I am to pay what I owe, but because that which I was owing has ceased to be owed." <sup>115</sup>

The context of this passage brings us to another aspect which has a rôle to play in predicating immutability of natural. For not only is this passage preceded by remarks concerning the relation between God and natural law, but it is also immediately followed by one, viz. that "thus" - i.e. distinguishing between, on the one hand, a change in natural law and, on the other, changes in the matter in regard to which natural law ordains something - "if God ordains to kill or to take away somebody's good, this shall not make homicide and theft (which words involve vices) licit; but what is done by the sovereign lord and maker of life and things shall be no homicide or theft" <sup>116</sup>.

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<sup>114</sup> *De iure belli*, prol., paragraph 44: "Non recte autem universaliter positum hoc fundamentum vel ex iustitia apparet, cui oppositum nimium et parum, cum in affectibus et sequentibus eos actionibus invenire non posset, in rebus ipsis circa quas iustitia versatur utrunque quaesivit: quod ipsum primum est desilire de genere in genus alterum, quod in aliis merito culpat: deinde minus suo accipere, potest quidem adventitium habere vitium, ex eo quod quis pro rerum circumstantiis sibi ac suis debeat, at certe cum iustitia pugnare non potest, quae tota in alieni abstinentia posita est."

<sup>115</sup> *De iure belli* I, I, x, 6: "Fit tamen interdum ut in his actibus de quibus ius naturae aliquid constituit, imago quaedam mutationes fallat incautos, cum revera non ius naturae mutetur quod immutabile est, sed res de qua ius naturae constituit, quaeque mutationem recipit. Exempli gratia: si creditor quod ei debeo, acceptum ferat, iam solvere non teneor, non quia ius naturae desierit praecipere solvendum quod debeo, sed quia quod debebam deberi desit."

<sup>116</sup> *Ibid.*: "...Ita si quem Deus occidi praecipiat, si res alicuius auferri, non licitum fiet homicidium aut furtum, quae voces vitium involvunt; sed non erit homicidium aut furtum quod vitae et rerum supremo domino auctore fit."

As we concluded in the previous chapter, the relationship between God and law expressed in this passage is a consequence of God's inherent goodness which cannot be denied without denying God's divinity; hence, elsewhere Grotius asserts that "God is just and acts justly"<sup>117</sup>. Precisely because of the immutable goodness and justice of God it is in one case right to take away life or somebody's goods and in another it is right not to do so; the divine unchangeable justice guarantees the rightness of acting differently from case to case. The justice which makes for the rightness of the two different cases does not derive from the facts of the cases themselves. Were that so, justice would be self-contradictory.

Similarly, in the cases where equity is applied recourse is had to the higher norms which dissolve the apparent contradictions of the lower norms and cases in order to provide the justice which, without this higher norm, would be lacking. In the ascending order of norms and principles there emerges the structure by which one turns from the infinite manifold of facts in this world, via the finiteness of the norms as they are set or humanly conceived of, to the evocative, one and infinite ultimate and unchangeable source of justice. This recourse to the ultimate divine source is (if we now exclude the appeal to scripturally revealed positive divine law) usually mediated through human nature and finds its expression in natural law; hence, Grotius spoke of the divinity of natural law by saying that the natural principles are "imprints of the divine mind". Once this nexus between God and natural law comes to the fore, the immutability predicated of God tends to become predicated also of natural law as it is in itself [not as universally conceived] - as such it is the true participation of the eternal law, the true image of the divine mind in man. In other words, the nearness of natural law to God as immutable source of justice also renders natural law itself unchangeable.

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Another question raised, but which has remained in the background, was whether political conservatism was a motive for the emphasis on the immutability of natural law. Without wishing to make Grotius into a protagonist for change, I do not think conservatism figures very prominently, in so far as change is not excluded on principle. According to Grotius' definitions there is nothing unchangeable in volitional law, which in fact is assigned an important place in his division of law. As concerns natural law, it may itself be unchangeable, but nevertheless it is so that, due to changes in circumstances, its norms may not apply - something which can be brought about by an appeal to equity. Such an appeal to equity opens great possibilities for change (as it does for arbitrariness).

That Grotius the statesman was well aware of the possibilities and dangers of change transpires from his written works; for one can adduce places where he points out the dangers of change as well as places where he explores the possibilities of no longer abiding by the rules as

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<sup>117</sup> Meletius, paragraph 11.

they were once set<sup>118</sup>. Notwithstanding Grotius' earlier plea for a change of the constitutional arrangement of the United Provinces, the vicissitudes which led to his political trial (which, according to Grotius in his *Apologeticus*, was based on an illegitimate change and infringement of the Dutch constitution and which brought an end to his political career in the Dutch Republic) will certainly not have inclined him to a favourable approach of the phenomenon of change<sup>119</sup>. Though it is not possible to establish precise causalities, this general biographically conditioned, political outlook may have been an additional factor in Grotius' emphatic claim that natural law is unchangeable, but is probably no more than that.

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<sup>118</sup> The point I wish to make transpires perhaps most clearly from some passages in *De imperio*. Thus cap. VI, xiii (Regulas Prudentiae habere suas exceptiones, & unde): "Sed quaecunque hic diximus [...] non debent perpetua semperque utilia censerī. Nulla enim prudentiae praecepta sunt plane universalia, quia ton kath'hekasta estin he phronesis. Tempora, loca, homines plurimum hic immutant. [...] Faciendum hic quod in navigatione, ubi rectum iter instituere nequeas, obliquandi sinus. [...] Sed prudentis est secundum ordinem & leges positivas agere in rebus communiter accidentibus. Feruntur enim leges epi to pleiston (L. III, D. de Legib.). Agere autem extra ordinem debet Summa Potestas en tois paralogou, quibus ordo aptari nequit. Casus sunt infiniti, ordo autem sive Lex positiva finita. Non potest autem finitum quid infiniti adaequata esse regula." And the ultimate answer Grotius gives to the question "Summa Potestas suis legibus an obligetur & quatenus" is: "Ratum esse actum, etiamsi actio non habeat plenam rectitudinem, dum jus non desit." (Op. Th. III, 233 a 4 ff. and b 9-10) Cf. also supra, note 2 at p. 153.

<sup>119</sup> For my view on the much discussed relation (see e.g. *Grotiana* 1984, pp. 32-35; Nellen, p. 101-102 note 22 and the references there) of the *Apologeticus* or *Verantwoordingh* to the plea for change in *De republica emendanda*, see *Grotiana*, 1986, pp. 96-98.





## V

## CONCLUSION





## V. The Conclusions Considered

We started off from a brief indication of the two main interpretations of Grotius' natural law theory which can be found in the literature. They center around the question whether Grotius' concept of natural law is still fundamentally based on an older philosophical and theological tradition which placed natural law in the framework of the relation between God and man - a tradition in which natural law stood as a symbol of the relation between God and man -, or whether it should be considered as introducing a secularized and juridical concept of natural law. We studied this question by concentrating on some concrete aspects of Grotius' natural law theory - aspects of a question which might be captured using the label *de fide et symbolo*.

The conclusions we came to can be summarized under the following points.

(1) *Fides* is indeed a fundamental concept in Grotius' works. All obligations voluntarily entered into, both legal and political, among men and between God and man are based on *fides*. *Fides* should however not be understood as deriving from an exclusively protestant theological source, nor has it a specifically scholastic source. Instead I argue that it has primarily a meaning similar to that which it already had in Roman antiquity, and which refers to the basic structure of obligation rather than to any particular content of the obligation. The general, structural meaning of *fides* can explain why it plays an important rôle between God and man as well as among men. This becomes most evident from the basis that *fides* forms for promising; the mutual promise in turn being the foundation of the bindingness of contract. This structure of *fides* is in a Christian conception of faith at the root of the relation between God and man, which with a revealing term is conceived of as a bond. This structure, however, can also be found at the basis of the social contract. We made a case for suggesting that in the end the theological conception of *fides* has primacy over the strictly secular conception of *fides*. There is a politico-biographic aspect to Grotius' theological conception of *fides*. The concept of *fides* was in the centre of the religious disputes which led to the life-sentence for Grotius. Grotius' conception of *fides* was, of course, in full harmony with his position in these disputes. But this need not detract from the correctness of our conclusion that ultimately the concept of *fides* which is dominant is one which originates in the specific nature of the relationship between God and man.

(2) In its concentration on the differences between natural law, divine law and volitional law the existing literature is misguided, in particular when it bases a farreaching secularization thesis on the said differences. On the basis of a careful scrutiny of the conceptual distinctions and the relations between the concepts distinguished, conclusions can be drawn which are quite different from those often to be found in the literature. Human volitional law may, as a matter of fact, well partake of natural justice; and divine volitional law always does so by virtue of God's necessary goodness. Natural law, both in its strict sense and in its broader sense, is - as to its origin - ascribed to God. The way Grotius does so must lead to the conclusion that the concept of an 'eternal law' is not as absent as is sometimes thought.

(3) The 'etiamsi daremus' hypothesis, because of its counterfactual formulation already, cannot be a decisive argument for the alleged secularization of natural law. Nor is it an expression of a straightforward answer to the question whether natural law is primarily intellectualist or voluntarist in essence, for Grotius' views on the rôle of will and intellect are too subtle to be expressed in one catch-phrase. It much rather points to an 'ontological' basis for natural law and lays particular emphasis on the immutability of law.

(4) In his emphasis on the immutability of natural law Grotius does not remove himself from the philosophical tradition which locates the origin of natural law in the Divine. As compared to Aristotle, the different assessment of the changeability of what is right by nature may be explained by the shift from a concentration on what is effected in practice to the norms as such.

All of the conclusions we have drawn point to the connections which Grotius' concept of natural law retains with a philosophical tradition which is associated with the awareness of a divine origin beyond the human world, and in which natural law is a designation of the borderline between that divine and human. The recovery of these connections involved the interpretation of materials which are scattered in relatively brief fragments throughout Grotius' works. These fragments, and those to be found in the theological pamphlets and poetical works in particular, mutually reinforce the coherence of the principles on which Grotius based his concept of natural law<sup>1</sup> - so it would be a mistake to think that Grotius had only ambiguous and undeveloped ideas about the concepts he used which made him willy-nilly the godfather of the rationalist natural law school.

This is not, however, to turn Grotius into a scholasticist. The ample use Grotius made of late scholastic sources<sup>2</sup> makes Grotius as little a scholasticist as the simple use of historical works makes him a historian or the use of poetry turns *De iure belli* into a poem. The cultural background of Grotius' works, so excellently described by De Michelis, gave Grotius little cause for identifying himself with scholasticism. In theology and philosophy Grotius abhorred the "*distinctiunculas [...] haustas ex scholasticorum inerudite subtilium minutiloquentiis*"<sup>3</sup>.

The fragmentary character of the treatment of principles at the basis of his concept of law and natural law, goes a long way towards explaining

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<sup>1</sup> Grotius' "ambivalence", of which Haggemacher speaks, has become for others who have taken their cue from the latter, something of a fig-leaf for questions which are left unanswered. Grotius' ambivalence, I venture to claim, may be considerably less than is suggested e.g. by J.C.M. Willems, 'How to handle Grotian ambivalence?', in *Grotiana* n.s. vol. vi, pp.106-114.

<sup>2</sup> *Supra*, note 133 at p. 146 and the prolegomena to *De iure belli*, par. 55.

<sup>3</sup> *Briefw.* VI, no. 2271, p. 212.

why Grotius has been subjected to such widely varying interpretations - and this already little more than a generation after his death. Grotius never wrote a systematic treatment concerning the philosophical bases of his concept of natural law, because his primary concern was not theoretical but practical.

This is expressed perhaps most clearly in a note to the definition from the Justinian's Institutes "jurisprudentia est divinarum atque humanarum notitia". Grotius remarks that "*Philosophia* offers this notion"; but "although philosophy is correctly considered an important part of jurisprudence" this definition "deservedly distinguishes the *notitia* from *scientia*, *gnosis* from *episteme* .

"For it suffices the lawyer to have only some quantity of knowledge concerning things divine and human; but really and precisely he must know what distinguishes right from wrong. The same was expressed by Quintilian, when he said that the life of the orator was connected to the knowledge of things divine and human, that is, he does not need fully to possess it, but neither should he be entirely strange to it."<sup>4</sup>

The theoretical interest Grotius did have, was almost entirely geared to the practical consequences of theory, and so much he made clear at several places in his works. Thus, in the *Meletius* he is concerned with *religio*, the end of which he acknowledges to be *fruire Deo*, which is reserved for the afterlife. But in so far as *religio in rebus consistat*, he understands *religio* to be quite the same as *jurisprudentia*<sup>5</sup>. He divides *religio* into a theoretical and practical part, the *dogmata* or principles and the *praecepta* or precepts. He does so, as he says, because *religio* concerns voluntary actions, and "all voluntary actions are preceded by the intellect". However,

"in every practical science the principles should be neither irrelevant nor redundant, but should either incite to action or to some

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<sup>4</sup> *Florum sparsio ad ius iustinianum*, p. 12-13: "Hanc notitiam Philosophia pollicetur. [...] Hujus philosophiae cum magna pars sit iurisprudentia, ut Ulpianus recte nos docet l. 1 D. de just. & jure, merito generis nomen sibi praemittit, specialem deinde differentiam adjiciens per justum atque injustum scientiam. Bene autem distinguit Ulpianus, & ex ea Tribonianus notitiam & scientiam, gnosis & epistemon. Nam Iurisconsulto sufficit res divinas humanasque (de quibus libros Varro scripserat) nosse aliquatenus: proprie autem ac peculiariter exacteque nosse, id est, scire, debet, justum injustum quid intersit. Idem ferme voluit Quintilianus: cum dixit, oratoris vitam cum scientia divinarum humanarumque rerum esse conjuncta, id est non eam plane possidere, sed neque ejus esse exsortem."

<sup>5</sup> *Meletius*, paragraph 18-9: "Reperto fine religionis, quibus in rebus ea consistat, videamus. Religio igitur, cum in actione versetur ea quae est kata proairesin ..." And in the introduction, addressed to J. Boreel, paragraph 4: "Quicum enim libentius hac de re loquar, quam cum eo qui raro exemplo ostenderit veram iurisprudentiam non humanarum tantum, sed et divinarum rerum notitiam complecti."

extent make clear what must be done and how it must be done."<sup>6</sup>

In fact at the end of the Meletius, Grotius puts the following words into the Patriarch's mouth, when the latter considers the cause of what Grotius in the introduction calls the "nova quotidiana dissidia et alii in fluctibus fluctus" amongst Christians:

"It seems to me that the single most important cause is that, with disregard of the precepts, the principles are declared to be the most important part of religion - but entirely wrongly, for the principles almost always subserve the precepts and lead up to them."<sup>7</sup>

Grotius is at his most express about the relationship between theoretical and practical philosophy in his well-known letter to Aubéry du Maurier on the study of politics<sup>8</sup>. Explicitly taking into account the fact that his correspondent was a politician, and bearing in mind the use rather than the enjoyment which studies would be to his correspondent, he writes

"As all Philosophy is divided into contemplative and active, you should particularly care for the latter, and let the former be no more than a handmaid to the latter."<sup>9</sup>

Accordingly, Grotius is briefest about recommended reading in theoretical philosophy. Whereas in practical philosophy, which Grotius divides first into moral and political theory, the *Nichomachian Ethics* and the *Politica* are compulsory literature, neither in logic nor in physics does Grotius deem it necessary to work one's way through the whole of Aristotle on these subjects. In the former the "figurae syllogismorum et regulae Topicae" are useful subjects, while in the latter "nothing is more eminently conducive to moral wisdom" than the study of the nature and functions of the soul. For reason of the time-claim he is imposing

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<sup>6</sup> Ibidem, par. 19: "... cum in actione versetur ea quae est kata proairesin, omnes autem voluntatis actiones intellectus praecedat, necessario duas habet partes: theoretiken unam, praktiken alteram; illam constituunt dogmata, hanc paraineseis. Latine decreta et praecepta vertit post Ciceronem Seneca. [...] Decreta in omni scientia activa nec extra rem esse debent nec supervacua, sed quae aut ad agendum incitent aut quid agendum sit et quomodo, aliquatenus praemonstrent."

<sup>7</sup> Ibid. par. 89: "Cuius mali causam inquirens, mihi, inquit, una haec videtur maxima, quod praeceptis posthabitis, maxima pars religionis circa decreta statuitur, perverse admodum, cum decreta ferme praeceptis inserviant et eo ducant."

<sup>8</sup> Briefw. I, no. 402, pp. 384-387; published separately in 1626 under the title De studio politico, TMD 482.

<sup>9</sup> Ibid, p. 384: "Sapienter igitur feceris, si saepe in mentem revoces legatum te esse, eoque dirigas omnem studiorum tuorum rationem, usus potius literis quam fruiturus. Quare cum Philosophia omnis divisa sit in contemplativam et activam, hac praecipue curare debes, illam non ultra quam ut huic ancilletur."

on his correspondent's course of reading, Grotius is hesitant in his advice on metaphysics, "prima philosophia", and recommends only a clear and brief work<sup>10</sup>.

In this same letter, Grotius also gives an indication of how the study of law fits into the study of practical philosophy. After ethics and politics, rhetoric must be studied and when that has been accomplished the moment has come at which no other study is better recommended than the study of law, "non illius privati ex quo legulei et rabulae victitant, sed gentium ac publici". The principles of this law "are to be found in moral wisdom", as is shown by Plato and Cicero. And on this score reading Thomas Aquinas' *Summa Theologiae* on justice and the laws "shall not be regretted"<sup>11</sup>. After the application of these principles is studied, the cycle of studies can be rounded off by reading history. The distinctness of practical philosophy from theoretical philosophy, which is so evident in this letter, has two consequences that can be retraced in other parts of Grotius' work. Firstly, this very distinctness

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<sup>10</sup> Ibid.: "Hanc [sc. Logica] nolim te petere ex ipso Aristotele - esset enim id prolixius, et passim multa occurrunt nullius aut modicae frugis - sufficere si compendium aliquod legeris. [...] Post Logicam Physica sequatur, quam ipsam quoque non opus erit fuisse persequi Aristotelica vestigia premendo. [...] Sicut autem in Logica praecipui usus sunt figurae syllogismorum et regulae Topicae, ita in Physicis nihil est praestantius et ad moralem sapientiam conducibilis ea parte quae animae nostrae naturam functionesque persequitur. Quare has partes non perfunctorie, sed exactiore quam caeteras diligentia tibi pertractandas censeo. Post Physica auctor essem tibi ut Metaphysica quoque, hoc est primam Philosophiam delibares: cuius gustum tibi aliquem praebere posset Timplerus libro non admodum aut prolixo aut obscuro: sed vereor ne nimium liberalis erogator sim tui temporis. Ad Activam ergo Philosophiam veniamus, cuius pars prior est moralis, altera civilis: utramque siquidem non gustare vis, sed haurire penitus, ipse tibi summus docendi artifex Aristoteles legendus erit. Inter Ethica quae ipsius nomine circumferuntur optima sunt Nicomachia. Politicorum unum opus extat."

<sup>11</sup> Ibid., p. 386: "Rhetorica quoque Aristotelis omnino tibi legenda arbitror, sed alio quam vulgus censet ordine, post Ethica et Politica. Vidit enim ille omnium scientiarum atque artium consummator ad persuadendi artificium rivos ex morali ac civili sapientia moliter deducendos. [...] Hoc spatio exacto nihil est quod tibi aequè commendem atque studium iuris non illius privati ex quo legulei et rabulae victitant, sed gentium ac publici, quam praestabilem scientiam Cicero vocans consistere ait in foederibus, pactionibus, conditionibus populorum, regum, nationum, denique belli iure et pacis. Huius iuris principia quomodo ex morali sapientia petenda sunt, monstrare poterunt Platonis et Ciceronis de Legibus libri. [...] Neque poenitebit ex Scholasticis Thomam Aquinatem si non perlegere, saltem inspicere secunda parte secundae partis libri quem Summam Theologiae inscripsit, praesertim ubi de iustitia agit ac de legibus." The reference to the *secunda secundae* is somewhat misleading, for there *iustitia* is treated, whereas the *leges* are not treated there, but in the *prima secundae*. The latter concerns, according to Aquinas, the general treatment of the extrinsic principles of human acts (cf. S.Th. I-IIae q. 6 & 49); in the former Aquinas discusses in detail each of the virtues in particular, "for there is little use in speaking about moral matters in general, since actions are about particular things" (prologue to I-IIae). That Grotius refers only to the I-IIae - which probably reflects its dominance in Grotius' memory of the *Summa* - shows again a certain dominant interest in the 'justum' in the third of three senses he distinguished.

means that Grotius does not reject theoretical philosophy as such, as is confirmed by a contemplative poem such as *Eucharistia* (II)<sup>12</sup>. Secondly, the fact that theoretical philosophy can only in certain parts and in certain respects be relevant to moral philosophy must mean that the kind of knowledge to which each can lead is different in character. The difference in degree of certainty that can be attained in each is a prominent characteristic to which Grotius - with an appeal to Aristotle himself - referred in *De iure belli* as the prime cause for the doubt which often arises in moral matters<sup>13</sup>. In the discussion of this topic Grotius does not claim to be able to resolve the doubt that may have arisen, but limits himself to provide a guideline of how to act best in circumstances of doubt<sup>14</sup>. The uncertainty of moral knowledge is not merely one of error but part and parcel of the fundamental impossibility of perfect human knowledge. To Grotius the ones who cannot acknowledge that certain things cannot be known, must needs be satisfied with a false ignorance. They are "like the adulterous Ixion who ravished the empty shades in the clouds he imagined to be Hera" - and ignore that "*nescire quaedam magna pars Sapientiae est*"<sup>15</sup>.

This general gnoseological point is also reflected in Grotius' conception of natural law when he has identified the natural inborn principles with the knowledge of the Creator's intention and quotes Lucan: "*dixitque semel nascentibus auctor quidquid scire licet*"<sup>16</sup>.

Here we have a point where Grotius differs fundamentally from some of his self-proclaimed, rationalist successors. For though they acknowledged the possible leeway caused by error, they claimed that in moral affairs ultimate certainty was possible to achieve. Thus, for instance, Pufendorf takes Grotius sharply to task for precisely the passage on the cause of doubt in moral affairs we have mentioned; whatever could be said in favour of Grotius (and Aristotle who with him is the other central object of attack in the chapter 'On the Certainty of Moral Sciences' of *De iure naturae et gentium*), "that any grounds for doubt

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<sup>12</sup> Supra, p. 120 note 75. This poem may also be the most efficacious rejoinder to Schlüter, p. 13, who held that "alle unmittelbar mystischen Elemente, alle direkten Beziehungen der Seele zu Gott fehlen in seiner Frömmigkeit."

<sup>13</sup> Supra p. 74, note 112.

<sup>14</sup> *De iure belli* II, XXIII.

<sup>15</sup> *Poemata* (1617), p. 331: "*Erudita ignorantia: Qui curiosus postulat tum suae/ Patere menti, ferre qui non sufficit/ Medioritatis conscientiam suae, / Judex iniquus, aestimator est malus/ Suique naturaeque: nam rerum parens,/ Libanda tantum quae venit mortalibus,/ Nos scire pauca, multa mirari jubet./ Hic primus error auctor est peioribus./ Nam qui fateri nil potest incognitum,/ Falso necesse est placet ignorantiam,/ Umbrasque inanes captet inter nubila/ Imaginosque adulter Ixion Deae./ Magis quiescet animus, errabit minus,/ contentus eruditione parabili,/ Nec quaeret illam, si qua quaerentem fugit./ Nescire quaedam magna pars Sapientiae est.*"

<sup>16</sup> Supra, p. 52.

come from the uncertainty of moral matters, we emphatically deny", Pufendorf states<sup>17</sup>.

But now we arrive at the issue of the reception of Grotius' work, which - however much it could explain of the variety of interpretations which have come into existence - falls outside the framework of our study.

We must round off this study and come to a conclusion.

Grotius' position concerning the foundation of law is epitomized in the Institutes' definition of *iurisprudentia* as the "*divinarum humanarumque notitia*", which as Grotius adds, derives from *philosophia*, the love of wisdom. Clearly, this places him and his concept of natural law in principle in the classical philosophical tradition. Though this has become somewhat obscured under the dominance of his interest in practice and practical consequences of principles, practice itself is therefore no less founded in philosophy. When Grotius specifies that the form of this practice as far as law is concerned ought not to be that of the "*legulei et rabulae*" but that of the *ius gentium et publicum*, he actually lays down that the nobler practice so founded in philosophy is the practice of politics - an echo of Aristotle's view of the *bios politikos* and the related view that only political justice is true justice while in nonpolitical relations there is justice only in a metaphorical sense<sup>18</sup>.

On the basis of the relationship of philosophy and public life sketched above, we can say that for Grotius politics has a foundation in philosophy. In several respects this foundation becomes visible in the foundation of natural law through which human laws are nourished by the divine. This, however, is not to assert that Grotius' conception of natural law feeds exclusively upon some idealist universe of values<sup>19</sup>. That would contradict the relative dominance of practical concerns and the mutual correlation of theory and practice in Grotius' work. Time and again we have found that some of the most fundamental points in his conception of natural law were linked to his concern with the disruptive

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<sup>17</sup> S. Pufendorf, *De iure naturae et gentium*, I, II, 9.

<sup>18</sup> *Nic. Eth.* 1134 a 26 ff..

<sup>19</sup> Haggenmacher, 1983, p. 627-8: "Considéré en lui-même, sans tenir compte des développements engendrés par son livre, Grotius demeure tourné vers le passé, et sa vision est essentiellement statique: théologien et philologue presque autant que juriste et 'diplomate', il prétend uniquement, à la faveur d'une siasie quasi-poétique du réel, mieux éclairer un ordre 'naturel', 'vrai', qu'il considère comme donné et en pratique immuable. [...] Il ne raisonne au premier chef en fonction ni de l'ordre politique ambiant, ni d'une 'pratique' au sens moderne, ni même des Lebensbegriffe de Dilthey, mais essentiellement en fonction de cet univers de textes qui n'a cessé de refléter à ses yeux un ordre de valeurs supérieur." Haggenmacher quotes to this effect P. Geyl: "His logical constructions... were built up in an ideal world. Classical literature and the Bible supplied him with an ideal world which was as full of life, in the imagination of his contemporaries, as their own every-day world, and which yet left the author on the law of war and peace far greater liberty in fashioning it in accordance with the needs of his philosophy than the world in which he lived could have done."

political consequences of the controversy over predestination - a concern which from the moment that it became clear to Grotius that he could not ever return from exile to take up political office in Holland, was extrapolated to concern for the unity of Christendom<sup>20</sup>. Hence, it could legitimately be said that his particular manner of founding of natural law in philosophy was nurtured by a practical and political concern.

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<sup>20</sup> Biographically this has been established by Nellen, especially pp. 59-79; more broadly by De Michelis, especially pp. 159-165.



## Index of Quoted Literature

Below I give a reference list of works quoted or referred to in the footnotes. I have refrained from providing a full bibliography. As concerns the literature on Grotius already the number of publications is prohibitive. It would be pretentious here to strive for any degree of completeness, particularly as there exist some more than adequate bibliographical instruments in the form of Ter Meulen and Diermanse's *Bibliographie des écrits sur Hugo Grotius, imprimés au 17ème siècle*, The Hague 1961 and the bibliography of most important works on Grotius, which appears regularly in the issues of *Grotiana*, New Series. In order to be consistent I have had to omit also works which in themselves are quite important to any study of Grotius and his works, just as I have also omitted a number of titles which have been important in the preparation of the present study but do not strictly concern Grotius or his natural law theory (those titles as titles would not reveal what rôle they have played anyway). As for Grotius' works themselves, the *Bibliographie des écrits imprimés de Hugo Grotius*, The Hague 1950 by J. Termeulen and P.J.J. Diermanse stands and will stand for some time to come, as the most complete and most accessible bibliography. In the footnotes I have referred to the particular work's number in this *Bibliographie* preceded by the acronym TMD. Unless otherwise indicated, references to Grotius' drama and poetry are to *De Dichtwerken van Hugo Grotius*, edited by the Grotius Instituut, The Hague with the support of the Koninklijke Akademie van Wetenschappen, Assen 1970-. Quotations from *De iure praedae commentarius* have been taken from Hamaker's edition, The Hague 1868 (TMD 684); quotations from *De iure belli ac pacis* have been checked against De Kanter-van Hettinga Tromp's edition, Leyden 1939 (TMD 615). References to theological works and politico-theological works are to *Hugonis Grotii Opera Omnia Theologica in tres tomos divisae*, J. Blaeu, Amsterdam 1679 (TMD 690), abbreviated as *Op. Th.*; those to the correspondence to P.C. Molhuysen/ B.L. Meulenbroek/ P. Witkam (eds.) *Briefwisseling van Hugo Grotius*, The Hague, 1928-. On editions from after 1950 referred to in the footnotes bibliographical information is given in the list below. Classical authors have been quoted from the Loeb Classical Library, unless specified otherwise.

- G. Ambrosetti, I presupposti teologici e speculative delle concezioni giuridiche di Grozio, Pubblicazioni della Facoltà di Giurisprudenza della Università di Modena, Bologna 1955
- Anselm of Canterbury, Proslogion, in S. Anselmi Cantuariensis archiepi- scopi opera omnia, F. Schmitt (ed.), Rome/Edinburgh 1938-'61, re- print Stuttgart 1968
- Aquinas, Summa Theologiae, Blackfriars Edition, Thomas Gilby (general ed.), London/New York
- G. Augé, 'Le contrat et l'évolution du consensualisme chez Grotius', in Archives de Philosophie de Droit, vol. 13, 1968, pp. 99-114
- Gregorius Ariminensis, In Librum Sententiarum
- Augustine, Contra Faustum Manichaeum, J.P. Migne, Patrologia Latina, vol. 42, cols.207-518  
- , De libero arbitrio, Migne, Patr. Lat., vol. 32, cols. 1221-1310
- J. Basdevant, 'Hugo Grotius' in Les fondateurs du droit international, Paris 1904, pp. 125-267
- J. Basdevant, 'La théorie générale de droit de Grotius' in Hugo Grotius: Essays on his Life and Works Selected for the Occasion of the Ter- centenary of his De jure belli ac pacis, Leyden 1925, pp. 25-32
- R. Bellarminus, De membris Ecclesiae militantis
- G. Belzer, [Introduction to] Hugo de Groot - Voorrede tot de drie boeken over het recht van oorlog en vrede, trans. A. Dirkzwager & A.C. Nielson, The Hague 1952.
- M. Berljak, Il diritto naturale e il suo rapporto con la divinità in Ugo Grozio, Università Gregoriana Editrice, Roma 1978 (Analecta Gregoriana, vol. 213, Series Facultatis Iuris Canonici: Sectio B, n. 42).
- H. Bettenson(ed.), Documents of the Christian Church, Oxford, 1946
- G. Bien, Die Grundlegung der politischen Philosophie bei Aristoteles, Freiburg/München, 1980
- Anton-Hermann Chroust, 'Hugo Grotius and the Scholastic Natural Law Tradition', in The New Scholasticism, vol., xvii, 1943, p. 101-133.
- F. Copleston, A History of Philosophy, Image Books edition, New York 1962-3.
- J.D.M. Cornelissen, 'Hugo de Groot's Annales et Historiae de rebus Bel- gicis op den Index', Mededeelingen van het Nederlandsch Historisch Instituut te Rome, vol. VIII, pp. 161-172
- M.B. Crowe, The Changing Profile of the Natural Law, The Hague 1977

- M.B. Crowe, "The 'Impious Hypothesis'; a Paradox in Grotius", in Tijdschrift voor filosofie, vol. 38, 1976, pp. 379-410
- M.B. Crowe, "The Term synderesis and the Scholastics", in Irish Theological Quarterly, vol. 23 (1956), pp. 151-164, 228-245
- T. E. Davitt, The Nature of Law, B. Herder, St. Louis/London 1953
- F. De Michelis, Le origini storiche e culturali del pensiero di Ugo Grozio, Firenze 1967
- G. Del Vecchio, Lezioni di filosofia del diritto, Milano 1950
- G. Del Vecchio, Contributi alla storia del pensiero giuridico e filosofico, Milano 1963
- E. Di Carlo, in: I prolegomeni al De iure belli ac pacis, tr. and ed. S. Catalano, 3a ed. Palermo 1957
- H. Diels, Die Fragmente der Vorsokratiker, I-III, 8 ed. Berlin 1956
- M. Diesselhorst, Die Lehre des Hugo Grotius vom Versprechen, Forschungen zur neueren Privatrechtsgeschichte, Vol. 6, Cologne/ Graz 1959.
- P.D. Dognin, 'La justice de Dieu et le droit naturel', in Revue des Sciences Philosophiques et Théologiques, vol. xlix, 1965
- A. Droetto, 'Instinto e ragione' in: Rivista internazionale di filosofia del diritto 1963, pp. 586-607
- A. Dufour, 'Grotius et le Droit naturel du dix-septième siècle', in The World of Hugo Grotius, p. 15-42
- E. Dumbauld, 'Some Modern Misunderstandings of Grotius', in Volkenrechtelijke Opstellen ter ere van B.M. Telders, F.M. baron van Asbeck en J.H.W. Verzijl, Zwolle, 1957
- John Duns Scotus, Opera omnia, Lugdunum, Laur. Durand 1639
- W.J.A.J. Duynstee, 'Geschiedenis van het natuurrecht en de wijsbegeerte van het recht in Nederland', in: Geschiedenis der Nederlandsche rechtswetenschap vol. II.
- W.J.M. van Eysinga, 'Het oudste bekende geschrift van De Groot over volkenrecht', in Mededelingen der Nederlandsche Academie van Wetenschappen, afd. Letterkunde, N.S., vol. 4, no. 11, 1941, pp. 464 ff.
- W.J.M. van Eysinga, Huigh de Groot: een schets, Haarlem 1945.
- G. Fassò, Storia della filosofia del diritto, Bologna 1968, vol. II.
- G. Fassò, 'Sull'interpretazione di alcuni passi groziani', in: Rivista internazionale di filosofia del diritto, 1951, pp. 753-761

- G. Fassò, 'Ugo Grozio tra medioevo ed età moderna', in Rivista di Filosofia, vol. xli, 1965, p. 174-190
- G. Fassò, Vico e Grozio, Napoli 1971
- R. Feenstra, "Een handschrift van de Inleidinge van Hugo de Groot met de onuitgegeven Prolegomena juri hollandico praemittenda", idem, vol. xxxvii 1967, pp. 444-484
- R. Feenstra and J.E. Scholtens, "Hugo de Groot's *De Aequitate*; tekstuitgave en tekstgeschiedenis met bijdragen over Nicolaas Blanckaert en over de voorrede tot de *Inleidinge*", Tijdschrift voor Rechtsgeschiedenis, vol. XLII, 1974, pp. 201-242
- R. Feenstra, 'Quelques remarques sur les sources utilisées par Grotius dans ses travaux de droit naturel', in The World of Grotius, Amsterdam & Maarssen 1984, pp. 65-82
- W. Fikentscher, 'De fide et perfidia', Der Treuegedanke in den 'Staatsparallelen' des Hugo Grotius aus heutiger Sicht, München 1979
- L. Firpo (ed.), Tommaso Campanella aforismi politici con sommari e postille inedite integrati dalla rielaborazione latina del De Politica e del commento di Ugo Grozio, Torino 1940
- H. Fortuin, De natuurrechtelijke grondslagen van De Groot's volkenrecht, The Hague 1946
- R. Fruin, 'An unpublished work of Hugo Grotius', in Verspreide Geschriften III, The Hague 1901, pp. 428 ff.
- Hugo Grotius, De fide et perfidia, in: W. Fikentscher, De fide et perfidia. Der Treuegedanke in den 'Staatsparallelen' des Hugo Grotius aus heutiger Sicht, München 1979, pp. 89-160
- Hugo Grotius, Meletius sive De iis quae inter Christianos conveniunt Epistola, critical edition with translation, commentary and introduction by G.W.M. Posthumus Meyjes, Leyden 1988
- Hugo Grotius, De republica emendanda, [A.C. Eyffinger, P.A.H. de Boer, J.Th. de Smidt, L.E. van Holk (eds.)] in Grotiana, N.S. vol. 5 - 1984, pp. 66-121
- Hugo Grotius, Observata in aphorismos politicos Campanellae, ms. Bibliothèque Nationale, collection P. Dupuy, vol. ix, 512, fol. 59r-67v.
- P. Haggenmacher, 'Genèse et signification du concept de "ius gentium" chez Grotius', in: Grotiana, New Series Vol. II, 1981, pp.44-103.
- P. Haggenmacher, Grotius et la doctrine de la guerre juste, (Publications de l'Institut Universitaire des Hautes Etudes Internationales Geneve), Paris 1983.
- J. Hervada, 'The Old and the New in the Hypothesis 'etiamsi daremus' of Grotius', in Grotiana, New Series vol. iv, 1983, pp. 3-20.

- G. Kisch, Erasmus und die Jurisprudenz seiner Zeit - Studien zum humanistischen Rechtsdenken, Basel 1960.
- A. Kuenen, "Hugo de Groot als uitlegger van het Oude Verbond", in: Verhandelingen der Koninklijke Akademie van wetenschappen, Afd. Letterkunde, Amsterdam 1883, vol. 12, pp. 301-332.
- R. Labrousse, 'Il problema della originalità di Grozio', in Rivista Internazionale di Filosofia del Diritto, vol. XXVIII, 1951, pp. 1-20
- James St. Leger, M.M., The 'Etiamsi daremus' of Hugo Grotius; a Study in the Origins of International Law, dissertatio ad lauream in facultate iuris canonici apud pontificium atheneum 'Angelicum' de urbe, Typus pontificiae universitatis gregorianae, Romae 1962.
- C.L. Manschreck, "The Role of Melancthon in the Adiaphora Controversy", Archiv für Reformationsgeschichte 1957, vol. 48, pp. 165-182.
- P.C. Molhuijsen, 'De bibliotheek van Hugo de Groot in 1618', in Mededelingen der Nederlandsche Akademie van Wetenschappen, Afd. Letterk., N.S. vol. 6 (1943), pp.45-63
- H.J.M. Mellen, Hugo de Groot (1583-1645): De loopbaan van een geleerd staatsman, (Reeks Erflaters), Weesp 1985
- Gerhard Oestreich, Geist und Gestalt des frühmodernen Staates: ausgewählte Aufsätze, Berlin, 1969
- Antony Pagden, 'The Preservation of Order: the School of Salamanca and the 'Ius Naturae'', in Medieval and Renaissance Studies on Spain and Portugal in Honour of P.E. Russell, Oxford 1981, pp. 155-166
- Pauly-Wissowa, Real-Encyclopedie der Classischen Altertumswissenschaft, vol. 1, s.v. 'Clientes', cols. 23-55 & vol. 6, s.v. 'Fides', cols. 2281-2286.
- R. Pintard, Le libertinage érudit ands la première moitié du xviie siècle, Paris 1943.
- R. Pintard, La Mothe le Vayer, Gassendi, Guy Patin: études de bibliographie et de critique suivies de textes inédits de Guy Patin, Thèse complémentaire présenté pour le Doctorat ès Lettres, [Appendice: Textes inédits de Guy Patin, Grotiana, pp. 69-86], Paris 1943.
- J.J. Poelhekke, "Hugo de Groot, een gefrustreerd staatsman?", Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde, N.S. vol. 46, 1983, no. 6, p. 165.]
- G.H.M. Posthumus Meyjes, 'Grotius as an Irenicist', in The World of Grotius, pp. 43-64

- F. Pringsheim, Gesammelte Abhandlungen I, Heidelberg 1961, pp. 131-235.
- S. Pufendorf, De iure naturae et gentium libri octo, ed. Amsterdam 1688, Classics of International Law, no. 17, vol. I, Oxford 1934.
- C.S.M. Rademaker, 'Books and Grotius at Loevestein', in Querendo vol. 2, 1972, pp. 2-29
- J.M. Rist, Stoic Philosophy, Cambridge 1969
- C.G. Roelofsen, 'Grotius and International Law; an Introduction to Some Themes in the Field of the Grotian Studies', in Grotius Reader: a Reader for students of international law and legal history, The Hague 1983, p. 3-21.
- G.H. Sabine, A History of Political Theory, 4th ed. (rev. by T.L. Thorson), Hinsdale 1973.
- Hugo de Sancto Victore, De sacramentis christiane fidei, Migne, Patrologia Latina, vol. 176
- J. Sauter, Die philosophischen Grundlagen des Naturrechts, Wien 1932
- J. Schlüter, Die Theologie des Hugo Grotius, Göttingen 1919
- J.E. Scholtens and R. Feenstra, "Hugo de Groot's De Aequitate; tekstuitgave en tekstgeschiedenis met bijdragen over Nicolaas Blanckaert en over de voorrede tot de Inleidinge", Tijdschrift voor Rechtsgeschiedenis, vol. XLII, 1974, pp. 201-242.
- H. Schotte, Die Aequitas bei Hugo Grotius, Inaugural-Disseratation Köln, 1963
- J.B. Scott, The Catholic Conception of International Law, Washington 1934
- F. Suárez, De legibus ac deo legislatore, (Coimbra 1612), Corpus Hispanorum de Pace, Madrid, vol. xiii.
- F. Suárez, Selections from three works, Classics of International Law, no. 20 vol. II, Oxford 1944
- J. Ter Meulen and P.J.J. Diermanse, Bibliographie des écrits de Hugo Grotius, Nijhoff, Den Haag, 1950
- Franco Todescan, Le radici teologiche del giusnaturalismo laico: I. Il problema della secolarizzazione nel pensiero giuridico di Ugo Grozio, (Per la storia del pensiero giuridico moderno, no. 14), Giuffré editore, Milano, 1983
- R. Tuck, 'Grotius, Carneades and Hobbes', in Grotiana, N.S. vol. IV, 1983, pp. 43-62
- R. Tuck, Natural Rights Theories, Cambridge 1979

- R. Tuck, 'Peter Haggenmacher: Grotius et la Doctrine de la Guerre Juste, 1983', in Grotiana, New Series Vol. 7 -1986, pp. 87-93
- G. Vázquez, Commentaria ac disputationes in primam secundae Sancti Thomae
- Fernandus Vasquez de Menchaca, Controversiae illustres
- T.J. Veen, Recht en Nut: studiën over en naar aanleiding van Ulrik Huber (1636-1694), Zwolle 1976.
- B.P. Vermeulen, 'God, wil en rede in Hugo de Groot's natuurrecht', in Wijgerig Perspectief, vol. 23, 1982-83, pp. 54-9
- B.P. Vermeulen, 'Discussing Grotian Law and Legal Philosophy', in Grotiana, N.S. vol. 6, 1985, pp. 84-92
- M. Villey, Leçons d'histoire de la philosophie du droit, Paris, 1962
- M. Villey, 'Le moralisme dans le droit à l'aube de l'époque moderne: sur un texte de Grotius', in Revue de Droit Canonique, 1966, tome 16, pp. 319-333
- E. Voegelin, 'Das Rechte von Natur', in Anamnesis: zur Theorie der Geschichte und Politik, München 1968, p. 117-133
- E. Voegelin, Order and History, vol. III, 'Plato and Aristotle', Baton Rouge, 1957
- E. Voegelin, Order and History; vol. IV, 'The Ecumenic Age', Baton Rouge 1974
- C. van Vollenhoven, 'The Framework of Grotius' Book "De iure belli ac pacis(1625)"', in Verhandelingen Koninklijke Akademie van Wetenschappen afdeling Letterkunde, Nieuwe Reeks, vol. 30 - 4, pp. 1-174
- T. Ware, The Orthodox Church, Harmondsworth 1975
- J.C.M. Willems, 'How to handle Grotian ambivalence?', in Grotiana n.s. vol. vi, pp.106-114.
- L.C. Winkel, Error iuris nocet: rechtsdwaling als rechtsordeprobleem, I. rechtsdwaling in de Griekse filosofie en in het Romeinse Recht, Amsterdam 1982.
- The World of Grotius (1583-1645), Proceedings of the International Colloquium organized by the Grotius Committee of the Royal Netherlands Academy of Arts and Sciences, Rotterdam 6-9 April 1983, Amsterdam & Maarssen 1984.











