Paolo Astorri, LUTHERAN THEOLOGY AND CONTRACT LAW IN EARLY MODERN GERMANY (CA. 1520 - 1720).

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In understanding the history of contractual thought in both Common Law and Civil Law jurisdictions, James Gordley, Harold Berman and Wim Decock have made notable and influential contributions. To put it (very) simply, Gordley made the case for Aristotelian thought, Berman for Christian theology and Decock for Jesuits. Yet what has been missing for many years is a similar intellectual exploration of Protestant notions of contracting. It is very satisfying therefore to have this much-needed contribution by Astorri. In his book, he examines how Lutheran theology interacted with the law of contract in German-speaking states during the early modern period. Specifically, Astorri's monograph documents the views of leading Lutheran theologians, explaining how they understood the ethics of contracting and probing how it influenced their juridical contemporaries. Although vast in its scope, in essence it considers their opinions on why contracts should be fulfilled, how interest should be regulated and how fairness, particularly relating to price, should be implemented.

Lutheran theologians felt the need to demonstrate how the otherwise radical and deeply disruptive theological principles of early Lutheranism did not necessarily undermine the normal functioning and everyday operation of a temporal society. You could still own things, contracts were still binding, commerce should still flow, and magistrates could still determine the just price of a contract. Indeed, by holding together Lutheran theology as well as the continuation of temporal society as it was, these theologians established in many ways, but also in relation to contract specifically, very distinct lines between the purpose of Christian morality and human law. Of course, the intensification of a distinction between law and spiritual salvation is a hallmark of Lutheranism and recognisable as an aspect of the theory of two kingdoms. But when it was deployed within Lutheran contractual thought it ensured the preservation of the existing sources used commonly by jurists at that time, i.e. *ius commune* sources, therefore placing the emphasis not upon *the law* itself but how an individual Christian *used* the existing law. Such an approach, Astorri stresses, creates an interesting and significant supplementary literature akin to Jesuit casuistry, although admittedly not to its extent. From this, Lutheran jurists could take principles to normatively underpin their description of the law while individuals found guidance, which implored adherence to a Biblical use of the contract (not because they would be rewarded but out of a sense of gratitude and faith). Crucially, Astorri makes clear that this did not lead to the creation of any discernible *Lutheran* contract law but did offer a distinctive mode of Lutheran contractual thought.

What Astorri stresses is the Lutheran response to usury and interest. Rather than relying on Canon law and the Aristotelian approach to usury, Lutherans drew directly from Biblical passages. Doing this gave them a direct Scriptural proposition from which to build something new. It also gave them the opportunity to explain the wrongfulness of usury in an innovative way. For the most part, these theologians argued that charging interest was to harm your neighbour. In this way, it becomes relational and not categorical. What is important is the individual contract and its consequences - not the use of interest as such. Astorri demonstrates how this rephrasing allowed Lutheran theologians to recharacterize the purpose of usury laws: to prevent the exploitation of weaker parties, particularly the poor. Protection not complete prohibition was the outcome. Hence, you could, in principle, take interest when your counterparty would not be harmed, and your conscience comfortable. On this, Astorri rightly contends that Lutherans established a new theory of usury and interest that contrasts with the approach of both Calvinist and Catholics. What Astorri does here is to turn on its head the somewhat lazy assumptions taken from an often-neglectful reading of Weber that in some way the Lutheran stress on individual conscience laid the foundations of a capitalist mindset. In stark contrast to (a misreading of) Weber, the Lutheran theologians described by Astorri made had the utmost regard for the counterparty's welfare – it was their primary concern , emphasising that parties should be motived by charity, love and that no-harm is done to another ensure their counter-party suffered no detriment. Only if both parties were wealthy could interest be charged, and even then, this was not done on the basis of self-interest but because there was no risk of detriment.

So why do old ideas matter? Indeed, reading over 580 pages on early modern Lutheran contractual thought does have the tendency to raise this question. It is probably legitimate to ask this

particularly when it comes to normative ideas that no longer appear to define the rules of contracting. We might ask why we should care about the views of early modern theologians (whether they be Lutheran, Calvinist or Jesuit) about things such as usury, just price or performance. For a sceptical reader who is concerned about contemporary contract law, what we need to know is whether there is any state regulation of interest rates; whether there was any fraud or undue influence in the creation of the contract; and to establish and enforce remedies for parties injured by anti-competitive behaviour. Arguably, these are modern iterations of old doctrines animated by prevailing policy considerations, but they do not appear to have any direct connection to Lutheran moral theology.

In answer, it could be said that although a singular focus may be what a client needs, what the law often benefits from, including contract law, is a wider context to remind us of what law has done and what it can do, if so desired. Returning to the past can demonstrate different ways that contracting can be understood and how contracts can be used. History of this sort can also point to wrong turns, mistakes or re-occurring complexities, providing notice of law's limits, and if used sensibly, such histories can offer insights into why law may be ineffective at some things (regulating interest, for example). It can challenge received wisdom about what the purpose of contract is or that there is one single purpose of contracting. Nascent within Astorri's monograph are all these things that legal history can offer, and it makes this book rewarding.

For example, at times it is refreshing to read how Lutheran theologians characterised contract law as a means by which one could help their neighbour. A contract was a way by which charity and love could be materialised by a Christian. Great care was to be taken during the creation and performance of a contract to ensure that at no point did you take advantage of or diminish the material position of your counterparty. You were to protect the weaker party not yourself. Regard for others was not merely viewed on the level of justice, i.e., what you owed to someone else, but from an ethical and theological perspective, i.e., to take care of another and to assist with their needs.

Indirectly, Astorri's history serves to, yet again, undermine the crude notion that barter was, whether in the distant past or closer to modernity, the first stage in the development towards modern contract law. So dominant is this origin story of commercial activity and contracting that it overshadows, sometimes without acknowledgment, how we view contract today, and can seep into, without examination, how we explain rules or doctrines of contract law. *Lutheran Theology and Contract Law* documents, like many other similar studies of different periods, how historical actors understood contract. To many it represented the creation of an ethical and legal relationship and not merely an elaborate extension of or for the mechanical swapping of goods or services.

Additionally, by demonstrating a noticeable degree of continuity between Catholic medieval understandings of the moral significance of contracting and the opinions of Lutheran theologians of the early modern period, Astorri demonstrates that it is a mistake to assume the Protestant mindset, culture and institutional structure was generative of and more adaptable to capitalism in comparison to a Catholic intellectual environment. To make it explicit, there is nothing apparent in Lutheran theologians' work when compared to say, Jesuit writings on usury, that suggests the acquisition of capital was made easier by the legal or moral structure of Lutheran theology or casuistry. In fact, on one reading of what Astorri documents Lutherans were more restrictive in their understanding of when and in what ways interest could be taken.

Astorri does not always make these points explicit, but it can be found here. For the most part, the book is a programmatic and exhaustive review of different theologians. At times this can appear encyclopaedic, leaving the reader to search for the analysis within the conclusions to each chapter. But then this is also what is impressive about this work: there has not been anything of this scale, size and scope written in English on this topic. It plots sources, records and ideas which are often beyond the reach of scholars working in this area and provides an indispensable contribution to the literature. Astorri writes with clarity and structure, which will aid future researchers who may pick up parts of this work for further examination.

For now, we have an invaluable guide to an otherwise unexplored aspect of contractual thought and something to now compare with Berman, Gordley and Decock's theses. And perhaps there is something here for contemporary scholars of contract. Could it be supposed that in troubled times we need a vision of contract that encourages us to love our neighbour *and* our world? On the first, it could be said that the law of delict and tort has been challenged to meet such aspirations since Lord Aktin's

dicta, whereas on the second, we might say environmental, social and governance (ESG) strategies and ethically aware consumers are ushering in a new era for the law of contract in many jurisdictions.

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