MEDIAEVAL COMMERCIAL CANON LAW & MORALITY: ITS APPLICATION TO TODAY'S WORLD

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I. Mediaeval commercial morality in theory

Introduction

Gratian's *Decretum*, the first systematic work of mediaeval canon law, also represented the high-water mark of Christian condemnation of trade. Christian teaching from Tertullian, Chrystostom, Jerome and Augustine had condemned merchants, who were caricatured as men who desired to get rich at any price.

Much of this teaching was based on Matthew 21 v.12 where Jesus' eviction of those buying and selling and changing money from the temple was pointed to as a justification of a universal condemnation of their business.

Gratian condemned all commercial profits and branded as usury the loans involved in the contract of *commenda* (a form of investment) and *societas* (a type of partnership agreement). If scholastic thought in particular and Christian teaching in general had remained there it would have had little useful to say about a phenomenon that developed early in man's history and has persisted and flourished until the present day.

The twelfth to the fourteenth centuries, the High Middle Ages, represent the period when canon law flowered and when theologians and canonists wrestled with the implications of the Church's teaching on the consciences of Christian citizens and on the laws that Christian authorities, both religious and secular, should enact and enforce.[1] The focus of the theologians was on the internal forum, the conscience, they were concerned with whether a man's intentions and actions would be judged to be righteous before God; the canonists' concern was with the law as it would be enforced in the external forum, by the earthly courts of the day.[2] Their

1. Also active at the time, and concerned with the interpretation, application and evasion of the secular laws of the kings of Europe and of the newly re-emergent Roman law, were other lawyers, often referred to as the legists, whose concern and approach did not differ markedly from that of modern lawyers, as McGovern has shown in his essay 'The Rise of New Economic Attitudes in Canon and Civil law 1200-1550 AD'.
2. Gilchrist at p.48.

approach, however, was a common one, and they are often referred to collectively as the scholastics.[3] For the purposes of this article, I am focussing on the two aspects of their work that were especially concerned with the commercial world: usury theory and just price theory.

A. Usury

Usury theory has already been exhaustively analysed by J.T. Noonan, and it would be pretentious of me to do anything more than to summarise his conclusions. Noonan's starting point is the Nymwegen capitulary of 806 which defines usury as 'where more is asked than is given'. For him, therefore, usury theory is a theory that forbids the taking of interest on loans. He then explores the exceptions that developed, such as the admission of the licitness of the census, the societas and the montes pietatis. In his conclusions, set out at pp.193-195 of his work, he says 'The rule, as applied, did not choke commerce. It regulated, in some measure, the course of credit.' The peculiarity of mediaeval usury theory is its unselfconscious inherent contradictions. The blanket prohibition on taking more than is given in a loan is overwhelmed by the number of exceptions that develop. Nonetheless, the distinction between theory and practice remains. Certain forms of loan, although common in the Middle Ages, remained condemned by the Church as usurious. Other forms of loan, such as census, societas and mons, were permissible.[4] The Church's teaching in relation to the latter was part of its usury theory. In retrospect, it may not be too much of an overstatement to conclude that the reformation of the usury rule that Calvin, inter alia, undertook, did little more than render the Church's doctrine on the subject into a form that the ordinary businessman could comprehend and which broadly reflected the way in which the teaching had already been applied in practice.

B. The Just Price

Canonists and theologians quickly moved beyond Gratian's condemnation of commercial profits. Just as the distinction between legitimate interest and usury emerged obliquely during the thirteenth and fourteenth centuries, to be brought into

3. A term that I use in this article to describe those within the mainstream of Christian thought from 1150 to 1450. J.T. Noonan in his work applies the term to Catholic thinkers through to the present day, but he and I, in common with other students of the period, would recognise that there was a decisive shift in thought on the questions of law and morality in the period 1450 to 1550.
4. Noonan at Chapters V to VII of his work.

the light of day by Calvin, so the distinction between legitimate and excessive profit emerged.[5]

Rufinus, an early commentator on the *Decretum*, wrote in Gratian's own lifetime in defence of profit earned from expense and labour.

By the time of Hostiensis (d.1271), canonists distinguished between 3 types of *emptio venditio*, of buying and selling. Firstly, there was **forced sale**, where goods bought for personal use or consumption later had to be sold. This was permitted to both laity and clergy and profits could be made. Secondly, there was the **labour of craftsmen**, who increased the value of the goods they bought by the work that they put into the finished product. This was permitted to the laity without restriction; and to clergy in relation to the Church's own estates and business affairs, to protect the interests of 'minors, orphans and widows' and in cases of necessity.[6] Thirdly, there was **negotiatio**, the activity of the merchant class proper who bought cheap with the motive of selling dear without any further addition to the goods or improvement. Forbidden to the clergy (cf. Gratian C.14 q.4 c.3) it was allowed to the laity as an evil necessity until condemned as usurious profiteering by C.14 q.4 c.9 in the *Decretum.*

Buying and selling generally was therefore free from opprobium. *Negotiatio* was according to Gratian an evil. However, canonists swiftly distinguished between profits made as a result of the expenditure of time and money and labour, which were *honestus questus* and those made without expenditure where the gain was *turpe lucrum.* In other words, pure speculation was condemned, but if, for example, goods had been transported any distance by the merchant, he was entitled to a profit.[7]

Raymond de Rover exploded the thesis of Max Weber and Werner Sombart that the 'just price' was a dogma linked to the mediaeval concept of a social hierarchy and corresponded to a reasonable charge which would enable the producer to live and to support his family on a scale suitable to his station in his life.[8] This position

5. Gilchrist at p.59-62 and p.64-67. The question of the mediaeval theory of usury is dealt with exhaustively in the first half of Noonan 'The Scholastic Analysis of Usury'.
6. Gilchrist at p.53-54.
7. This was the defence of the merchant originally suggested by Augustine of Hippo.
8. De Roover at p.418.

was in fact held by the nominalists, the followers of William of Occam, and Weber had seized on a quotation from Heinrich von Langenstein (1325-97) to justify his point. De Roover successfully demonstrated that this was a marginal view, whose proponents were tainted with heresy and outside of the mainstream of scholastic thought.[9]

Duns Scotus' position resembled that of the nominalists, but left the question of social status out of account. For him the just price should reflect the cost of producing the item sold, including a normal profit element, and compensation for the risks involved in production.

The Thomist position reflected the main sources of price-setting in the mediaeval world: the just price was to be the market price (secundum aestimationem fori), determined in a particular town at a particular season, subject to one important reservation: in cases of collusion or public emergency, the public authorities retained the right to interfere and to impose a fair price. Aquinas himself was astute enough in his Summa Theologicae II, ii, qu.77, art.1, ad.1, to clarify that the just price being impossible to determine with precision, one could deviate from it to a minor extent without any injustice. The Salamanca school of law, founded by Francisco de Vitoria (ca. 1480-1546), held that price should be determined solely by questions of supply and demand without regard for labour costs, expenses or incurred risks. They would have had a lot in common with Thatcherite free-market economists of today. This school of law was, however, founded at the very time when the old theological certainties were being challenged and re-thought.

Although Jean Gerson (1362-1428), often a radical, recommended price fixing on all commodities, in fact mediaeval price regulation usually only embraced a few basic necessities such as wheat, bread, meat, wine and beer.

The Thomist proviso, allowing for public interference in price-setting, was rejected by Martin Azpilcueta (Navarrus) (1493-1587), who rejected municipal price-intervention on the basis that it was unnecessary when goods abounded, and ineffective or harmful when goods were scarce because it either destroyed the market for the goods in question or led to the creation of a parallel, black market where the goods were sold in violation of the promulgated price restrictions.

9. However, as Professor Tierney noted at p.37 of his work the canonists did rely on the concept of a man's station in life in certain contexts, notably when it came to protecting clerical incomes! The point is that it was not widely used by them in commercial matters.

Price variation

Mediaeval lawyers accepted the observation that the Romans had made that price varied from place to place and in accordance with time, and that the just price could only be estimated according to a particular place and at a particular time.

The unjust price

Pretium affectionis, i.e. price discrimination, was where some weakness or necessity by one party was taken advantage of by the other, or a figure was fixed outside of market fluctuations. However, it was not unjust for a seller to sell at a higher than normal price if he had a particular need for the goods that the buyer wished to purchase, i.e. that the seller's own weakness was used by him to his own advantage.

Artificially fixed prices, brought about by base business methods, such as monopoly or price agreement, forestalling (i.e. preventing supplies from reaching market), regrating (cornering the market to drive prices up) or engrossing (that is accumulating stocks), were unjust.

Monopolies

According to canon law, monopoly profits were *turpe lucrum* and subject to restitution. In this battle, the legists, that is to say those concerned to apply the law, and particularly Roman law in this context, were ahead rather than behind the canonists and the theologians.[10] Elsewhere, one can see a not entirely unexpected divergence between the moral views expressed by theologians and canonists and the attitudes and approach of the legal practitioners of the day.[11]

Municipal price regulation

Towns were largely responsible, even in the relatively centralised kingdoms of England and France, for implementing economic policy and they operated it in their own favour. Those coming from the countryside to sell were subjected to the full rigours of competition whereas the guilds regulated and controlled competition in the goods

10. McGovern in 'The Rise of New Economic Attitudes in Canon and Civil Law AD 1200-1550' at p.45.

11. It is sufficient really to compare Noonan's work with McGovern's, to identify the evident tensions between the exhortations of the theoreticians and the solutions offered by the practitioners.

that the townsmen sold.[12] Petrus de Ancharano, however, was clear that the activities of guilds and monopolies should be curtailed if they restrained freedom of commerce, freedom of contracts, freedom to dispose of one's property and the free choice of those wishing to make purchases.[13] Nonetheless, towns, unlike private individuals, could legitimately, according to scholastic doctrine, fix prices. There also existed during the Middle Ages state monopolies: salt was a state monopoly in France and the English government set retail prices for wine.

Enforcement of the just price

Leaving aside the just price as fixed by municipal price regulation, the just price was enforced to some degree by both of the forums of which the scholastics habitually thought.

In the external forum, there was the doctrine of *laesio enormis. Laesio enormis* began as a Roman law remedy, restricted to sales of land (*fundus*), and availing only the seller, who could put the buyer to an election between paying the balance of the value of the land or returning it and recovering his money if the seller had originally sold the land for less than half of its true value. That true value, doubtless a fruitful arbitrium source of litigation, was to be fixed by an arbitrium boni viri.[14] In the hands of the canonists, *laesio enormis*, became a generalised remedy throughout the law of sale, and was even available to the buyer if he paid more than 50% too much for his purchase.

In the internal forum Aquinas noted that the just price could not be fixed precisely (*punctualiter*) but consisted of a rough estimation which could vary a little in each direction without violating the equality of justice. Beyond those bounds, the exaction of an unjust price was a matter for penance and possibly restitution.

Profit

Profit was similarly to be assessed on the basis of two standards. On the one hand there was the economic or objective analysis of Rufinus and Sicardus which

12. It would be false to claim that the guilds were totally free to fix prices as they chose, or even had a 'right' to do so. In England, statutes of 15 Henry VI c.6 (1437), 19 Henry VII c.7 (1504), and 22 Henry VIII c.4 (1530) all forbade guilds to set prices 'for their singular profit, and to the common hurt and damage of the people.'
13. McGovern in 'The Rise of New Economic Attitudes in Canon and Civil Law AD 1200-1550' at p.45.
14. The little available evidence, recited by Baldwin at p.28, shows that during the mediaeval period the *arbitrium boni viri* quickly became a corporate body composed of a number of 'estimators' who together determined the correct price.

followed Augustine and justified mercantile profits by the factors of expenses and labour. On the other hand, Huguccio, following the canon *Qualitas*, proposed a moral or subjective analysis which examined the intention of the merchant. Was the merchant transacting business in order to supply his own and his family's needs, or was it to fulfil a calculated greed for wealth?' The first analysis was appropriate to the external forum, and was enforceable, if only partially, by means of the just price doctrine and its remedy *laesio enormis*. The second analysis was enforceable only in the confessional, and Huguccio was sufficiently forthright as to suggest the bishop as an appropriate man to determine the level of profit that a merchant could, in good conscience, make.

C. Squaring the circle

Noonan's analysis of usury theory includes a chapter on the Just Price in which he highlights the contradictions between Just Price theory and the ban on usury as set out in the Nymwegen capitulary.[15] I have, above, argued that usury theory, although not systematically thought through, was broader and more nuanced than the Nymwegen capitulary's formulation. If we allow ourselves the luxury of carrying out the necessary systemisation for the mediaeval scholastics then the conflicts between Just Price theory and usury theory are greatly reduced.[16] Both then become moderate and workable guidelines for good commercial behaviour, capable of application in today's world as they were in their own time.

It is therefore possible to summarise the broad teaching of the scholastics as follows:

(i) Mediaeval commercial (canon) law

(a) No usury, i.e. no (excessive) interest;
(b) the just price is the market price (*secundum aestimationem fori*);
(c) *In extremis*, the just price is the price fixed by the authorities;
(d) Prices more than 50% deviant from the just price will be rectified;
(e) No price discrimination, all purchasers are to be treated equally;
(f) No monopolies, because of their tendency to overcharge;

15. Chapter IV.
16. I admit that this is an ex post facto rationalisation and would be improper if I were to pretend to be an historian of the period. However, this article is written more as a commentary on the thought of the scholastics and particularly concerned to identify whether and to what extent it could be of relevance today and so, in that context, I hope that Noonan will forgive me the luxury of reading back into scholastic usury theory the systemisation of a later age.

(g) No forestalling, engrossing or regrating, i.e. stock-piling to alter the flow of goods to market thereby altering the price;

(h) No pure speculation.

(ii) Mediaeval commercial morality enforced only in the internal forum

(a) The price charged must not be a not-just one, i.e. it must correspond closely to the 'just price';

(b) The merchant's profits must not exceed those which are necessary in order to supply his family's needs.

II. The Effect of Mediaeval Commercial Morality: did it work?

The external forum

(1) *Usury*: There is well-documented evidence from Venice and Florence that loans of 5% to 12% were legal under municipal law.[17] The total prohibition of usury was not a workable proposition. However, the laws against usury that did exist were enforced against the 'manifest usurers', i.e. against the well-known loan-sharks and they served to keep the price of credit within bounds. However, the laws also appear to have kept consumer credit out of reach of the poor who had to wait until the introduction of the *montes pietatis* before their needs were met. In short, it can be concluded that at least the Calvinist re-interpretation of usury was enforced.

(2) *Market price*: Market prices seem to have been enforced through the use of the 'estimators' and a certain amount of municipal monitoring. From Charlemagne on, legislators were particularly alert to the use of false weights and measures by vendors in order to achieve an illicit competitive advantage.

(3) *Price-fixing by authorities*: Often attempted, often a failure is probably a good summary of municipal intervention on the markets in times of dearth. De Roover remarks that 'the history of price controls is a history of woe'[18] but opines that matters would have been worse in the absence of intervention. The most successful forms of intervention were when the authorities had their own granaries, whose contents they would sell at opportune moments, following the biblical example of Joseph.[19]

17. Gilchrist at p.113.
18. At p.430.
19. Genesis 41.

(4) *Laesio enormis: 50% price deviation*: The irony of the development of *laesio enormis* is that this remedy generalised by the mediaeval theorists died a death as an effective tool for the vendor for whose benefit it had originally been devised. First the Romanists and then the Canonists approved various devices by which the vendor stipulated in the contract of sale that he renounced his right to claim *laesio enormis*, by for example, making a gift of the balance of the price to the purchaser.[20]

(5) *Price discrimination*: It seems probable, despite a lack of evidence, that this problem subsisted largely undetected because the typical case envisaged by the scholastics was that of the traveller and unless a traveller stayed in a place long enough to both determine the 'going rate' and to complain about his over-payment it is difficult to see how the problem could come to light.

(6) *Monopolies*: Mediaeval price regulation was by the towns for the towns, therefore, while monopolies and co-operative associations among the rural sellers were heavily opposed by the municipalities, the guilds that operated cartels within the walls were allowed a fairly free hand.

(7) *Stock-piling*: The penalties for forestalling, engrossing and regrating were strict. The temptation was no doubt great. Beyond that it is difficult to say.

(8) *Speculation*: The difficulty with speculation was that the criteria used to define it were imprecise. At what point did a merchant depart from his legitimate trade and engage in purely speculative activity? The problem was further compounded by the scholastics' recognition that the element of risk involved in certain transactions in fact took them outside the usury prohibition because the trader was in effect trading risk against interest. Based as it was on an examination of the merchant's intention, the prohibition on speculation must have been something of a toothless animal in the external forum.

The internal forum

It is very difficult to assess the effect to which the morality that the scholastics sought to impose on trade practices was observed. Confessionals keep no records. It is, however, characteristic of humanity to be more generous in death than in life, and a large number of merchants gave away in their last will and testaments their ill-gotten gains. The greatest impact that these theories of morality would have had was in the twelfth and early thirteenth centuries, when they were held to in strictness

20. Baldwin at p.24-26.

by their proponents and not wholly undermined by the activities of the clergy and the great monastic houses. As the Middle Ages wore on, their cultural effect would have diminished as even the ordained seemed to be ignoring the spiritual injunctions of the theorists.

Conclusion

The mediaeval Church did not by its teaching or its encouragement of price regulation subsidise the inefficient, prevent competition or otherwise stultify economic activity. In relation to profit they recognised that just means do not always yield just results, but came to the view that such matters could not be dealt with by the courts of this earth.

III. What would the Scholastics have to say about business today?

(1) *Usury*: One can imagine the joy with which a total ban on interest would be met by banks and traders around the world. However, if it is accepted that the scholastics arrived at a pseudo-Calvinist position, it might perhaps have two clear applications. On the one hand, domestically, it might translate into a tougher stance in relation to 'exorbitant' interest-rates under s.137 of the Consumer Credit Act. On the other hand, internationally, should not the First World and New World banks release the Two-Thirds World of all or part of their debt obligations? Is this not manifest usury on a grand scale?

(2) *Market price*: There is little cause for complaint about the important but often unheralded work of the Trading Standards Authority in checking weights and measures. However perhaps one of the techniques of price-raising currently en vogue should be brought more clearly to the public's attention: instead of raising prices overtly vendors are now reducing the quantity supplied: look at the number of jams now sold in less than 1 lb jars! Also to be lauded is the requirement that prices be displayed prominently close to goods and that in supermarkets prices per 100g be provided to enable comparisons to be made.

(3) *Price-fixing by authorities*: Two examples spring to mind: the one, international attempts to sustain the prices of raw materials in a falling market, the other, the Common Agricultural Policy. Both these examples would be atypical for a scholastic who would be accustomed to thinking of price-fixing as an act in favour of the buyer rather than for the protection of the seller. The first has largely failed because it was under-resourced, undermined by speculation and undercut by indisciplined competition and over-production by the very people that it was trying to help. The second has been a spectacular, if costly success. It is objectionable because it is price-regulation 'for the town

by the town', i.e. it is protection for expensive producers of food within the E.C. at the expense of cheaper producers outside of the E.C. But that is to make a criticism of it that goes beyond the scholastic.

(4) *Laesio enormis: 50% price deviation*: Present in its Roman form in French law, this concept lives on in English law in the rules relating to assured tenancies. Perhaps it could still be usefully employed in relation to large-scale transactions.

(5) *Price discrimination*: There are current rules relating to this that are enforced as part of competition law and it is also enforced, tangentially, by those rules that monitor the relationship between the cash price and the credit price under the Consumer Credit Act 1974.

(6) *Monopolies*: Competition law regulates a number of abuses. England, France and Germany all have their national competition laws, that are to a lesser or greater degree effective and then there is European Competition Law, which by Article 86 of the Treaty of Rome 1957 punishes abuses of a dominant (i.e. monopoly or quasi-monopoly) position, and Article 85 which punishes co-ordination of activity by companies in order to enable them to behave as if they were a quasi-monopoly. It is generally acknowledged that E.C. competition law has more teeth than national competition law but even it seems pretty anodine on the question of mergers, i.e. the creation of dominant companies.[21] You could count on the fingers of one hand the number of mergers that the European Commission has blocked! One aspect of monopoly control that the scholastics would understand is the use of regulators over privatised monopolies. This arrangement bears more than a passing resemblance to the mediaeval practice of kings awarding powerful nobles concessions to run such and such an activity, with licences renewed at intervals.

(7) *Stock-piling*: If the B.B.C.'s recent drama *Rhodes* exposed nothing else, it reminded the world that the diamond cartel has maintained the price of those sparkling crystals through somewhat dubious means. Were stock-piling to be adopted by developing countries as a means of maintaining the incomes of the producers on the other hand, the scholastics would approve: the source of the restrictions being governmental in origin and the aim being to enable producers to meet their basic needs this, would be a legitimate and even laudable activity.

21. This is despite Regulation 4064/89 on Mergers which applies to them in addition to Articles 85 and 86.

(8) *Speculation*: You do not have to scratch the surface of the modern stock markets too far to discover that 'futures' trading is far more voluminous and lucrative than other forms of trading nor that only 2% of all 'futures' transactions actually result in the delivery of goods. The E.R.M. nearly completely collapsed under the weight of currency speculation in 1993. Speculation remains an evil where the few get very rich at the expense of the many. The scholastics would be appalled by its prevalence.

Turning to the internal forum, to rules of morality traditionally not enforced as law, what possible application might the rules that the price to be charged should not be an unjust price or that profits should be modest have? The latter is obvious, Christians are told that they cannot serve both God and Mammon and that they should seek first the Kingdom of God. God promises to provide our needs but if he gives us a superabundance then we should follow the example of John Laing and give the excess away.[22] The principles set out above are helpful because they remind us that even the most just economic system that man can devise in this fallen world will produce freak results For example, most musicians make a living but some, through their popularity, make millions out of royalties; should not they give away the excess?, should there be a cut-off point enforced by law? In many fields at the frontiers of technology, intellectual property rights, patents, copyrights and plant breeders' rights are the most valuable assets that a company has: they can be sold many times without becoming exhausted. They have founded the fortunes of men such as Bill Gates of Microsoft. Does there not come a point where in equity they should be given away to the poor, when the work, including the risk of failure, that went into producing them has been more than recompensed and their revenues should dry up?

Conclusion

At least from what we can read back into scholastic thought it appears surprisingly modern and relevant in its economic outlook. The mediaeval Catholic Church contained within it the tension between those tied to the world system of the day, those seeking to escape from that system and those seeking to impose God's rule on that system. The same tensions are felt by churches and individual Christians today. Jesus records the effect of pouring new wine into old wine-skins, but he did

22. Professor Tierney develops a careful account of the controversy surrounding whether to give alms was an act of justice or an act of mercy, at pp.35-37 of his work. His conclusion is that for the scholastics, it was an absolute duty to give alms out of one's superfluity but an act of mercy to give alms out of one's own necessities.

not deal with the converse situation; it may be a little like pouring old wine into new wine-skins to critique the world economic system of today by the standards of men writing 800 years ago, but if we wish to learn the recipe for good wine then we do well to start our study with the great wine-makers of the past.[23]

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23. David Johnston in his inaugural lecture as Professor of Civil Law at the University of Cambridge (1997) C.L.J. 80 has recently highlighted some of the ways in which 'dead' law, old legal solutions to problems can be applied and 'renewed' to provide practical answers or at least a practical framework for answers, in today's world.