Divine Law, Natural Law and Reason in Dutch Jurisprudence: The Rise of Moral Relativism in the Jurisprudence of the Dutch "Golden Age"

***Prof. A.W.G. Raath*[1]**

Samevatting

Die uitgangspunt van die reformatoriese regs- en politieke teorie was dat die mensdom deur die wet van God regeer word. Die Reformatore het die sosiale orde van die Hebreeuse republiek as uitgangspunt vir die regs- en staatsfilosofiese denke geneem vir sover dit 'n model van die gelding van die transendentale beginsels van die goddelike reg en geregtigheid gebied het. Die Reformatore het naamlik geglo dat die mensdom regeer word deur die wet van God soos dit in die Skrif vervat is en dat die mens verplig is om die samelewing in te rig en te handhaaf soos deur God in die Skrif vereis word. Die reformatoriese uitgangspunte met betrekking tot die staat en die reg is vanaf die middel van die 17de eeu geleidelik deur die rasionalistiese klem op die mens se rol in die formulering van die beginsels onderliggend aan die regsorde vervang. Die ondermyning van die goddelike beginsels wat die regsorde onderlê, het met die relativering van die morele dimensie in die regsorde gepaard gegaan. Terwyl die proses van sekularisering, deur die regsteorie van Hugo Grotius geïnisieer, tot morele relativisme in die Nederlandse reg gelei het, het die impak van die reformatoriese denke oor die reg in die nuwe pionierskolonies van Amerika steeds voortgeduur. In hierdie artikel val die klem spesifiek op die bydrae van Ulrich Huber en Antonius Matthaeus, twee invloedryke Nederlandse skrywers uit die middel van die 17de eeu, as voorlopers van die

1 Senior Professor in Administrative Law and Philosophy of Law, University of the Free State. The author is indebted to Professor H.A. Wessels of the Department of Roman Law and History of Law at the University of the Free State for his assistance with the translation of Ulrich Huber's *De Jure Civitatis* (1694) and the facilitation of this research through the unit for legal-historical research in the same departement.

verligtingsdenke wat Europa vanaf die begin van die 18de eeu oorspoel het.

1. Introduction

Towards the middle of the 17th century the legal and theological authors of the Dutch Republic differed on the issue of whether the Mosaic law was still enforceable in the state. The general view was that a distinction had to be drawn between the political and the moral laws, and it was maintained that the political laws had no binding authority although the moral laws were still enforceable. Johannes Groenewegen, for example, held that the law in Leviticus 20: 10 and Deuteronomy 22: 20 was moral to the extent that adultery was forbidden, while this same law was political in so far as the punishment for this crime was death, and since it concerned only the Jews, it was abrogated with the end of the Jewish polity (*Hollandsche Consultatien*, Vol. I, page 307 [*HC*, I: 307].[2] To Groenewegen the same applied to the laws of Exodus 22: 16, 17 and Deuteronomy 22:29, because the judicial laws of the Old Testament did not bind the Christians under the new dispensation.[3] This view was not shared by the theologians from Leiden in their advice of 15 December 1635 (see *HC*, II: 257, 497). The States of Holland, in a resolution of 19 March 1735, stated that the "civil laws" of Moses were no longer binding. In a letter to the States, the Court of Holland, in its motivation of a sentence which it had imposed, relied on the text of Deuteronomy 19: 9 - 16 regarding the giving of false evidence, for its view that the civil laws of the Jews were no longer binding. In their response to the court's views, the States observed that the "Court in justification of a sentence, which, to the Court, was too rigorous, referred to the fifth book of Moses, where the judges are called upon to act towards a person giving false evidence in the same manner as he does towards his brother, which allegation, if enforced would mean that the Court is competent and obligated to do justice according to the civil laws, given by God through Moses, not to the whole of mankind, but to the Jewish nation, which, according to the united

2 Groenewegen observes that there is no obstacle that God expressly stipulated in Leviticus 20: 10 and Deuteronomy 22: 10 that the adulterers shall be punished with death and "that consequently an adulterous woman is dead in the eyes of God even if the authorities allow her to live. Also see 492 *et seqq.* He quotes Calvin, *Institutes* Vol. I: Book 4, Chapter 20 [I: 4: 20], Rivet, Zepper and other Reformed authors.

3 In *HC*, III, Groenewegen explicitly states that the laws of the Old Testament do not oblige Christians since the time of grace is passed (see 90 and 292).

judgment of the theologians and the lawyers is a supposition of far-reaching consequences" (Grotius, 1939: 4 - 5).

The movement towards relativising the enforcement of the divine law was largely influenced by the works of Grotius. He was mainly responsible for the enhancement of the status of the natural law and for relativising the enforcement of the divine law. Among the Dutch authors on Criminal law, mainly Matthaius and Huber endeavoured to maintain the traditional role assigned to divine law by the Reformation, although they showed clear traces of the influence of Grotius's rationalistic views of natural and divine law.

2. The Reformational views on the status and enforcement of moral law

2.1 John Calvin on divine and Mosaic law

2.1.1 The threefold nature of the law

John Calvin's views on the status and function of divine law are representative of the Reformational theory of law and justice. Except for minor differences in emphasis, all the major Reformers were in agreement on the division of Biblical law into moral, ceremonial and judicial laws. In his Aphorisms Calvin formulates this division as follows: "The Law is threefold: Ceremonial, Judicial, Moral. The use of the Ceremonial Law is repealed, its effects are perpetual. The Judicial or Political Law was peculiar to the Jews, and has been set aside, while that universal justice which is described in the Moral Law remains. The latter, or Moral Law, the object of which is to cherish and maintain godliness and righteousness, is perpetual, and is incumbent on all" (Calvin, *Institutes*, Aphorisms Book II, Number 23 (page 1657) [*Aphorisms*, II, 23 (1657)]. This distinction is maintained by Calvin in his *Institutes* (IV.20.14 (1621)). Calvin observes that the divine law in its totality, as promulgated by Moses, is distributed into the moral, the ceremonial, and the judicial law (*Institutes,* IV.20.14 (1636)). We should not be moved, says Calvin, by the thought that the judicial and ceremonial laws relate to morals (*Institutes*, IV.20.14 (1637)). Only the first class of laws are known as the moral laws because without these true holiness of life and an immutable rule of conduct cannot exist (*Institutes*, IV.20.14 (1637)). The moral law is contained under two headings, the one of which simply enjoins us to worship God with pure faith and piety, the other to embrace men with sincere affection. It is the true and eternal rule of righteousness prescribed to the people of all nations and of all times, "who would frame their life agreeable to the will of God" (*Institutes*, IV.20.15 (1637)). God's eternal and immutable will is

that we are all to worship him and mutually love one another (*Institutes*, IV.20.15 (1637)). The ceremonial law of the Jews was a "tutelage" by which the Lord was pleased to exercise as it were, the childhood of that people, until the fullness of the time should come when he was fully to manifest his wisdom to the world, and exhibit the reality of those things which were then adumbrated by figures (Galatians 3: 24; 4: 4) (*Institutes*, IV.20.15 (1637)). The judicial law was given to the Jews as a kind of polity. It contained and expressed certain forms of equity and justice, by which they might live together innocently and quietly. Both the ceremonial and the judicial laws applied to the Jewish nation only, and could be abrogated without disturbing the principles of piety and charity contained in them: "And as that exercise in ceremonies properly pertained to the doctrine of piety, inasmuch as it kept the Jewish Church in the worship and religion of God, yet was still distinguishable from piety itself, so the judicial form, though it looked only to the best method of preserving that charity which is enjoined by the eternal law of God, was still something distinct from the precept of love itself. Therefore, as ceremonies might be abrogated without at all interfering with piety, so, also, when these judicial arrangements are removed, the duties and precepts of charity can still remain perpetual" (*Institutes*, IV.20.15 (1637)). In effect it does not mean that each nation is completely at liberty to enact the laws it wishes without having recourse to charity – although each nation is free to make the laws it judges to be beneficial, still these are to be tested by the rule of charity, "so that while they vary in form, they must proceed on the same principle" (*Institutes,* IV.20.15 (1637)). This means that those "barbarous and savage laws, … which conferred honor on thieves, allowed the promiscuous intercourse of the sexes, and other things even fouler and more absurd, I do not think entitled to be considered as laws, since they are not only altogether abhorrent to justice, but to humanity and civil life" (*Institutes*, IV.20.15)).

Because equity is natural, it cannot be the same in all circumstances, and therefore ought to be proposed by all laws, "according to the nature of the thing enacted" (*Institutes*, IV.20.16 (1637-8)). Nothing prevents the diversity of constitutions, provided they all alike aim at equity as their end (*Institutes*, IV.20.16 (1637-8)). Because the law of God (or moral law), is nothing else than the testimony of natural law, and of the conscience which God has engraved on the minds of men, the whole of equity is prescribed in it; "Hence it alone ought to be the aim, the rule, and the end of all laws"; "Wherever laws are formed after this rule, directed to this aim, and restricted to this end, there is no reason why they should be

disapproved by us, however much they may differ from the Jewish law, or from each other" (*Institutes*, IV.20.16 (1638)).[4]

Calvin explains the effects of maintaining the essence of charity according to the fixed principles contained in the moral and natural law as follows: The law of God forbids stealing. The punishment appointed for theft in the civil polity of the Jews may be seen in Exodus 22. Very ancient laws of other nations punished theft by exacting the double of what was stolen, while subsequent laws made a distinction between theft manifest and not manifest. Other laws went the length of punishing with exile, or with branding, while others made the punishment capital. Among the Jews, the punishment of the false witness was to "do unto him as he had thought to have done with his brother" (Deuteronomy 19:19). In some countries, the punishment is infamy, in others hanging, in others crucifixion. All laws alike avenge murder with blood, but the kinds of death are different. In some countries, adultery was punished more severely, in others more leniently. Yet we see that amidst this diversity they all tend to the same end. For they all with one mouth declare against those crimes which are condemned by the eternal law of God – viz. murder, theft, adultery, and false witness; though they do not agree as to the mode of punishment. This is not necessary, nor even expedient. There may be a country which, if murder were not visited with fearful punishments, would instantly become a prey to robbery and slaughter. There may be an age requiring that the severity of punishments be increased. If the state is in troubled condition, those things from which disturbances usually arise must be corrected by new edicts. In time of war, "civilization would disappear amid the noise of arms, were not men overawed by an unwonted severity of punishment. In sterility, in pestilence, were not stricter discipline employed, all things would grow worse" (*Institutes*, IV.20.16 (1638)). Calvin adds: "One nation might be more prone to a particular vice, were it not more severely repressed. How malignant were it, and invidious of the public good, to be offended at this diversity, which is admirably adapted to retain the observance of the divine law" (*Institutes*, IV.20.16 (1638 - 9)). Therefore, the allegation that the law of God, enacted by Moses, is insulted were it abrogated, and other laws preferred to it, is absurd: "Others are not preferred when they are more approved, not absolutely, but from regard to time and place, and the condition of the people, or when those things are abrogated which were never enacted for us" (*Institutes*, IV.20.16 (1638)). The Lord did not deliver it by the hand of Moses to be promulgated in all

4 Calvin relies on Augustine, *De Civitate Dei*, 19, 17.

countries, and to be everywhere enforced; but having taken the Jewish nation under his special care, patronage, and guardianship, he was pleased to be specially its legislator, "and as became a wise legislator, he had special regard to it in enacting laws" (*Institutes*, IV.20.16 (1639)).

2.1.2 The enforcement of the moral law

To Calvin the use of the moral law is threefold. The first use shows our weakness, unrighteousness, and condemnation; not that we may despair, but that we may flee to Christ. The second is that those who are not moved by promises may be urged by the terror of threats. The third is that we may know what is the will of God; that we may consider it in order to practice obedience; that our minds may be strengthened for that purpose; and that we may be kept from falling (*Aphorisms*, II, 24 (1657)). The sum of the law, to Calvin, is contained in the Preface, and in the two Tables. In the Preface we observe firstly, the power of God to constrain the people by the necessity of obedience; secondly, a promise of grace, by which he declares himself to be the God of the Church, and thirdly, a kind act, on the grounds of which he charges the Jews with ingratitude, if they do not require his goodness (*Aphorisms*, II, 25 (1657)). Whilst the first table relates to the worship of God, consisting of four commandments, the second table contains the duties of charity towards our neighbour, consisting of six commandments. The duties of exalting God in the four commandments of the First Table include man's duty of adoration, trust, invocation and thanksgiving towards God (*Aphorisms*, II, 27 (1658)); protecting the worship of God from being profaned by superstitious rites (*Aphorisms*, II, 28 (1658)); that a regard for God's majesty may be cultivated, that his holy word and "adorable" mysteries may not be rashly abused for the purposes of ambition or avarice and that the wisdom, power, goodness and justice of God may be adorated (*Aphorisms*, II, 29 (1658)); that the name of God may not be profaned by perjury, unnecessary oaths, and idolatrous rites (*Aphorisms*, II, 29 (1658)); to cultivate a spiritual rest by abstaining from work, that a day for the calling on the name of God may be kept and that servants may have some remission from labour (*Aphorisms*, II, 30 (1659)). The duties contained in the six commandments of the Second Table include promoting the duties of charity towards our neighbour, forbidding the taking of anything from the dignity of those who are above us, by contempt, obstinacy, or ingratitude, and commanding us to pay them reverence, obedience, and gratitude (*Aphorisms*, II, 31 (1659)). Because God has bound mankind "by a kind of unity", man is forbidden to do violence to private individuals, and is commanded to exercise benevolence (*Aphorisms*, II, 32 (1659)); because God loves purity, we ought to put away from us all uncleanness, and adultery in mind, word, and deed is forbidden (*Aphorisms*, II, 33 (1659)); since injustice is an abomination to God, he requires us to render to every man what is his own

and he forbids stealing, either by violence, or by malicious imposture, or by craft, or by sycophancy (*Aphorisms*, II, 34 (1659)); God, who is truth, abhors falsehood, by forbidding calumnies and false accusations, by which the name of our neighbour is injured (*Aphorisms*, II, 35 (1659-1660)), by requiring every one to defend the name and property of our neighbour by asserting the truth (*Aphorisms*, II, 35 (1559-1660)); and since God would have man's soul pervaded by love, every desire averse to charity must be banished from our minds, and therefore every feeling which tends to injure another is forbidden (*Aphorisms*, II, 36 (1660)).

2.2 Johannes Althusius on the symbiotic nature of society and the political enforcement of the moral law

2.2.1 The enforcement of the moral law in the state

In his views on the political relevance and enforcement of the divine law, Johannes Althusius was a staunch Calvinist. In his political theory he advanced pioneering views on the political relevance and enforcement of the moral law in the Reformational tradition. Although Althusius, in the Praefatio of his *Politica*, observed that he left out "all theological, juridical and philosophical considerations" and that he retained only those which to him seemed "essential and consonant to the sciences and disciplines"[5], he stated that he found a "niche for those precepts of the Ten Commandments and the laws of sovereignty about which the other political scientists maintained a profound silence."[6] To Althusius the Ten Commandments

5 "Quo in opere, ad suas sedes, omnibus merè theologicis, juridicis, & philosophicis rejectis, selegi illa tantùm, quae huic scientiae & disciplinae essentialia, & homogenae mihi esse videbantur" (Althusius, [1614] 1961: *Praefatio*). See also Carney, 1965: 8: "In this work I have returned all merely theological, juridical, and philosophical elements to their proper places, and have retained only those that seemed to me to be essential and homogeneous to this science and discipline."

6 "Atq; inter alia etiam praecepta Decalogi, & jura majestatis, de quibus apud alios politicos altum silentium, suis in locis adspersi" (Althusius, [1614] 1961: Praefatio). Carney translates this as follows: "And I have included among other things herein, all in their proper places, the precepts of the Decalogue and the rights of sovereignty, about which there is a deep silence among the other political scientists" (1965: 8). The implications of Althusius's views are that the purpose of political science is the maintenance of social life among men. Although certain legal, theological, and ethical material must be removed from the sphere of politics, in order to remove the confusion in this area, politics and theology may have partly overlapping subject matter, as theology and political science share the Decalogue, and law and political science embrace the doctrine of sovereignty, although each discipline must limit itself to the aspects of the common material that is essential to its own purpose, and to reject what is not (see Friedrich's Preface in Carney, 1965: xvii). Elsewhere Althusius states that the subject matter of the Decalogue is indeed political in so far as it directs

form the basis of man's symbiotic existence in the political sphere: "The precepts of the Ten Commandments have infused a vital spirit by its association to and symbiosis with life".[7] To Althusius the Ten Commandments constitute the "way", the "rule", the "barrier for that human society that we are seeking."[8] Althusius states that if one should take this away from the political realm, politics itself is taken away: "In that all the symbolism and social existence between human beings is taken away" (Carney, 1965: 8). Althusius states the importance of the divine law for human society as follows: "What is human life without the piety of the First Table and without the justice of the second Table.[9] What is the state

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symbiotic life and prescribes what ought to be done therein: "For the Decalogue teaches the pious and just life; piety toward God and justice toward symbiotes. If symbiosis is deprived of these qualities, it should not be called so much a political and human society as a beastly congregation of vice-ridden men. Therefore, each and every precept of the Decalogue is political and symbiotic. … If you would deprive political and symbiotic life of this rule and this light to our feet, as it is called, you would destroy its vital spirit. Furthermore, you would take away the bond of human society and, as it were, the rudder and helm of the ship. It would then altogether perish, or be transformed into a stupid, beastly, and inhuman life. Therefore, the subject matter of the Decalogue is indeed natural, essential, and proper to politics" (Carney, 1965: 143).

7 "Decalogi praecepta, quatenus nimirum illa consociationi & vitae symbioticae, quam tradimus, spiritum vitalem infundunt …" (Althusius, [1614] 1961:Praefatio). Carl J. Friedrich (in Carney, 1965: Preface), describes the relationship between sovereignty and the Decalogue in Althusius's political thought as follows: "(L)egislation expresses the special sovereign law which is embedded in a general sovereign law and right; both belong to the people, understood as the collectivity of corporate members, not of the individual persons. Law as the product of such special sovereignty is consensual within the context of the general law, which the reason that is embodied in the Decalogue prescribes." In this regard Althusius follows Calvin's views on the law in so far as the divine law of the Decalogue makes explicit what reason could teach the natural man. To Althusius everybody should participate in the shaping of those laws, through the participation of the individual persons (*singuli*) in the activities of the corporate entities to which they belong: "Such special laws are seen as 'explaining' the Decalogue, and as 'accommodating' it to the circumstances of place, time, and so forth" (1965: Preface). They may somewhat depart (*recedere*) from the moral law, as stated in the Decalogue, adding or detracting, but they must not be wholly contrary to natural law and moral equity" (1965: Preface)

8 "…. Quam tradimus, spiritum vitalem infundunt, facet praeferunt & vitae sociali huic, quam quaerimus, viam, regulam, cynosuram atque sepem societati humanae constituunt & praescribunt" (Althusius, [1614] 1961: Praefatio). Carney's translation reads as follows: "The precepts of the Decalogue are included to the extent that they infuse a vital spirit into the association and symbiotic life that we teach, that they carry a torch before the social life that we seek, and that they prescribe and constitute a way, rule, guiding star, and boundary for human society" (1965: 8).

9 Althusius repeatedly asserts that piety is required by the first table of the Decalogue and justice by the second, "and that the two together are furthermore validated in the

without a community and that communication which is vital and necessary for human life." The principle central to the idea of justice, is the precept of neigbourly love contained in the Decalogue.[10] Althusius's distinction between the first and second tables of the Decalogue and between piety and justice, corresponding to each of the two tables, has far-reaching implications also for the distinction of and the role of church and state, because universal symbiotic communion is both ecclesiastical and secular. Corresponding to the former are religion and piety, which pertain to the welfare and eternal life of the soul, the entire first table of the Decalogue. Corresponding to the latter is justice, which concerns the use of the body and of this life, and the rendering to each his due, the second table of the Decalogue. In the former, everything is to be referred immediately to the glory of God; in the latter, to the utility and welfare of the people associated in one body: "These are the two foundations of every good association. Whenever a turning away from them has begun, the happiness of a realm or universal association is diminished …" (Carney, 1965: 70).

2.2.2 The political relevance of the two tables of the Decalogue in the state

Secular and political communion in the universal realm is the process by which the necessary and convenient means for carrying on a common life of justice together are communicated among the members of the realm (Carney, 1965: 74). This communion is the practice of those things that relate to the use of this life or the public affairs of the realm, whence arises the secular right of sovereignty (*jus majestatis*), and the employment of a king: "This secular right of the realm (*jus regni*), or right of sovereignty,

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experience of men everywhere. Thus both divine revelation and natural reason are called upon in political science to clarify the true nature of symbiotic association" (Friedrich in Carney, 1965: xix). In the Preface to his *Politics*, Althusius asks: "For what would human life be without the piety of the first table of the Decalogue, and without the justice of the second? What would a commonwealth be without communion and communication of things useful and necessary to human life? By means of these precepts, charity becomes effective in various good works." (Carney, 1965: 8 - 9). Elsewhere (at 69) he observes: "Piety is to be understood according to the first table of the Decalogue, and justice according to the second. Polybius says that the desirable and stable condition of a commonwealth is one in which holy and blameless life is lived in private, and justice and clemency flourished in public."

10 He states: "The entire second table of the Decalogue pertains to this: 'you shall love your neigbour as yourself'; 'whatever you wish to be done to you do also to others', and conversely, 'whatever you do not wish to be done to you do not do to others'; 'live honourably, injure no one, and render to each his due' [Matthew 22: 39; 7: 12 (Shabbath 31a; Digest I, 1, 10, 1)]. Of what use to anyone is a hidden treasure, or a wise man who denies his services to the commonwealth?" (Carney, 1965: 17).

guides the life of justice organized in universal symbiosis according to the second table of the Decalogue. This right trains us how to live justly in the present world, as the Apostle says [Titus 2: 12], and so involves the practice of the second table of the Decalogue" (Carney, 1965: 74). The Decalogue teaches us the things that we are to be vouchsafed to our neigbours. The things that are vouchsafed to our neighbours in civil and social life, are formulated by Althusius in the form of that which are rightly owed to him, and, says Althusius, "are his so that he possesses them as his own" (Carney, 1965: 75). That which belongs to the neigbour has the dimensions of both "rights" enforceable by the neighbour, and "norms" prohibiting the injuring of his rights and liberties. That which is the neighbour's is, first, his natural life, including the liberty and safety of his own body; the opposite of which is terror, murder, injury, wounds, beatings, compulsion, slavery, fetters, and coercion (Carney, 1965: 75). Secondly, the neighbour possesses his reputation, good name, honour, and dignity, "which are called the 'second self' of man." Opposed to them are insult, ill repute, and contempt. Althusius also includes chastity of body, the contrary of which is any kind of uncleanness and fornication. Also pertaining to this category is the right of family, and the right of citizenship that belong to some (Carney, 1965: 75). Thirdly, Althusius identifies the external goods that man uses and enjoys, opposed to which are the corruption, damage, and impairing of his goods in any form, as well as their plundering or robbery, and any violation of their possession or artificial impediment in their use (Carney, 1965: 75).

The "normative" side of the Decalogue contains the duties we are vouchsafed to our neighbour. By acting according to them, we may live an honourable life, not injuring others, and rendering each his due (Carney, 1965: 76).[11] Above all, we are vouchsafed to do to our neighbour what we wish to be done to ourselves.[12] Man has to render to his neighbour honour, authority, dignity, pre-eminence, and the right of family; neither may we, on the contrary, despise him or hold him in contempt according to the fifth precept of the Decalogue (Carney, 1965: 76). We also have the duty to defend and conserve our neighbour's life, and his body may not be injured, hurt, struck, or treated in any inhumane way whatever, nor may the liberty and use of his body be diminished, or taken away: the sixth precept (Carney, 1965: 76). His chastity is to be left intact, free from fornication, and may not be taken away in any manner whatever: the

11 Althusius refers to *Institutes* I, 1, 3; and *Digest* I, 1, 10, 1 on this point.
12 Matthew 22: 39; 7: 12; Leviticus 19; Luke 13: 24.

seventh precept (Carney, 1965: 76). His goods and their possession, use, and ownership are to be conserved, and they may not be injured, diminished, or taken away: the eighth precept (Carney, 1965: 76). His reputation and good name are to be protected, and they may not be taken away, injured, or reduced by insults, lies or slander: the ninth precept (Carney, 1965: 76). Also one may not covet those things that belong to another, either by deliberation or by passion, but everything our neighbour possesses he is to use and enjoy free from the passion of our concupiscence and perverse desire (Carney, 1965: 76).

2.2.3 Sovereignty and the precepts of the Decalogue

Althusius states that if sovereignty is taken away from the political sphere the entire association is taken away: "What other bond is there than this one only. By these the state[13] is established and conserved. Once they are taken away its entire framework consisting of the symbiosis of various associations is dissolved and that which could have been ceased to exist" (Carney, 1965: Preface). Althusius asks how there can be a ruler, prince, administrator or governor of the state without the necessary powers, and without the use and exercise of sovereignty. He adds: "Consequently it is not strange that he (the jurist) might draw knowledge of certain matters from politics. Consequently matters and material derived from the law of sovereignty or the Ten Commandments may be theological, ethical, juridical. As far as those facts coming from the law of sovereignty conform to the Decalogue, the form and compass of those sciences may be accepted into those sciences as their own" (Carney, 1965: Preface). Although Althusius ventures to steer clear of matters in the Ten Commandments and the law of sovereignty which are heterogenous and foreign to politics, he "claims those which are germane to politics in so far as they breathe a spirit of symbiotic life which it shapes and conserves."[14] Althusius frequently makes use of examples from the scriptures which have either God or holy men as their author or authors, because he thinks that since the beginning of the world, there has been no state wiser than that of the Jews, and that we make a mistake as often as we depart from

13 Althusius decribes the state as "the universal association" (*consociatio universalis*): the commonwealth; an association inclusive of all other associations (families, collegia, cities, and provinces) within a determinate large area, and recognizing no superior to itself (Carney, 1965: 9, note 1).

14 "I claim the Decalogue as proper to political science insofar as it breathes a vital spirit into symbiotic life, and gives form to it and conserves it, in which sense it is essential and homogeneous to political science and heterogeneous to other arts" (Carney, 1965: 9).

similar facts and circumstances.[15] This has practical implications for the political and constitutional views of Althusius based on the principle of symbiotics. Although some people attribute the laws of sovereignty to the highest officials and not the universal association, and some jurists and politicians attribute them solely to the prince and the highest official, Althusius and a few others on the other hand maintain that the symbiotic body is germane to the universal association; they constitute the spirit, soul and heart. The owners and usufructuaries of sovereignty are the entire people fused together into one symbiotic association.[16] To Althusius the laws of sovereignty are attributes of that association which nobody can abdicate, transfer to somebody else or alienate even if he wishes to do so. In the same way nobody can communicate the life which he enjoys with anybody else.[17]

The basis of Althusius's political views is contained in the Decalogue, as it expresses itself in the political sovereignty of the symbiotic body of the people in the state, the effect of which is that man's symbiotic existence is determined, guided and shaped by the enforcement of the Decalogue.[18]

2.2.4 Natural law and the precepts of the Decalogue

Althusius formulates a close relationship between the Decalogue and natural law, as a result of which these two together form the common law

15 See Carney, 1965: 10: "I more frequently use examples from sacred scripture because it has God or pious men as its author, and because I consider that no polity from the beginning of the world has been more wisely and perfectly constructed than the polity of the Jews. We err, I believe, whenever in similar circumstances we depart from it."

16 See Carney, 1965: 10: "A few others and I hold to the contrary, namely, that they are proper to the symbiotic body of the universal association to such an extent that they give it spirit, soul, and heart. And this body, … perishes if they are taken away from it. I recognize the prince as the administrator, overseer, and governor of these rights of sovereignty. But the owner and usufructuary of sovereignty is none other than the total people associated in one symbiotic body from many smaller associations." The principle of universal symbiotic communion is described by Althusius as "the process by which the members of a realm or universal association communicate everything necessary and useful to it, and remove and do away with everything to the contrary" (at 69). The right of the realm pertaining to symbiosis and communion is described as "living lawfully, as nourishing life, and as sharing something in common" (ibid.).

17 Also see Carney, 1965: 10: " These rights of sovereignty are so proper to this association, in my judgment, that even if it wishes to renounce them, to transfer them to another, and to alienate them, it would by no means be able to do so, any more than a man is able to give the life he enjoys to another."

18 This entails that both tables of the Decalogue are of concern to the magistrate, "as can be demonstrated by examples of pious kings, namely, of David, Solomon, and others who followed them" (Carney, 1965: 154). He cites I Chronicles 23 ff.; I Kings 4 ff.; II Chronicles 2: 12; 14; 15; 17; 19; 23; 30 f.; 34 f.; II Kings 12; 18; 22. Also see 160 n 1 and his reliance on Deuteronomy 17: 16 ff.; Joshua 1: 8; I Samuel 12: 15 ff.; Exodus 19 f.; 28-30.

in the formulation of proper law for particular societies.[19] The Decalogue has been prescribed for all people to the extent that it agrees with and explains the common law of nature for all peoples. It has also been renewed and confirmed by Christ our king (Carney, 1965: 139). Other laws (*leges*) are prescribed for the inhabitants of the realm both individually and collectively. By them the moral law (*lex moralis*) of the Decalogue is explained, and adapted to the varying circumstances of place, time, person, "and thing present within the commonwealth" (Carney, 1965: 139). Althusius cites the example of Moses, who, after the promulgation of the Decalogue, added many laws by which the Decalogue was explained and adapted to Jewish commonwealth (Carney, 1965: 139).[20] Such laws, because of circumstances, can therefore differ in certain respects from the moral law, "either by adding something to it or taking something away from it (Carney, 1965: 139).[21] However, such laws ought not to be at all contrary to natural law (*jus naturale*), or to moral equity.[22] As men cannot live without mutual society, so no society can be secure or lasting without laws (*leges*).[23] From what has been stated it follows that the political authorities are obligated in the administration of the commonwealth to the proper law of Moses so far as moral equity or common law are expressed therein. This is to say that man is required to conform to everything therein that is in harmony with common law. But he is by no means required to conform to those things in which the proper law of Moses (judicial, political and ceremonial), in order to be accommodated to the polity of the Jews, differs from common law (Carney, 1965: 143). Accordingly, the magistrate who makes the proper law of Moses compulsory in his commonwealth sins grievously, for those particular circumstances and considerations because of which the Jewish proper law was promulgated should bear no weight in his commonwealth (Carney, 1965: 144).

2.2.5 Justice and the precepts of the Decalogue

In Althusius's political theory the Decalogue plays a foundational role in accomplishing justice and is closely intertwined with the principles of sovereignty. This implies that the Decalogue ensures that works of love

19 For his theory of the relationship between the Decalogue and natural law, Althusius relies largely on Zanchius's *De redemptione.*
20 He cites Deuteronomy 6 - 8; Exodus 21 - 22.
21 *Digest* I, 1, 6.
22 *Institutes* I, 2, 11.
23 Althusius refers to Plato, *Laws* III.

can be performed and public happiness be attained (Carney, 1965: 18). The general good and welfare of the body politic (commonwealth) is maintained by enforcing the precepts of the Decalogue (Carney, 1965: 18). Whilst the administrators of public duties are those who expedite the public functions of the commonwealth or city (both political and ecclesiastical), the political functions of the city concern the use of whatever is contained in the second table of the Decalogue (Carney, 1965: 42). This means that the precepts of the Decalogue are relevant for maintaining public peace and tranquility in the body politic. So for example, a correct worship of God is derived from those rules and examples of the divine word that declare and illustrate love toward God and charity toward men. True and correct worship of God is either private or public. Private and internal worship consists of the expression of confidence, adoration, and thankfulness – the first precept of the Decalogue.[24] Private and external worship consists of rites and actions that revere God, the second precept[25], or of words that do the same, the third precept.[26] Public worship of God consists of holy observance of the Sabbath by corporate public celebration, the fourth precept (Carney, 1965: 47).[27] Whatever is in conflict with these precepts of the first table is called impious. For that reason these precepts are always, absolutely, and without distinction binding upon all, to such a degree that the second table of the Decalogue ought to yield precedence to the first table as to a superior law.[28] Therefore, "if a precept of God and a mandate of the magistrate

24 The first precept of the first table is about truly cherishing and choosing God through the knowledge of him handed down in his word, and through unity with him accompanied by a disposition of trust, love, and fear. Forbidden by this precept are ignorance of God and of the divine will, atheism, errors concerning God, and enmity or contempt towards God (Carney, 1965: 136).

25 The second precept is about maintaining in spirit and in truth a genuine worship of God through prayers and the use of the means of grace. In this precept a false or feigned worship of God is forbidden, whether through images, idolatry, hypocrisy, human traditions, magic, or anything else (Carney, 1965: 136).

26 The third precept is about rendering glory to God in all things through the proper use of the names of God, oaths of allegiance to him, respect for what has been created by the Word of God, and intercessory prayers. Negatively, this precept is about not taking away from the glory of God by perjury, blasphemy, cursing, abuse of creation, superstition, a dissolute life, and so forth (Carney, 1965: 136-7).

27 Althusius states that the fourth precept is about sanctifying the sabbath in holy services through hearing, reading, and meditating upon the Word of God, and through use of the sacraments. Negatively, it is about not violating the sabbath through occupational employment, marketing, physical labours, games, jokes, frolics, feats, or the mere form of piety (Carney, 1965: 137).

28 The precepts of the second table are inferior to the precepts of the first table. Althusius cites the following Biblical passages in support of this principle: Luke 9: 3, 24 f., 59

should come together in the same affair and be contrary to each other, then God is to be obeyed rather than the magistrate" (Carney, 1965: 137). Althusius adds that in like manner private utility ought to give way to public utility and the common welfare. Whence it is that these precepts of the first table can never be set aside or relaxed, and not even God himself is able to reject them" (Carney, 1965: 137).

It is also important to note that common or moral law is general in its application, whilst proper law in the form of forensic and political law makes specific determinations, which it relates to the circumstances of any act (Carney, 1965: 141). So for example, the Jewish proper law is twofold. It is in part ceremonial, and in part forensic or judicial. The ceremonial law, because of its emphasis, was directed to the observance and support of the first table of the Decalogue through certain political and ecclesiastical actions; or it was devoted to piety and divine worship. The forensic law was the means by which the Jews were informed and instructed to observe and obey both tables, or the common law, for the cultivation of human society among them in their polity, "according to the circumstances of things, persons, place, and time" (Carney, 1965: 141).

To Althusius the duties of justice to one's neighbour are either special or general. Special duties are those that bind superiors and inferiors together, so that the symbiote truly attributes honour and eminence by word and deed to whomever they are due, and abstains from "all mean opinion of such persons", the fifth precept of the Decalogue.[29] General duties are those every symbiote is obligated to perform toward every other symbiote. They consist of defending and preserving from all injury the lives of one's neighbour and oneself, the sixth precept[30]; of guarding by thought, word, and deed one's own chastity and that of the fellow symbiote, without any

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ff.; I Kings 21: 10 ff.; Matthew 5: 18, 29; 9: 13; 10: 37; 13: 5, 11; Acts 5: 29; I Samuel 19: 17 f.; Hosea 6: 6 (Carney, 1965: 192 note 8).

29 The fifth precept is about those things that inferiors are expected to perform towards superiors, and vice versa. The dignity, honour, authority, and eminence of superiors are to be upheld through respect, obedience, compliance, subjection, and necessary aid. To Althusius these are owed to more distinguished persons because of the gifts, talents, or services they bring to public or private office in the commonwealth, or because of their origins. He states: "and when a man fulfills these duties, he is at the same time upholding reason and order in social life. Negatively, this precept is about not despising, scorning, or depreciating our neighbour by word or deed. It is also about not destroying order among the various stations in human society, and not introducing confusion into them" (Carney, 1965: 137).

30 Of the common duties, which are to be performed toward everyone, the sixth precept requires the defence, protection, and conservation of one's own life and that of one's

lewdness or fornication, the seventh precept[31]; of defending and preserving the resources and goods of the fellow symbiote, and of not stealing, injuring, or reducing them, the eighth precept[32]; of defending and preserving one's own reputation and that of one's neighbour, and of not neglecting them in any manner, the ninth precept[33]; and of avoiding a concupiscent disposition toward those things that belong to our neigbour, and of seeking instead satisfaction and pleasure in those things that are ours and tend to the glory of God, the tenth precept (Carney, 1965: 47).[34]
It is the duty of the political authorities to "uphold and communicate" the duties of both tables of the Decalogue for the sake of the welfare of the commonwealth (Carney, 1965: 47-8).[35] The two tables of the Decalogue were set forth as two headings of the common law by Christ: "The first heading pertains to the performance of our duty immediately to God, and the second to what is owed to our neighbour. In the former are the mandates and precepts that guide the pious and religious life of acknowledging and worshipping God. These are in the first table of the

neighbour. The conservation of one's own life comes first, and that consists in defence, conservation, and propagation of oneself … Conservation of the neigbour's life is the protection through friendship and other duties of charity, such as provision for food, clothes, and anything else he needs for sustentation. Negatively, this precept prohibits enmity, injury to the human body, assault, mutilation, blows, murder, terror, privation of natural liberty, and any other inhuman treatment (Carney, 1965: 138).

31 The seventh precept concerns the conservation of the chastity of one's own mind and body, and that of one's neighbour, through sobriety, good manners, modesty, discretion, and any other appropriate means. Negatively, it pertains to the avoidance in word or deed of fornication, debauchery, lewdness, and wantonness (Carney, 1965: 138).

32 The eighth precept concerns the defence and conservation of one's own goods and those of one's neighbour, and their proper employment in commerce, contracts, and one's vocation. Negatively, it forbids the disturbance, embezzlement, injury, seizure, or impairment of another's goods, or the misuse of one's own. It condemns deceit in commerce and trade, theft, falsehood, injury, any injustice that can be perpetrated by omitting or including something in contracts, "and an idle and disordered life" (Carney, 1965: 138).

33 The ninth precept concerns the defence and conservation of the good name and reputation of oneself and one's neighbour through honest testimony, just report, and good deeds. Negatively, it prohibits hostility, perverse suggestions, insults of any kind, defamations, and slander, either by spoken or written words or by an act or gesture (Carney, 1965: 138).

34 The tenth precept concerns concupiscence, and exerts influence on each of the other precepts of the second table. "'We are taught […] by the authority and bidding of laws to control our passions, to bridle our every lust, to defend what is ours, and to keep our minds, eyes, and hands from whatever belongs to another'" (Carney, 1965: 138).

35 Also see 55. Not only the fifth precept of the second table, but also the sixth, seventh, eighth, ninth, and tenth precepts concern the political society and the magistracy of the commonwealth, both as to persons and as to the goods of the subjects. Whatever is in conflict with these precepts of the second table is called unjust (Carney, 1965: 138-9).

Decalogue, where they instruct and inform man about God and the public and private worship of him … In the latter table are those mandates and precepts that concern the just, and more civil and political, life" (Carney, 1965: 136).[36] Althusius adds: "Man is informed by them that he may render and communicate things, services, counsel, and right (*jus*) to his symbiotic neighbour, and may discharge toward him everything that ought to be rendered for alleviating his need and for living comfortably. Properly speaking, however, they are not called mandates and precepts, as the previous ones are, but rather judgments, statutes, and witnesses. They are contained in the second table of the Decalogue" (Carney, 1965: 136).

2.2.6 Legality and the precepts of the Decalogue

The Decalogue also provides the criteria for legality in the public sphere. An administration is said to be just, legitimate, and salutary that seeks and obtains the prosperity and advantages of the members of the realm, both individually and collectively, and that, on the other hand, averts all evils and disadvantages to them, defends them against violence and injuries, and undertakes all actions of its administration according to laws (Carney, 1965: 92). This power of administering that those in power have is bound to the utility and welfare of the subjects, and is circumscribed both by fixed limits, namely, by the laws of the Decalogue, and by just opinion of the universal association (Carney, 1965: 93). Political authorities are not permitted to overstep these limits. Those who exceed the boundaries of administration entrusted to them cease being ministers of God and of the universal association, and become private persons to whom obedience is not owed in those things in which they exceed the limits of their powers (Carney, 1965: 93). The political authorities exceed the limits and boundaries of the power conceded to them, first, when they command something to be done that is prohibited by God in the first table of the Decalogue, or to be omitted that is therein commanded by God (Carney, 1965: 93). The limits of their power are transgressed, thirdly, when in the administration entrusted to them they seek their personal and private benefit rather than the common utility and welfare of the universal association (Carney, 1965: 93). The norm for maintaining the secular administration is the Decalogue and the civil functions attached thereto (Carney, 1965: 170). The second table of the Decalogue provides the

36 In the "secular" or "civil" administration the magistrate must "rightly" and "faithfully" attend to the civil functions of the second table of the Decalogue (Carney, 1965: 170).

norms for the establishment and conservation of good order, proper discipline, and "self-sufficiency" in the commonwealth (Carney, 1965: 170). In the enforcement of the precepts of the second table of the Decalogue, the magistrate should always and regularly observe that moderation is exercised, and that the right of each member of the commonwealth is observed, "neither diminished nor increased to the detriment of another" (Carney, 1965: 170). The responsibility of the magistrate in this civil administration of the functions of the realm as demanded by the second table of the Decalogue, is twofold. It pertains, first, to the general right (*jus generale*), and concerns the management of the necessary means for conserving justice, peace, tranquility, and discipline in the commonwealth. It pertains, secondly, to the special right (*jus speciale*), and concerns the management of the means necessary for procuring advantages for the social life (Carney, 1965: 170). Furthermore magistrates have the duty to apply punishments to evil-doers who offend against the first or second table of the Decalogue in order that others who witness them may become apprehensive and be deterred from evil-doing by the fear of punishment (Carney, 1965: 172).

Althusius also provides for representatives of the people (ephors) to correct the illegal conduct of the highest political authorities. These ephors have the power of helping the general and supreme magistrate by counsel and aid, and of admonishing and correcting him when he violates the Decalogue of divine law, or the sovereign rights and laws of the realm. Therefore, they have received the right of the sword (*jus gladii*) for the sake of discharging this required responsibility (Carney, 1965: 99). Political power is established for the utility of those who are ruled, not for those who rule, and the utility of the people or subjects does not in the least require unlimited power. The "forms and limits" of this mandate are the Decalogue, the fundamental laws of the realm, and those conditions prescribed for the supreme magistrate in his election and to which he swears allegiance when elected (Carney, 1965: 117). But if no laws or conditions have been expressed in the election, and the people has subjected itself to such a magistrate without them, then whatever things are holy, fair, and just, and are contained in the Decalogue, are considered to have been expressed, and the people is considered in the election to have subjected itself to the imperium of the magistrate according to them, because the people grants no power to accomplish its own ruin (Carney, 1965: 119).[37]

37 The nature of magistracy and imperium is that they regard the utility of subjects, not the benefit of the one who exercises the imperium, and they administer the commonwealth according to right reason and justice.

3. Rationalism and the movement towards moral relativism

3.1 Hugo Grotius on reason and justice

In typical Scholastic fashion, Hugo Grotius, probably the most influential Dutch legal author of the 17th century, draws a complex distinction pertaining to law. To Grotius Jurisprudence demands a knowledge, firstly of justice (*Rechtvaerdigheid*) and the laws (Grotius, 1903: Book I, Chapter 1, Paragraph 1 (page 1) [*I*, I, I, 1 (1)]).[38] He deals with laws in terms of their origin and their contents respectively. Laws are either inborn (*Lex naturalis*) or given (*Lex positiva*), says Grotius. The law in its inborn form is defined by Grotius as the judgment of reason, showing from their own nature which matters are honourable or dishonourable, sanctioned by God to be followed (*I*, I, II, 3 (2).[39] Of these matters some are unique to man, and some are shared with other creatures (*I*, I, II, 6 (2-3).[40] Man is unique in the sense that not only does he know what is right, but he is also led to religion and community with other men (*I*, I, II, 6 (1).[41] Of the inborn laws some Laws are given either by God or by man. The divine laws are those only revealed by God the Father through Jesus Christ our Lord and no other (*I*, I, II, 9 (4)). Human legislation made in conflict with natural law does not affect the validity of natural law. In this respect natural law is immutable. Obligations imposed by natural law, however, may change if the duty imposed by natural law changes, for example if I am relieved from the payment of a debt, I need not pay it back. Similarly if a person kills on the command of God, he does not transgress the precepts of natural law.[42] The efficient cause of the inborn or natural law is human nature.[43] The essence of human nature is man's social appetite.[44] The rules

38 "Jurisprudence is the science of living according to justice."

39 At *I*, I, I, 5 (1) Grotius makes reason the supreme norm for what is right: "Right in its wider sense is the agreement of the act of a reasonable being with reason, in so far as another has an interest in such act." Also note his definition of natural law in terms of reason at *I*, I, II, 5: "The natural law of man is the dictate of reason pointing out what things are in their very nature honourable or dishonourable, with an obligation to observe the same imposed by God." Grotius cites *Institues* 1: 2: pr., 1, in support.

40 "… not, indeed, that animals devoid of reason can really have a share in law, which has reference to reasonable beings only."

41 R.W. Lee's translation of this reads: "But, inasmuch as man is a reasonable being, he is further led to religion and to a rational communion with other men …." (Grotius, 1926), 7).

42 See e.g. *De iure belli ac pacis*, I, 1, 10.

43 Grotius, *De iure belli ac pacis*, Prol. 16: "nam naturalis juris mater est ipsa humana natura, quae nos, etsiamsi re nulla indigeremus, ad societatem mutuam appetendam ferret."

44 Prol. 6: "appetitus societatis, id est communitatis, non qualiscunque sed tranquilla, et pro sui (hominis) intellectus modo ordinatae cum his qui sunt sui generis."

corresponding with these principles are the rules of natural law, as taught by man's reason.[45] Although Grotius deduces the existence and content of natural law from human nature, he grounds the obligating power (*principium obligationis*) in God. Following the medieval Scholastics, Grotius distinguishes between the law of nature (a *lex indicativa*, an indictment of the reason as to what is just) and the *ius divinum voluntarium* (a *lex praeceptiva*, of which God is the lawgiver). Also natural law can, according to Grotius, in a certain sense be called divine law, because God, as the *auctor naturae*, is in the final instance the source thereof, so that *Deo adscribendi merito potest* (Prol. 12); but of the positive divine law God is the immediate source. Natural law is "ideo id Deum velle quia justum est"; positive divine law is "justum esse, id est jure debitum, quia Deus voluit" (*De iure belli ac pacis*, I, 1, 15). The laws of the Old Testament are not recognised by Grotius as positive divine law. This does not mean that these laws are no longer valid.

3.2 Justice and law in Huber's legal philosophy

Although Ulrich Huber followed the Reformational perspectives on divine law, he reflects clear traces of rationalistic influence by Grotius. Huber defines the science of law (jurisprudence) as " a science of what is just and fair, or an art of doing what is good and just" (Huber, 1939: Book I, Chapter I, Section 1 (page 1)) [*J,* I, I, 1]). The end and object of jurisprudence is to attain justice. Justice is a virtue displaying itself in a steadfast resolve to give to every man his own.[46] Huber distinguishes between two sorts of justice: that which may be called *commercial justice* and that which is called *distributive* (*J*, I, I, 5). Commercial justice teaches man to give to every person that which fully belongs to him, and which he may demand with emphasis; such as property, "in which I have the ownership, but which is in the possession of another; or a debt which someone owes me, but does not pay."[47] Huber denotes this branch of the law as "commercial", because it applies daily to the commerce and conduct of human beings (*J*, I, I, 7 (1)). Distributive justice teaches man to give to everyone that which rationally ought to be given him, "but

45 *De iure belli ac pacis*, I, I, 1, 10: "Jus naturale est dictatum rectae rationis, indicans actui alicui ex eius cconvenientia aut disconvenientia cum ipsa natura rationali inesse moralem turpitudinem aut necessitatem moralem ac consequenter ab auctore naturae Deo talem actum aut vetari aut precipi."

46 *Digest*, I, I, I.

47 Huber relies on Grotius, *De jure belli ac pacis*, I, I, 4.

which he cannot demand from those who are willing to grant it; just as a man shows gratitude to his benefactors, or gives alms to the poor, or distributes prizes according to the merit of those who have behaved well."[48] The punishment of crimes, however, belongs to the first sort, because the criminal fully deserves the punishment (*J*, I, I, 8 (2)). In commercial justice distinction of persons makes no difference to the law, but we give to every man alike that which belongs to him, whether he is a farmer or noble; subject or king. This is commonly called arithmetical proportion or simple equality (*J*, I, I, 10 (2)).[49] Distributive justice on the other hand, has different rules for different persons; a man owes more or less gratitude, greater or lesser alms, according to the person's desert or distress; in the distribution of prizes, the ascription of honour, the conferring of offices, regard must be had to the different qualities of persons – this is called geometrical proportion, or relative equality (*J*, I, I, 11 (2)).[50] All laws must also agree with the rules of Justice, so far at least, that they do not conflict with them, and this agreement is called Equity (*J*, I, I, 12 (2)).

Law is, says Huber, "for the transactions of mankind, binding them to what is right and honourable (*J*, I, II, 2 (4)). Huber distinguishes between two kinds of law: *intuitive* and *derivative* (*J*, I, II, 3 (4)). Natural law corresponds with intuitive law (or natural right). This is defined as "the judgment of the intellect, informing us what things, by their own nature, are honourable or dishonourbale, with Divine obligations to do them or not to do them. The essence of this kind of law is to command or forbid" (*J*, I, II, 4 (4)).[51] Huber states that to this class of law belongs only what must be done or avoided of necessity; "but some improperly include in it things which are indeed allowed, but which, even apart from such permission, may nevertheless be done without committing a crime; for instance the law of nature permits a man to protect himself against violence, and to live in freedom, a right which no man ought to assail …" (*J*, I, II, 5 (4)).[52] In its proper sense intuitive law is immutable, so long as circumstances remain the same. Every kind of virtue belongs to it, and every kind of vice is in conflict with it (*J*, I, II, 7)). Intuitive law has some fundamental rules, such as: live honourably, injure nobody, give to every man his own, do unto others as you would be done by, and others of the same kind (*J*, I, II, 8 (4)).[53]

48 He cites Grotius, *De jure belli ac pacis*, I, I, 4.
49 Huber refers to Grotius, *Introduction*, I, I.
50 Huber refers to Grotius, *Introduction*, I, I.
51 See Grotius, *Introduction*, I, II, 5.
52 This is called "Permissive" natural right.
53 Huber refers to *Institutes*, I, I, 3.

Next Huber distinguishes derivative law, whether in its divine or human manifestations (*J*, I, II, 9 (4)). Divine law may be divided into old and new. The old law was given by Moses to the Jewish people, and the new law by Christ to all the peoples (*J*, I, II, 10 (5)). The old law is further divided into the law peculiar to the Jewish people or common to all nations. The whole law (ceremonial, political and moral) of the Old Testamant was given solely and expressly to the Jews; but all laws of individual nations are of this character, that they consist of institutes which either apply to that nation alone, or which they have in common with other nations; as the Emperor Justinian teaches (*J* I, II, 11 (5)).[54]

The peculiar Jewish laws relate either to *ceremonial* or *polity* – the ceremonial law prescribed various ecclesiastical customs or ceremonies in connection with the administration of sacred matters (*J* I, II, 12 (5)). The political or civil law was a rule for the Jewish nation according to which they were bound generally or particularly to regulate their life, commerce and conduct, in so far as they were citizens of a State (*J*, I, II, 13 (5)). The law common to all nations consists in regulations in conformity with which the Jews had to live, without regard to the condition or opportunities of the Jewish nation or State. This is generally called moral or ethical law (*J*, I, II, 14 (5)). Ecclesiastical (ceremonial) law was nothing other than a faint forecasting of Christ and His office. With Christ's coming to earth this class of law was abrogated (*J*, I, II, 15 (5)). The political or civil law of the Jews is also not binding on Christian nations, "because such was not the wish of the lawgiver; just as a king, who has many nations under his sway, when he enacts a law for one of them, does not bind his other subjects also to maintain that law, or as when he prescribes laws expressly for one of the nations under him" (*J*, I, II, 16 (5)). Huber adds, however, that so far as the municipal laws are founded on essential principles of virtue and honour, man is bound "substantially'" to observe them (*J*, I, II, 17 (5)). It is in this sense that the universal Moral Law, namely the Ten Commandments, "although expressly given to the Jewish people (as the introduction 'Hear Ye, Israel!' shows), are nevertheless understood to oblige all Christian peoples to obey them, in so far as (with the exception of the fourth commandment) they embrace nothing but what the intuitive law demands of men" (*J*, I, II, 18 (5)). The new law given by Christ applies undoubtedly to all nations, not only in virtue of the authority of the Lawgiver, but also in respect of the matter of its commandments (*J*, I, II, 19 (5)).

54 *Institutes*, I, II, I.

The law of nature and of the nations in their essence and application are governed by divine law. This law is laid down in Mosaic and Christian law. The former is applicable to the Jews alone and the latter to all people. Mosaic law, in turn, is twofold: ceremonial and moral. This is founded in necessity or probability – necessary as often in the Ten Commandments. The ceremonial and judicial laws are injunctions which concern observation of the Sabbath or politics. They may be binding on the Jews or the other people. Those laws of the first type, but not the rest, are confirmed to the Jews exclusively, but in so far as they involve honour and morality, even if it is not a matter of necessity, they are obligatory today. Changeable laws consist of those which are ceremonial or peculiar to the Jews. Consequently it would seem that in the New Testament no more severe morals are enforced than those derived from the Old Testament.

The relationship between divine and natural law can be summarised as follows: the law of nature and of the nations arises from the dictates of reason (Huber, 1694: Part I, Book I, Chapter VI, Paragraph 1 (page 24(column1)) [*DJC*, I, I, VI, 1 (24(1)).[55] The dictates of reason and the precepts of natural law were obscured by primeval sin (*DJC*, I, I, VI, 3 (14(1)). If man had remained free from sin it would have been inevitable that he would clearly and distinctly see the truth (*DJC*, I, I, VI, 4 (14(1)).[56] The standpoint of divine law is not different from that of natural law although their foundations should not be confused (*DJC*, I, I, VI, 7 (24(2)). Divine law largely has a bearing on theology (*DJC*, I, I, VI, 8 (24(2)).[57] The law provided by Moses is Divine Positive Law. The ceremonial and moral law given to the Hebrews embrace politics, which forms part of the moral discipline (*DJC*, I, I, VI, 10-11 (25(1)). The ceremonial laws disappeared with Christ's crucifixion (*DJC*, I, I, VI, 12 (25(1)).[58] Moral law is directed towards the government of morals and is founded on necessity or probability (*DJC*, I, I, VI, 13 (25(1)). Necessity features in the Ten Commandments of the Lord, except in the fourth commandment (*DJC*, I, I, VI, 14 (25(1)).[59] God desired to govern the Jews partly by

55 "Dictamina rationum, unde jus Naturae & Gentium oriuntur, sunt principia philosophiae, quibus, si sola sint …"

56 "Integer homo si maneret, fieri non posset, quin id quod clare & distincte perciperet, verum esse sciret."

57 "De moralibus agendis loquitmur. Nam credenda quae sunt, ad hanc artem non pertinent, sed ad Theologiam, cujus tam naturalis quam revelatae praecepta diversae sunt institutionis; etsi aliquando illis haec Ars omnino carere nequeat."

58 "Caerimoniae post *Christum*, quem adumbrabant, evanuerunt, affixae omnes cruci salutiferae." Huber quotes Colossians 2: 14 in support.

59 "Necessitas apperet in decem dictis Domini, *exceptio quarto*. Probabilis ratio moralis est in Politicis Judaeorum, nec non in praecepto de *sabbatho*, cui & *rituale* quid accessit."

means of the common law which we find in the Ten Commandments and partly by their own laws (*DJC*, I, I, VI, 14 (25(1)). Laws founded on moral necessity are binding on the entire human race in perpetuity (*DJC*, I, I, VI, 17 (25(1)).[60] The revealed will of God in no way differs from the dictates of our own mind (*DJC*, I, I, VI, 20 (25(2)).[61] The laws of Moses do not apply to us as inviolable institutions, but are subject to certain variations which may be explained in terms of the diversity of customs and rules of life which the state tolerates (*DJC*, I, I, VI, 21 (25(2)).[62] The penalties provided by God should be observed as well as the proportion between crime and punishment (*DJC*, I, I, VI, 22 (25(2)).[63] The amount and nature of punishment is not binding on other nations (*DJC* I, I, VI, 23 (25(2)).[64] The degree of punishment may vary to a certain extent in accordance to the customs of the times and the desire of the people to increase or mitigate the penalties (*DJC*, I, I, VI, 24 (25(2)).[65]

3.3 Anthonius Matthaeus and the enforcement of the principles of divine law

What are the implications of enforcing the principles contained in the moral law and the Mosaic political and judicial laws? How should the principles contained in the Mosaic laws be interpreted and applied in terms of the principles of natural equity? How much freedom and discretion should magistrates have in the punishment of offences for transgressing the moral and Mosaic laws? These are some of the issues addressed by Anthonio Matthaeus in his influential work on Criminal Law, *De Criminibus*[66], first published in 1644 and followed by repeated

60 "Leges, quae nituntur necessitate morali, omne genus hominum in perpetuum obligant."

61 "Vis quidem *nomothetica* non potuit ad alios pertinere quam ad *Hebraeos*, sed revelata Dei voluntas in his quae nobis aeque conveniunt, nec ab animi nostri dictatis ullo modo discrepant, hodieque necessariò nos tenet, *ut putem.*"

62 "Qua ratione quaedam *constitutiones Mosaicae* ad nos plane non pertinent, ut constitutiones *asylorum*, Quaedam ad nos adhucdum spectant, sed cum aliquo discrimine, quantum diversitas morum & instituta Reipubl. Ferre queant, ut se res habet in foenore."

63 "Sic poenas delictorum à Deo statutas servare debemus, ut *eadem proportio* delictorum ad delicta, poenarumque ad poenas custodiatur."

64 "Sed modis generibusque poenarum sine dubio non adstringimur aliae gentes."

65 "Gradus etiam aliquantum variare licet, quatenus mores temporum & ingenia populorum poenas remitti aut intendi requirunt …"

66 The full title reads: *De Criminibus Ad LLIB. XLVII. ET XLVIII. DIG. Commentarius Antonii Matthaei, IC. In illustri Academia Ultrajectina Antecessoris. Adjecta est brevis & succincta Iuris Municipalis interpretatio, cum indice triplici; Titulorum, Rerum & Verborum, nec non Legum, qua strictius, qua fusius explicatarum.* The

reprints, ten in the next hundred years. Considering the issue of whether human legislators may prescribe and enforce any punishment they think fit, for example prescribing and punishing simple theft with the death penalty, Matthaeus considers the purpose and role of divine law in systems of Criminal Law. Matthaeus is of the view that the penalty of death by hanging when imposed for simple theft would be too harsh and not in accord with distributive justice, "which bids fit penalties to be imposed on offences and does not allow a man deserving the lash to be cut to pieces by the fearful scourge" (Matthaeus, 1661: Chapter II, Paragraph 6 (page 58) [*DC*, II, 6 (58)]. Matthaeus is of the view that this penalty is contrary to divine law, "which punishes a thief with a fine and not death [Exodus 22: 1 *et seqq*.]. To Matthaeus divine law is holy and immutable to such an extent that nothing can be added to or subtracted from it [Deuteronomy 4: 2; Revelations 22: 18-19]. He then asks: "(A)nd since it has not been abrogated by the advent of Our Saviour, why should it not be allowed to stand?" (*DC*, II, 6 (58)). All Mosaic laws, on the evidence of Duarenus and Contius, which pertain to the teaching of the Decalogue, have their foundation in natural equity and bind Christians today. This law does not exclusively belong to the courts, but in part to morals. Since Christ in different places confirms laws of this nature[67], it follows that they are not abolished and cannot be abolished by the decree of any human being, since every magistrate ought to be the servant and executor of the divine will.[68] From this Matthaeus draws the conclusion that in no way did the Great and Almighty Lord intend simple theft to be punished by death (*DC*, II, 6 (59)). Matthaeus cites the example of adultery: by divine law adultery is punished with death.[69] He adds that many commentators acknowledge that this capital penalty has incorrectly been changed to a penalty other than the death penalty by the statutes of several regions, and asks why do they (the supporters of magisterial freedom to exact any punishment they like) not admit, in accordance with the opposite argument, that a punishment other than capital for simple theft could not be converted into capital punishment (*DC*, II, 6 (59)). In opposition to the arguments of

edition used for this article is the second which was published in Amsterdam by Johannis à Waesberge in 1661 and the fifth and final edition which appeared in 1761 in Antwerp by Franciscus Gressat.

67 For example John 8: 3; 1 Corintheans 10: 8; Matthew 12: 8, read with Deuteronomy 15: 11; Matthew 26: 52; Job 12: 8, read with Deuteronomy 15: 11; Matthew 5: 8 *et. seqq.*

68 Romans 13: 1-4.

69 Leviticus 20: 10; Deuteronomy 22: 22; John 8: 5.

those who advance the idea that legislators may prescribe any punishment they choose, because the legal rules written for the Jews were abrogated by the advent of Christ, Matthaeus states that it is not true, for if the legal rules bind only the Jews, then why were the tribes of Canaan cast out because of immoralities?[70] "Why," asks Matthaeus, "before the law on those who practise unnatural vice, were the most prosperous cities of Gomorrah and Sodom consumed by fire?[71] Why was Tamar adjudged to the flames before a law was passed on adultery?[72] Furthermore, in what place is it written that Christ, by his advent, rendered the legal rules completely and totally obsolete?" (*DC*, II, 6 (60)).

Matthaeus states that this law is not purely legal, but partly oral and is inviolable like the eighth commandment, for by it the penalty against transgressors is established. Moreover, says Matthaeus, how ridiculous it would be to say that the law, that it is not permitted to steal, is indeed given to all men of all ages, but that the punishment which is the concluding part of that law, pertains only to the Israelites? (*DC*, II, 6 (60)).

After having considered the arguments of those who are in favour of increasing the punishments prescribed by the Mosaic law, based on the examples of punishment for the theft of Laban's effigies of his gods (*DC*, II, 6 (60))[73], Joseph's silver cup (*DC*, II, 6 (60))[74], Achan's theft (*DC*, II, 6 (60))[75], and Nathan's accusation of theft against David (*DC*, II, 6 (61))[76], Matthaeus refutes the arguments in favour of the extension of penalties by legislators. Next he considers the question of whether legislators may, with the increase in crimes, increase the penalties for such crimes (*DC*, II, 6 (61)). Matthaeus supports the principle that with an increase in crimes, penalties should be increased as well (*DC*, II, 6 (61)). He argues as follows: "I do not deny that with the number of criminals increasing daily, the penalties should be increased, and I shall go further and say that if in any region there are such frequent thefts, so many burglars, so many pickpockets, such large bands of housebreakers that the state cannot be safe unless they be crucified, they should be crucified. Indeed the safety of the people ought to be the supreme law, but if the bilgewater of evils can be drained in another way – for example, by fines, by dishonour, by

70 He refers to Leviticus 18: 24.
71 Genesis 19.
72 Genesis 38: 24.
73 Genesis 31: 32.
74 Genesis 44: 9.
75 Joshua 7 (*DC*, II, 6 (60)).
76 2 Samuel 12: 5 (*DC*, II, 6 (61)).

flogging, and by labour on public works, why should we not proceed by that road rather than with the noose and the gibbet?" (*DC*, II, 6 (61)). In answering to the arguments of those who maintain that under no circumstances should thieves be punished by death, Matthaeus relies on the theological views of Calvin in his Institutes[77], to the effect that "(t)here is a time which requires the severity of penalties to be increased. If any disturbance arises in the state, the evils which are accustomed to develop therefrom must be corrected by new edicts. In time of war, all civilized behaviour collapses amidst the conflict of arms unless the unaccustomed fear of punishment is introduced. In famine and in pestilence, unless greater severity is applied, all things will go to pieces. There is a people rather prone to a certain vice, unless it is most severely curbed. How mischievous and how harmful to the public weal will be the man who is vexed by such diversity, so well suited to maintaining the observance of the law of God? Now it is utterly futile to say, as is asserted by certain people, that an insult is inflicted on the law of God passed down through Moses, when it is abrogated, and other new laws are preferred to it. For other laws are not preferred to it, as long as they are judged better, not by simple judgment, but by the judgment of the times, the place and the condition of the people" (*DC*, II, 6 (62)). Neither, says Matthaeus, quoting Calvin, is a law abrogated which was never passed. So, indeed, the Lord did not pass down through the hand of Moses a law which was to be spread to all races, and was to flourish in all places, "but when he had taken the Jewish people into his own trust and patronage and protection, he wished to be the lawgiver for them alone and, as was the mark of a wise lawgiver, he had a certain unique system in passing laws" (*DC*, II, 6 (62)). Matthaeus also quotes Peter Martyr to the effect that the law concerning the abduction and violation of a girl is partly civil and partly moral – it is moral and eternal so that fornication and uncontrolled lust should be prohibited by the magistrates, but it has a civil rationale in deciding the type of punishment, "which is left to the discretion of the ruler but discretionary in such a way that it may change the civil significance of the Jewish law when it appears to suit his people better, not indeed for their licence but for amending their vices" (*DC*, II, 6 (62)).[78] Furthermore he

77 *Institutio Christianae (religionis)*, IV, 20.16.

78 Quoting Martyr's *Loci communes lib.* 4. *resol.* 4. *quaest.* Matthaeus also quotes Peter Martyr's summary in his *Loci communes class* 2.38, in support of the principle that Divine Law demands that crimes be punished, but that the manner thereof has been entrusted to the magistrates. And it is not necessary that the same laws should flourish: "Indeed I know that those civil laws, handed down by Moses do not bind us

cites Philip Melanchthon[79] to the effect that it ought to be enough for the Christian judge, that the law corresponds with this rule, that it should punish evil deeds. Degrees of punishment are to be permitted to the legislators, punishing thieves more severely among those peoples whose discipline is slacker than in other places where there have been "many bonds of discipline" (*DC*, II, 6 (62)).

Matthaeus also quotes from the Reformed theologians Wolfgang Musculus[80], Fransiscus Junius[81], Lambertus Daneau[82], Johannes Piscator[83], Andreas Rivet[84], and Guillelmus Amesius[85] in support of the principle that the law of Moses only decreed a fine for thieves, so that only loss with regard to his property should be suffered by the thief. It was not permitted for judges to change this penalty, but consideration of the facts was in their power. If murder, violence or another crime was connected with the theft, a heavier punishment could be inflicted on account of the double crime (*DC*, II, 6 (64)).[86] This does not mean that magistrates may not apply heavier punishments where the frequency of a certain type of crime demands heavier punishment. However, this does not imply that the same type of punishment may be exacted as those prescribed for transgressions of the First Table of the Decalogue (*DC*, II, 6 (64)). So for example, it is forbidden to punish thieves by death because the principle is that it is not right for someone to be condemned to death except for crimes which the law, given through Moses, punished by death, or which, by sound reasoning, are equal to them: "For in a matter as serious as this, a knowledge of the Divine Law, which alone calms the mind, cannot be obtained from anywhere other than from that law which certainly did not establish the penalty of death for a thief" (*DC*, II, 6 (65)).

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any more than the ceremonial laws. The ceremonial laws remained until the arrival of Christ. The civil laws were applicable for as long as that state existed and they were appropriate to the people. However, I dare to say that it is fitting that the justice, which is seen in those laws, should not be neglected but that the useful aspect should be adopted by our magistrates."

79 *Loci communes.*
80 *Explicatio in decalogum.*
81 *De politae Moysis observatione.* 6 *in fin*.
82 *Ethices Christianes* 2.15 *in fin*.
83 *Aphorismi Doctrinae Christianae*.
84 *Decalogus, de poenis civilibus furtis*.
85 *De conscientia* 5. 52.1.
86 See 2 Samuel 12.

4. Conclusion

The basic tenet of the Reformation regarding law and government was the restoration of the principle that people should govern and be governed by the laws of God. In this respect the Reformers frequently referred to the Hebrew social order as a typical example of a legal and political system grounded in and governed by the law of God and God's transcendental precepts of law. The Reformers believed that mankind is governed by the law of God as set forth in Scripture. Both the moral law and the judicial laws of Moses were taken to be normative to and applicable to all the courts within the state's jurisdiction in order to establish and maintain the society God requires.

Modern humanism substituted the norms of divine and Mosaic law for the law of the state. The transition from Biblical law to humanistic law entered Western systems of law towards the middle of the seventeenth century. Gradually legal positivism, fostered by the humanistic faith in man's reason, manifested its hostility towards Biblical law. Biblical law, as the common law of nations, was superceded by, firstly, natural law based on the faith of man's reason, and ultimately by legal positivism, based on the idea of the integrity of the state's positive law.

In Holland, in particular, and Dutch jurisprudence, in general, the shift from Biblical law to legal humanism received a strong impetus from the legal philosophy of Hugo Grotius who defined right in terms of man's rational capacity. Even legal authors who expressed their support for the Reformational perspectives on law and jurisprudence, accommodated strong elements of rationalism in their legal philosophy, thereby preparing the way for the introduction of the Enlightenment in politics and legal theory. Of these pre-enlightened thinkers, Ulrich Huber and Anthonius Matthaeus played an important role in advancing the status of natural law and the role of man's reason in determining what is right and just. In this respect Huber advanced the idea of man's natural ability to identify the principles of right in a rationalistic fashion stronger than Matthaeus.

An understanding of the shift towards moral relativism in Western jurisprudence, as it culminated in the theories of Thomas Hobbes, John Locke and Jeremy Bentham, necessitates an understanding of the development of legal theory, especially in Criminal Law jurisprudence, from the classical Reformed perspectives on law and government to the introduction of rationalism in the legal theory of Ulrich Huber. In this respect the legal system of Holland, in its rejection of the judicial law of Moses as a manifestation of God's immutable principles of legal justice, receded towards enlightened jurisprudence and politics much faster than

some of the colonies in New England which, for example in 1641 applied "the judiciall law of God given by Moses and expounded in other parts of scripture, so far as itt is a hedge and a fence to the moral law, and neither ceremoniall nor typical nor had any reference to Canaan, hath an everlasting equity in itt, and should be the rule of their proceedings", and on April 3, 1644 confirmed that "the judiciall lawes of God, as they were delivered by Moses … be a rule to all the courts in this jurisdiction in their proceeding against offenders" (Hoadly, 1857: 69). The jurisprudential "backsliding" of Dutch culture from the middle of the 17th century from divine law to the authority of the human reason (Grotius) or human intellect (Huber), did not show sufficient appreciation for the fact, as stated by Rushdoony, that every culture is *religious in origin*, because it establishes and declares the meaning of justice and righteousness, law is inescapably religious, in that it establishes in practical fashion the ultimate concerns of a culture (Rushdoony, 1973: 4).

Bibliography

ALTHUSIUS, JOHANNES. [1614] 1961. *Politica*. Faksimiledruk der 3. Auflage Herborn 1614. Aalen: Scientia.

CALVIN, JOHN. 1996. *Institutes of the Christian Religion Volumes 1-4* (Beveridge transl. (1800)): The Ages Digital Library. Books for the Ages, Version 2.0, Ages Software. Albany: Ages Digital Library.

CARNEY, FREDERICK, S. 1965. *The Politics of Johannes Althusius* (transl. F.S. Carney). London: Eyere & Spottiswood.

GROTIUS, HUGO. 1670. *De iure belli ac pacis: libri tres: in quibus jus naturae & gentium, item juris publici praecipua explicantur.* Amstelaedami: Blaeu.

GROTIUS, HUGO. 1903. *The Introduction to Dutch Jurisprudence*. (Transl. A.F.S. Maasdorp) Cape Town / Johannesburg: J.C. Juta & Co.

GROTIUS, HUGO. 1926. *The Jurisprudence of Holland*. (Transl. R.W. Lee) Oxford: Clarendon Press.

GROTIUS, HUGO. 1939. *Inleidinge tot de Hollandsche Rechts-geleerdheid.* Arnhem: Gouda Quint.

HOLLANDSCHE CONSULTATIEN. 1728. (*Consultatien, Advysen en Advertissementen Gegeven en geschreven by Treffelicke Rechtsgeleerden in Holland en elders*. (Transl. M.T.J. Murray & H.A. Wessels) (unpublished text of the translation from the Dutch edition of 1728).

HOADLY, CHARLES. (Ed.). 1857. *Records of the Colony and Plantation of New Haven from 1638 to 1649*. Hartfield: for the editor.

HUBER, ULRICH. 1694. *De Jure Civitatis, Libri Tres. Novam Publici Universalis disciplinam continentes. Insertis aliquot de jure sacrarum & Ecclesiae, capitibus. Edition Tertia, Priore multo locupletior. Cum Indice rerum necessario.* Franequerae: Henricum Amama & Zachariam Taedema.

HUBER, ULRICH. 1742. *Heedendaegse Rechtsgeleertheyt, Soo elders, als in Frieslandt gebruikelyk.* Vierde Druk. Amsterdam: Johannes Rotterdam.

HUBER, ULRICH. 1939. *The Jurisprudence of My Time (Heedendaegse Rechtsgeleertheyt)* Vol. I. (Transl. Percival Gane) Durban: Butterworth & Co.

MATTHEI, ANTONII. 1661. *De Criminibus Ad Lib. XLVII. Et XLVIII. Dig. Commentarius*. Amstelodami: Johannis à Waesberge.

MATTHAEUS, ANTONIUS. 1987. *On Crimes. A Commentary on Books XLVII and XLVIII of the Digest*, Vols. 1 - 4. (Transl. M.L. Hewett & B.C. Stoop) Cape Town / Wetton / Johannesburg: Juta & Co, Ltd.

RUSHDOONY, ROUSAS, JOHN. 1973. *The Institutes of Biblical Law*, Vol. II. The Presbyterian and Reformed Publishing Company.