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CASUISTRY, ANTI-PROBABILISM AND CONTRACTS: PAOLO COMITOLI SJ AND HIS *RESPONSA MORALIA*[1]

Abstract

Early modern moral theology, that is the so-called second or late scholasticism with its casuistry, dedicated considerable attention to contract law. Theologians approached contracts as a morally significant subject, though they took into account not only theological merits but also the standard legal doctrines, from both civil and canon law. This paper examines the contractual cases of conscience in the *Responsa moralia* of the Italian Jesuit Paolo Comitoli (1545–1626). This collection of moral cases, spanning over eight hundred pages, covered numerous topics, including contract law.

Although Comitoli was not among the most distinguished scholars of his time, he stood out from his peers as he contributed to both the epistemological debate and the contractual doctrine. His engagement with the former is evident in the widely recognised view that he was – untypically for the Jesuits of his time – an antiprobabilist, meaning he held that in a disputed moral case with dissenting authorities, one should favor the more probable opinion of the learned authors. His contribution to the latter is demonstrated in his work *Doctrina de contractu*, where he extensively developed a sophisticated theory of contracts, including a new definition and twelve attributes of a contract.

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This paper focuses on the characteristics of Comitoli's contractual cases and on the application of his epistemological doctrine in contractual casuistry.

Key words: contract law, late scholasticism, casuistry, moral theology, probabilism

1. Introduction

The history of contract law in Europe was strongly influenced by the so-called second scholasticism, as has been shown in many studies. The moral theology of the early modern period took into account not only the scholastic methodological framework from Aquinas and the fundamental concepts of Aristotle, but it also paid a great deal of attention to the legal dimensions of moral dilemmas. Both civil and canon law, and at times also customary law, served as the relevant source of questions and answers which affected the moral evaluation of Christian's actions. One of the less-studied areas of this phenomenon are the plethora of writings of the early modern theologians which gathered together their solutions to the cases of conscience. Often these works resulted from the actual inquiries posed before theologians who collected and systematised their *responsa* in the form of vast volumes.

One of the major doctrinal disputes that underpinned cases of conscience were the fierce debates on the significance of probable opinions among the early modern moral theologians. These debates affected all the areas of scholarly inquiry into this era, contract law included. The agreements between parties to contract fall into the scope of expertise of theologians due to the fact that the performance of a contract was considered a morally relevant action (or not). Unsurprisingly, we can find many contractual cases within moral casuistry and within these cases we can also trace the epistemological choices of moral theologians.[2]

With this paper I would like to shed some light on the depiction of contract law as it was presented by an Italian Jesuit, Paolo Comitoli SJ (1545–1626), in his moral casuistry.[3] The three objectives of this study are (i) to present his methodological approach

[2] For the general introduction to the early modern law and theology, see W. Decock, C. Birr, *Recht und Moral in der Scholastik der Frühen Neuzeit 1500–1750*, Berlin 2016.

[3] For a similar approach to Comitoli's writings (a simultaneous analysis of both his doctrinal writings and cases of conscience), see O. Condorelli, *Noterelle sparse in tema di fides e bona*

to contractual cases of conscience, (ii) to characterise his account on probable opinions, as he was – untypically for a Jesuit of this time – the protagonist of the so-called anti-probabilism and (iii) to show how his anti-probabilist approach was applied in contractual casuistry. Additionally, this study will offer the opportunity for new remarks on the relations between Comitoli's practical solutions to contractual cases with his theoretical elucidations on the subject dedicated to contracts, which was presented in his treatise.[4]

2. The *Responsa Moralia* of Paolo Comitoli

Paolo Comitoli was an Italian Jesuit, a moral theologian who taught at various Italian universities and who was engaged in a couple of political affairs of his time.[5] Among his works there were two which dealt directly with contract law. The later one, which will serve in this paper as the main source of knowledge on Comitoli's theoretical framework developed for contract law, was *Doctrina de contractu universe ad scientiae methodum revocato in III partes distributa*.[6] The earlier one was Comitoli's *opus vitae*, a vast collection of his solutions to the cases of conscience intertwined with theoretical elucidations. *Responsa moralia in VII libros digesta, quibus, quae in christiani officii rationibus videntur ardua ac difficilia, enucleantur* were published three times: in Lyon *apud Horatium Cardon*

fides tra diritto canonico e diritto civile nell'età intermedia, [in:] *Iura Communia. Scritti in ricordo di Mario Montorzi*, eds. D. Edigati and M.P. Geri, Pisa 2022, pp. 219–223.

4 Cf. P. Alexandrowicz, *Paolo Comitoli SJ on Contracts*, "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung" 2021, vol. 107, pp. 258–260, 297–298; P. Alexandrowicz, *Libertas contractus. Paolo Comitoli SJ on Freedom of Contract*, "Czasopismo Prawno-Historyczne" 2021, vol. 73(1), pp. 181–201.

5 On Comitoli, see N. Southwell, *PAULUS COMITOLUS*, [in:] N. Southwell, *Bibliotheca scriptorum Societatis Iesu, apud Iacobi Antonii de Lazzaris Varesii*, Roma 1676, p. 647; A. de Backer, *Comitolus, Paul*, [in:] *Bibliothèque des écrivains de la Compagnie de Jésus: ou Notices bibliographiques*, eds A. de Backer et al., vol. 1, Liège 1869, col. 1344–1345; P. Bernard, *Comitoli Paul*, [in:] *Dictionnaire de théologie catholique: contenant l'exposé des doctrines de la théologie catholique, leurs preuves et leur histoire*, eds E. Mangenot et al., vol. 3, Paris 1908, col. 308; J.P. Donnelly, *Comitoli, Paolo*, [in:] *Diccionario histórico de la Compañía de Jesús* eds. C.E. O'Neill, et al., vol. 1, Roma 2001, pp. 874–875; I. Birocchi, *Comitoli, Paolo*, [in:] *Dizionario biografico dei giuristi italiani (XII–XX secolo)*, eds I. Birocchi et al., vol. 1, Bologna 2013, p. 565; P. Alexandrowicz, *Paolo Comitoli SJ…*, pp. 255–263.

6 The *Doctrina* edition of Lyon 1615 was used as a source edition throughout this article. For the general presentation of Comitoli's contract law, see P. Alexandrowicz, *Paolo Comitoli SJ…*, Lyon 1615; Rouen 1709, pp. 263–299.

in 1609, in Cremona *apud Bartholomaeum Fontana* in 1611, and in Rouen *apud Nicolaum Boucher* in 1709.[7] The three editions of *Responsa* testify that they were acclaimed within their genre and received some attention from other scholars although it was only one among hundreds of collections of this type that were printed in the early modern period.[8] In the foreword, Comitoli noted that he collected his cases and some general accounts in this work after he was encouraged to do so by his fellow Jesuits. The *Responsa* were divided into seven books spread over 846 pages in their first edition. The books covered cases of conscience according to their subject, e.g. on sacraments, on oaths, on crimes, on wills. Each book consisted of *quaestiones* which at times were provided with additional titles. The length of each book varies considerably, ranging from 145 *quaestiones* (318 pages) in the first book to 19 *quaestiones* (34 pages) in the second book. An overview of its contents can be presented as follows:

1. *De sacramentis* (145 *quaestiones*, 318 pages).
2. *De voto, et iureiurando* (19 *quaestiones*, 34 pages).
3. *De contractibus* (44 *quaestiones*, 144 pages).
4. *De criminibus, et criminosis* (58 *quaestiones*, 136 pages).
5. *De criminosa ignorantia, de metu iusto, ac de tuta eligenda opinione* (17 *quaestiones*, 52 pages).
6. *De censuris, et irregularitate* (65 *quaestiones*, 135 pages).
7. *De testamentis, de legatis piis, deque usucapione* (17 *quaestiones*, 54 pages).

3. Contractual cases in *Responsa Moralia*

3.1. The contents of *De contractibus*

Comitoli dedicated the third book of his *Responsa* to contracts, which was simply titled *De contractibus*. There were 44 *quaestiones* spread over 144 pages, as indicated above. The headings were at times placed before the number of *quaestio*, at times after. There was

7 The *Responsa* edition of Lyon 1609 was used as the primary source edition throughout this article.

8 On the early modern casuistry, see e.g. P. Hurtubuise, *La casuistique dans tous ses états: de Martin Azpilcueta à Alphonse de Liguori*, Ottawa 2009; J.-P. Gay, *La casuistique moderne entre expression et production de norms*, [in:] *La fabrique de la norme: Lieux et modes de production des normes au Moyen Âge et à l'époque modern*, eds V. Beaulande-Barraud et al., Rennes 2012, pp. 49–67.

also no consistency in the used font (the headings were given in italics, but the heading after the number of *quaestio* 29 was not italicised). In total, thirteen *quaestiones* were given additional headings, which provides an accurate insight to the contents of this part of the *Responsa*. Probably the headings given before the number of *quaestio* were meant to serve more than one chapter, but it is not always easy to see that it was a coherently adopted rule, so it seems better not to draw too far reaching conclusions from the structure of *De contractibus* apart from the general presentation of its contents.

Q. 1. *Utrum contractus sit nullus propter dolum, quando dolus causam dedit contractui. An metus efficiat contractus nullos*. Q. 2.
Q. 3: *Num metus levis iure conscientiae efficiat contractus nullus.*
Q. 4: *Utrum contractus contra legem humanam initus ipso iure sit nullus*.
Ex turpi promisso, stipulationeve num aliqua oriatur obligatio. Q. 5.
De lucro et ludo alaetorio. Q. 7.
De recenti collybistarum nundinatione pecuniaria. Q. 15.
De rectore quodam ecclesiastico rem ecclesiae male, et contra ius, alienante. Q. 19.
Q. 25: *De censu vitalitio*.
Q. 27: *Utrum constitutio Pii V. de censibus, constringat omnes*.
De iustitia pretii, et pensionis, in censu Pontificio. Q. 28.
De livello Galliae citerioris. Q. 29. *Utrum livellus idem sit quod census*.
Q. 44. *De solutionibus*.

According to these headings, among the contractual issues that were most relevant for Comitoli there were the causes of the voidability of contracts (*dolus, metus*, contract against the statutes or nefarious, aleatory contracts), banking and mercantile contracts, the alienation of ecclesiastical goods, contract of sale, papal taxes on contracts in comparison to the French agrarian contract of *livellum*, and monetary contractual provisions. However, when we take a closer look at the contents of *De contractibus,* two major observations can be made. Firstly, these headings did not cover all the issues discussed by Comitoli, as he regularly digressed on very broad topics. Secondly, many chapters of this book were not the actual cases of conscience but were rather theoretical accounts on broadly discussed issues.[9] This is evident for example

[9] For the similar observation, see rev. Anonymous, *Le journal de sçavants*, Paris 1709, p. 728 [from:] Paolo Comitoli, *Responsa moralia in VII. libros digesta* […] *Doctrina de contractu universe ad scientiae methodum revocato* […], Rouen 1709.

in the initial *quaestiones* where moral cases were not discussed, and instead we can find standard late scholastic doctrinal elucidations on particularly relevant issues from contract law. Sometimes they were artificially built around standard cases taken from other authors. Along with these theoretical *quaestiones* there were many cases of conscience which were narrated by Comitoli in a way that suggests that they were actually brought before him and he was asked to give his *responsa* on them.

3.2. Comitoli's sources

The *Responsa* were very similar to other works of the second scholasticism in terms of the way the sources and doctrinal authorities were employed. It is difficult to provide a general overview, as in each case only a closer examination of the nature of the reference and of its influence on the main argument should define the overall significance of the source. Still, some observations from a bird's eye view are possible.

Obviously for Comitoli the very sources of moral theology and canon law were of great importance. At times, he referred directly to the Scripture (he was also trained as a Bible scholar), he made use of both the *Decretum* and the later collections of canon law, as well as the more recent papal provisions and the decrees of the Council of Trent. He also cited *Corpus iuris civilis*, especially the Digest, which is also not surprising. When we move from the sources to the literature, we should firstly note that without any doubt Thomas Aquinas was crucial for Comitoli, since the whole of the second scholasticism was founded on his doctrine. Comitoli also regularly referred to ancient authors, thus Aristotle (whom he cited both in Greek and in Latin translation) and Cicero were particularly relevant for him, but various Church Fathers also appeared regularly as authorities (either directly or intermediately through Gratian's *Decretum*).

Comitoli referred to a large number of medieval writers, theologians, canonists and civil lawyers, but it was also a very common pattern to use these authorities. The authors from ca. 1450–1600 were more important as their opinions were either inspirational or polemical for Comitoli. Among these authors the noticeable groups are the Spanish late scholastics (Juan de Medina, Martín de Azpilcueta, Domingo de Soto, Diego de Covarrubias y Leyva, Alfonso de Castro, Gabriel Vásquez) and Italian theologians (Angelo Carletti di Chivasso, Battista Trovamala de Salis, Giovanni Cagnazzo, Tommaso de Vio, Silvestro Mazzolini da Prierio, Bartolommeo Fumo) but Comitoli also drew on the works of other authors (Konrad Summenhart, Adrian of Utrecht, John Major).

These writers, mostly theologians, but also philosophers, jurists and canonists, regularly appeared in *De contractibus*, very often in the chains of references to their answers provided for the same questions as Comitoli analysed.

Apart from these standard referencing frames, Comitoli at times took into account more specific sources or mentioned the contemporary personalities involved in political actions or in the discussed cases. For example, he mentioned his own brother Napoleone Comitoli as the bishop of Perugia in this manner, as well as his fellows Jesuits e.g. Stefano Iuccio, Everard Mercurian, Jacobus Lainez, or some authors relevant only for particular questions of *De contractibus*, e.g. Charles Dumoulin or Giovanni Battista Lupi. There were many more curiosities in the references, but they were usually understandable in relation to the specific contents of *quaestio*, e.g. when there was a detailed discussion on papal taxes or a description of the international mercantile case involving figures from various relevant trade cities.

3.3. Selected cases of conscience: the alienation of ecclesiastical goods and the contract of sale

Six *quaestiones* dedicated to the alienation of ecclesiastical goods and the contract of sale in general were selected for closer examination for three main reasons. Firstly, these *quaestiones* were to some extent gathered together by the author and may be seen as an example of the organisation (or lack thereof) of the material discussed by Comitoli. Their closer examination will provide an opportunity to learn more about the structure of Comitoli's work. Secondly, they dealt with an issue which was not discussed as a separate topic within Comitoli's *Doctrina*, and for this reason they constitute a worthwhile subject for investigation. Thirdly, they resulted from Comitoli's practice as a moral theologian and were not artificially distilled for the sake of presenting doctrinal curiosities.

The question of the alienation of property belonging to the Church was a wide-ranging and important issue for canon law. There were lots of canons dealing with the subtleties of this problem. The most general rule stated that the alienation of the Church goods was prohibited. Therefore, the primary task of canonists was to concentrate on numerous exceptions to this rule. *Quaestio* nineteenth had a heading referring to the ecclesiastical rector who was alienating the Church property wrongfully and against the law. The following five chapters lacked titles so they *prima facie* may be treated

as elaborating on the same topic. Each of them was based on a detailed presentation of the case, underlying its legal relevance and justified solution to the case. The first two of the cases were much longer than the remaining four. As the first one was given a heading and the standard casuistic reasoning was applied, I will describe it at length before summarising the cases that follow.

3.3.1. Detrimental alienation

The first case was the question posed by the rector of a religious society who was the person responsible for managing the house owned by the society.[10] The rector came to the idea that the recently improved building worth four hundred florins, and currently rented for thirty, should be sold, and he was the one entitled by the Apostolic See to alienate it, so he began to search for a buyer. During the two-year long period of waiting for buyers, two of them appeared. The first one pledged two hundred florins and the rector accepted. Then the other came and offered two hundred and fifty in cash. Of course, the seller preferred the more generous offer but was not so sure about the acceptance of the previous one. Here the doubt of the prelate arose because his confreres declared that the trust of the first buyer should be respected, and the second bargain rejected. Comitoli noted that what was trusted and promised should be always examined to establish whether it is not contrary to law and is possible to perform. What was contrary to the ecclesiastical statutes was claimed to be void, therefore any alienation of the Church property which was not clearly beneficial for the Church should be declared as void.

Such an explicit elucidation led in this case to the conclusion that the acceptance of the first offer would not accrue any benefit to the Church but would instead be detrimental. The rector had more sophisticated ideas, namely that he could make himself the owner of the house or by analogy to a guardian claim to be acting on behalf of his ward, but these were also rejected. When the time came for the first buyer to be informed about the situation, he got very angry, screaming that he was being cheated but the rector remained steadfast. Then the second buyer was summoned, and the rector expected to receive the promised two hundred fifty in cash but it was not forthcoming. The parties discussed the price and finally it transpired

[10] P. Comitoli, *Responsa moralia in VII libros digesta, quibus, quae in christiani officii rationibus videntur ardua ac difficilia, enucleantur*, Lyon 1609, lib. 3, q. 19, num. 1–9, pp. 414–417.

that the buyer would pay only two hundred and twenty in instalments. The situation became so complicated that the rector came back to the first buyer and sold the house to him for two hundred in cash. Here the main question of the case arose: was he entitled to act this way?

To answer this question, Comitoli reached for various arguments and organised them into three reasons. Firstly, there was the threat of scandal and insult in the rejection of the first buyer. Therefore, it was agreed that the rector may refuse to accept the higher offer. However, because it was against the general rule stated before, an additional argument was added, namely that when the difference in price was not that big, it was much safer to take the price in cash than to wait for the payment from the second buyer. Comitoli said that the immediate money, even though a smaller sum, was to be viewed as bigger than the really bigger amount because it would be paid immediately. Secondly, the strongest point was put forward: how can you sell the house worth four hundred florins for two hundred?

Moreover, at the same time leaving behind the profitable annual income from renting the house – how could it be? And Comitoli even added that one should keep in mind that the estimated prices of buildings in this particular city were very low. These points were elaborated in a way that left no room for justifying the rectors' actions. The Jesuit explained how he should better manage the property left in his power. The main conclusion was that if it had not been necessary to sell the house under conditions which were profitable for the buyer but detrimental for the Church, it should not have been done. Comitoli added to this point a quote from Aquinas which supported his opinion. Thirdly, it was forbidden to alienate Church goods if it was without clear benefit for the Church. In this case this condition was broken, with the effect that the performed sale had to be treated as non-existing.

In the next step Comitoli moved to the practical effects of this explanation and proposed a couple of decisions which should be made against the rector. These started from very general ones, such as that he had violated the ecclesiastical laws or that the contract was non-existing. Both parties should be brought back to the pre-contractual conditions. Further, Comitoli considered the application of the bull of Paul II *Ambitiosae cupiditati* which stipulated the punishment for the wrongful alienation of the ecclesiastical goods. He referred to Martín de Azpilcueta, Tommaso de Vio and Silvestro Mazzolini da Prierio to explain that this provision might be used

in the case of detrimental alienation. Finally, he said that the damages arising from this sale should be paid by the rector himself. He quoted in favour of this judgement a gloss to c. *Quicumque* from Gratian's *Decretum*. The gloss introduced an analogy between the person acting for the Church and the guardian acting for the ward. The criterion of one's adequate performance was the utility of the actions: neither the administrator nor the guardian should prefer his own utility over the utility of the Church or a ward respectively. Comitoli also took some further explanations from Guido de Baysio, Juan de Torquemada and others to justify that when an ecclesiastical prelate did something detrimental to the Church by fault or deceit, he should be the one who reimburses the loss. With this statement, Comitoli had to deliberate on the scope of the fault incurred on the part of the prelate. It was obvious that the deceit and heavy fault were enough to recognise him as the one obliged to pay back. To take into account *culpa levis* and *culpa levissima*, however, he needed to search for some justification. He found it again in the analogy with the guardian's duty of care. With the syllogism based on the quote from the Justinian's Code, and the explanation of c. *Quicumque* made by canonists, he found the solution. All in all, Comitoli came to the conclusion that even *culpa levissima* in the actions of the prelate may have led to his responsibility for the losses suffered by the Church.

To sum up this case, we can say that it was a good example of the application of the general rules to the problem which occurred in reality. Comitoli considered this case from the point of view of moral theology, but he drew heavily on canon law and on the Roman law. The value of this case arises from its presentation being so rich in details. It enabled Comitoli to show how the general rules of canon law work and coincide in practice. He did not limit himself to answering the question, but additionally offered insight to some problems connected with the case. He used various authorities to justify his opinion.

We may add here the definition of contract proposed by Comitoli: "contract is the legal consent of at least two wills: the inviting and the invited. Consent arises from the causes of ownership and donation, the performance or forbearance of any action, signalled externally and established for the wellbeing of the state and of mankind".[11]

[11] Idem, *Doctrina de contractu universe ad scientiae methodum revocato in III partes distributa*, Lyon 1615, pars 1, cap. 4, num. 10, p. 11. See, P. Alexandrowicz, *Paolo Comitoli SJ*…, pp. 264–267.

When we juxtapose this definition with the above described case, we see that indeed the public value of contract and the aim of every contract focused on the common good can be noticed also in this case. Comitoli's practical solution was in line with his theoretical account.

The second case was an assiduous explanation of a very precise question regarding the alienation of goods by religious orders privileged by the Apostolic See.[12] The granted privilege was characteristic for mendicant orders and it enabled them to alienate goods without further permissions from the Apostolic See. This question was much more specific than the previous one. The answer and explanation offered by Comitoli was long and very technical, in the sense of collecting and discussing a lot of sources relevant to this question. Mostly, he tried to analyse the current ecclesiastical legislation, that is, the several papal constitutions and decrees of the Tridentine council. However, it seems that Comitoli did not intend to build any connection between the previous case and this one. It is interesting to see whether and how the next cases connected with the question of alienating the Church goods were related to one another. The following four short cases are even more loosely tied to the question stated in the first case of this group of questions.

3.3.2. The contract of sale

The next case involved a precise question connected with the contract of sale.[13] The background of the story was the sale of oil by merchants in Venice. There was a problem regarding the quality, weight and volume of the oil. It was usually sold in the summer, using the scale appropriate for preparing oil in the winter. The other difference arose from the place of oil production. Comitoli described the differences between the oil from Apulia, Corfu and Salo. The result of the different kinds of oil being sold by merchants was that different amount of oil was required to fill the ewer because the oil with lower fat content also weighed less. The question was whether the seller could take the profit arising from these conditions and keep it as a just benefit, and Comitoli answered positively. The crucial condition for this conclusion was that the volume of oil required to fill the ewer was not the result of the merchant's deceit, but it was rather the nature of the oil that led to this ewer being

12 Idem, *Responsa*…, lib. 3, q. 20, num. 1–7, pp. 418–422.
13 Ibidem, lib. 3, q. 21, num. 1, p. 422.

described as "miraculous". The Jesuit reasonably added that the same conditions were sometimes advantageous for the sellers, and at other times as disadvantageous. The seller bore the risk and accrued the benefit from the nature of the oil. Then Comitoli noted that the same applied to other mercantile deals, for example when there was something heavier because of humid winds. As long as it was the effect of nature, it was just to make profit from this. Still, when one did something to change the weight of the goods, it was explicitly said that the sinners' intentions were blinded with the greed of gold.

The fourth case was the sale of a ring, which was estimated by the craftsmen for 250 florins, by a Christian to a Jew.[14] After nine days, the Jew returned the ring saying that its really worth was no more than 30. The Christian recognised the ring and took it. Comitoli said that there were two possible options for the Christian. Either the price of the ring had not been properly estimated, which was very unlikely, or the contract should be declared void and the Jew should be forced to pay back the received money. The justification of the second option was founded on the antisemitic attitude to the buyer, clearly demonstrated by the words Comitoli used to describe him (which was hardly exceptional in these days). A more balanced argument is that if the Jew had some doubts about the value of the ring, he would have quickly come back to the Christian. He waited nine days, which made it possible to assume that he needed this time to prepare a forgery.

The next case also involved a Jew in a contract of sale.[15] This time the object of sale was a painting. The famous painting was sold to the Jew by a Christian woman, unaware of its value, for the twentieth part of the proper price. The Jew wanted to sell it at a profit, so he went to the painter to refresh the painting. The painter, however, figured out that a trick was being played and decided not to return the painting to the Jew. He kept it for himself and gave the Jew back a different painting similar to the first one. The question in the case was whether it was sinful to make any agreement of this kind with the Jew. Here Comitoli's answer was not that clear, but it seems that in his opinion one could not punish the painter just because he acted in this way. The more important part of the case was that the Jew had violated the law by deceiving the woman and this made his position very weak. This contract of sale should be taken as void because

[14] Ibidem, lib. 3, q. 22, num. 1–2, pp. 423.
[15] Ibidem, lib. 3, q. 23, num. 1–3, pp. 423–424.

it was deceit that had led the woman to sell the painting. Comitoli foresaw that the Jew might defend himself, claiming that the deceit was not the very cause of the contract but rather it just happened within it, but the Jesuit rejected the effectiveness of this defence. In this case he referred to Aquinas and to Prierias.

The final case was a contract between Catherine and Andrew.[16] He was obliged to pay an annual rent of five florins as long as she or her daughter remained alive. After their death he might become the owner if he paid a hundred, while Catherine and her daughter would be entitled to some support in case of necessity. Catherine asked whether there was a sin in such a contract. Comitoli answered that indeed this contract was calamitous because it was in fact a lifelong rent. This contract was a false loan. Comitoli matched this case with a woman that the civil Gloss had described as a "most greedy sort of human". He saw here a tricky deceit on the part of Catherine.

3.3.3. Comitoli's method of applying the law

After the presentation of the particular cases which may be connected to the title of the nineteenth *quaestio,* we can try to make some general observations. Firstly, there was a very loose connection between the *quaestiones* from 19 to 24. The first one was definitely reflecting upon the alienation of ecclesiastical goods, the second one also, but the rest of them should be rather treated as cases regarding the contract of sale. The last one was also somewhat different to the others. So for Comitoli's *Responsa* we should not overemphasise the value of the headings for the organisation of the collated material. However, what these cases had in common was the method of their analysis. Each of them began with a short description of the facts of the case followed by a precise question posed to Comitoli. He answered these questions in a schematised way, providing useful rules of law or precise conditions for the application of law. He also referred to popular authors as well as to canon and to the Roman law, but he did not do this in all cases. He used these sources as an additional value to his own arguments.

The interesting fact about Comitoli's responses was that many of them came from his own experience and for that reason sometimes the cases were coloured by interesting details of the case. They also provided an interesting insight to the scope of his

16 Ibidem, lib. 3, q. 24, num. 1–2, p. 424.

daily work as an advisor in practical theology. The questions formulated by the people involved in contracts were focused on the moral evaluation of the situation. The answers Comitoli provided were obviously rooted in canon law and drew also from the Roman law, but their primary meaning was the purely moral issue. The general picture of Comitoli's contractual cases enables us to examine his approach to finding morally acceptable solutions when there were contradictory opinions among the learned authors. And this leads us to the next point of investigation.

4. The early anti-probabilism in *Responsa Moralia*

4.1. Background

In the second half of the 16th century, a new approach was developed to the evaluation of the opposing opinions articulated by learned authors on moral matters. This approach originated mostly in the Spanish scholastic writings and was called probabilism.[17] In short, according to this new doctrine, when there was a moral case to be solved, but it was one disputed by the learned authors who provided opposing solutions, it was justified to follow not only the most probable opinion but also the less probable one. The opinion supported by a minority of authorities still had to be probable to justify the moral solution behind it. Comitoli was an opponent of this approach and for this reason he is regularly listed among the small number of authors who opposed probabilism in the early stage of its doctrinal development.[18]

[17] On the early modern probabilism see e.g. T. Deman, *Probabilisme*, [in:] *Dictionnaire de théologie catholique: contenant l'exposé des doctrines de la théologie catholique, leurs preuves et leur histoire*, eds. É. Amman et al., vol. 13(1), Paris 1936, col. 417–619; I. Kantola, *Probability and Moral Uncertainty in Late Medieval and Early Modern Times*, Helsinki 1994; R.A. Maryks, *Saint Cicero and the Jesuits: The Influence of the Liberal Arts on the Adoption of Moral Probabilism*, Aldershot 2008; R. Schuessler, *Moral im Zweifel*, vol. 2: *Die Herausforderung des Probabilismus*, Paderborn 2006, pp. 62–65; D. Schwartz, *Probabilism Reconsidered: Deference to Experts, Types of Uncertainty, and Medicines*, "Journal of the History of Ideas" 2014, vol. 75(3), pp. 373–393; R. Schuessler, *The Debate on Probable Opinions in the Scholastic Tradition*, Leiden–Boston 2019; idem, *Casuistry and Probabilism*, [in:] *A Companion to the Spanish Scholastics*, eds. H.E. Braun et al., Leiden-Boston 2021, pp. 334–360.

[18] H. Hurter, *Nomenclator literarius recentioris theologiae Catholicae theologos exhibens*, vol. 1, Innsbruck 1872, p. 680; J. Müllendorf, *Comitolus, Paul*, [in:] *Wetzer und Welte's Kirchenlexikon oder Encyklopädie der katholischen Theologie und ihrer Hülfswissenschaften*,

It was particularly interesting as probabilism was soon to be linked with the Society of Jesus as a characteristic of the Society's agenda within moral theology. This makes the anti-probabilist account of Comitoli particularly interesting for examination. Comitoli did not refer to the specific term "probabilism", nor did he describe his attitude as "probabiliorist" or as "antiprobabilist" as these terms were developed later, and especially the latter does not refer to any coherent set of doctrines.[19] Still, for the sake of clarity, it seems justified to use these terms which are commonly adopted in the description of the history of epistemology at this point.

4.2. Comitoli on the choice of safe opinion

Comitoli explained his attitude towards weighing contradictory opinions in the *Responsa* in the chapter entitled *De tuta opinione eligenda*. He divided his argument into two parts: at first, he asked whether in the event of disagreement between the theologians, the Christian faithful might follow the opinion which was less probable and disregard the more probable one, and secondly, he discussed the causes for considering one opinion more probable than the other one.

He began by rebuffing the argument of Bartolomeo Fumi (Armillus), who in his *Summa* stated clearly that one can reject *opinio probabilioris* and follow *opinio probabilis*.[20] To justify his own claim, Comitoli referred to several authors including Henry of Ghent, Jean Gerson, Antoninus of Florence, John Major, Konrad Summenhart, Adrian of Utrecht, Tommaso da Via Cajetan, Domingo de Soto, Silvestro Mazzolini da Prierio, Angelo Carleto de Clavasio, Giovanni Cagnazzo, Martín de Azpilcueta and Niccolò de' Tedeschi.[21] The Italian Jesuit provided five arguments to support his claim.[22]

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eds J. Hergenröther, F. Kaulen, vol. 3, Freiburg i. B. 1884, col. 691; T. Deman, op. cit., col. 497–498; A. Astrain, *Historia de la Compañía de Jesús en la asistencia de España*, vol. 6: *Nickel, Oliva, Noyelle, González*, Madrid 1920, pp. 154–155; J.P. Donnelly, op. cit., p. 875; J.-P. Gay, *Jesuit Civil Wars: Theology, Politics and Government under Tirso González (1687–1705)*, London 2016, p. 86; R. Schuessler, *Moral im Zweifel*…, vol. 2, pp. 62–65; D. Schwartz, op. cit., p. 379, n. 21; R. Schuessler, *The Debate*…, p. 107; R. Schuessler, *Casuistry and Probabilism*…, p. 351.

19 See e.g. J. Fleming, *Defending Probabilism: The Moral Theology of Juan Caramuel*, Washington 2006, p. 5.

20 B. Fumi, *Summa aurea armilla nuncupata*, Venice, 1578, sv. *opinio*, num. 2, p. 804.

21 P. Comitoli, *Responsa*…, lib. 5, q. 15, num. 1, p. 651.

22 Ibidem, lib. 5, q. 15, num. 1–3, pp. 651–652.

Firstly, it was not justified to abandon one's reason (*ratio*), as a man should live according to his reason. Giving precedence to *opinio improbabilis* over *opinio probabilis* or to *opinio minus probabilis* over *opinio magis probabilis* was acting against reason. Secondly, the more probable opinion was naturally closer to the truth and because of that it should be followed. Thirdly, one should follow the more probable statements as they bring one closer to the truth, which is in line with the overall human purpose according to Aristotle. Fourthly, if a judge should give precedence to those testimonies which are more probable, so should anyone in his internal court, in the tribunal of truth (i.e. in conscience). Fifthly, one should always choose the greater good, and it was the more probable opinion that was more likely to lead to the greater good than to the less probable one.

To these he also added that the popes who discussed the opposing opinions in their documents always preferred *opinio probabilioris*. Comitoli than criticised a distinction in the very act of choosing the opinion made by some commentators of Aquinas. According to Comitoli, who followed John Major and Gabriel Vásquez on this point, the safer opinion is not the one which is founded on the more secure statement (*tutius dictum*) but rather the one founded on the more trusted arguments (*certiora argumenta*).

Then the author moved to the issue of the causes which contributed to the level of an opinion's probability.[23] He recalled the word of Aristotle δόξης ὀρθότης ἡ ἀλήθεια (Nic. Eth. 1142b) which again highlighted the vital role of truth for Comitoli's concept of probability. Interestingly, before listing the ten causes, he mentioned Konrad Summenhart's treatise *De contractibus*. This treatise was particularly relevant for Comitoli's theory of contract, as is proved by numerous references to Summenhart in Comitoli's *Doctrina de contractu* and by the appreciation of Summenhart's contractual concepts (e.g. Comitoli built his own definition of contract in close relation to Summenhart's, but not without subjecting it to critique).[24] Here Comitoli signalled that he presented the causes following Summenhart's argument on the varying opinions within the contract doctrine. The latter (according to the Jesuit) listed seven causes for giving precedence to one opinion over the other: five resulted from the

[23] Ibidem, lib. 5, q. 15, num. 4–9, pp. 652–654.

[24] Idem, *Doctrina*…, pars 1, cap. 1, num. 4–5, pp. 3–4. See, P. Alexandrowicz, *Paolo Comitoli SJ*…, pp. 264–265.

authority of the learned authors, and two from the credibility of the opinion itself.[25] To this Comitoli added one more cause at the end of his list.

Indeed, the first five causes refer to the authors of the discussed opinions and to their internal qualities as moral authorities, such as the expertise of a particular author in a specified area, the sainthood and chastity of the author's life, the diligence of an author in a particular case, or his pursuit of truth. Finally, when there were many concurrent opinions, it was particularly relevant to study the reasonableness of the opinions, as it was not always the case that the more numerous were more adequate. Here Comitoli provided the quotations from various sources which all had in common this caveat not to follow simply the majority's opinion: Pope Pius II, Justinian, Bartolus, Scevola, Cicero. The sixth cause was the one explained in the answer to the first question provided by Comitoli (to follow the firmer opinion), and the seventh was when one of the parties provided more clear and adequate testimonies and arguments.

To these causes taken from Summenhart, Comitoli added his own, the eighth cause, which stressed the value of the opinion which was backed up with custom (*consuetudo*) and authority (*auctoritas*). He then explained the meaning and relevance of these two elements with references to various renowned authors (Augustin, Cyprian, John Chrysostom, Tertulian, Aquinas, Aristotle, Cicero). He mostly focused on the nature of *ratio* in relation to *auctoritas* and he ended with some remarks on Socrates and Cicero, which were rather loosely linked to his argument. Interestingly, in the remaining two *quaestiones* in the same book of the *Responsa,* contracts were also discussed, but the cases were not strictly contractual, being more moral in nature, and they were linked to the discussion on the safe opinions. The first case discussed the moral obligation of the confessor who was sure that the contract of the penitent was unjust, but the penitent was of a different opinion, and the second one was founded on the contract of partnership.

Comitoli's account of the choice of the safe opinion was quite brief and it had a simple structure. The Italian Jesuit explained why the more probable opinion should prevail over the less probable one and the basis for ascribing to an opinion the characteristic

[25] K. Summenhart, *Opus septipertitum de contractibus pro foro conscientiae atque theologico*, Hagenau 1500, tract. 7, q. 100 [no pagination].

of the more probable one. Even from this short *quaestio* we can say that Comitoli was undoubtedly the adversary of probabilism and that the contracts played a pivotal role in his conceptual framework as even in this general *quaestio* he relied on the famous contractual treatise of Konrad Summenhart. Comitoli was also well-acquainted with the recent developments in epistemology, as was proved by the literature he relied on.

4.3. The early recognition of Comitoli as an anti-probabilist

Comitoli's anti-probabilist approach was regularly noticed by modern scholars who extensively wrote on the origins and growth of probabilism. As Comitoli was not among the most influential authors, his opinions were not of the highest importance, but at times we can also find that later authors contested his solutions to moral cases.

Anthony Terill mentioned resistance to Comitoli from other Jesuit scholars. Terill briefly summarised that Comitoli in his *Responsa* taught that it was not licit to follow the less safe opinion when there was a safer one which was more probable.[26] However, Terill added that this did not stop Comitoli from following the less safe opinion only because it was a more probable one. For Terill, the doctrinal position of Comitoli was therefore somewhat incoherent. In the description of the authors dissenting from the probabilist approach ca. 1550–1650, Ignaz Neubauer also mentioned Comitoli and Andrea Bianchi (Candidus Philaletus) but he added that they had no followers or very few ones.[27] Slightly earlier, in his description, Neubauer had also mentioned the Jansenists who opposed probabilism and the most famous satirical work against the moral theology of the Jesuits, i.e. *Les Provinciales* written by Blaise Pascal.[28] Comitoli was also mentioned by Pascal in the discussion on the significance and measurement of attrition but it seems that, for Pascal, Comitoli was just one of many Jesuit writers whose doctrines should be opposed. Interestingly, Pascal did not praise Comitoli's anti-probabilist approach.

26 A. Terill, *Regula morum sive tractatus bipartitus de sufficienti ad conscientiam rite formandam regula*, Liège 1677, *praefatio* [no pagination].

27 I. Neubauer, *Theologia dogmatico-polemico-scholastica praelectionibus academicis accomodata*, vol. 2, Würzburg 1768, num. 308, p. 256.

28 B. Pascal, *Les Provinciales ou Lettres écrites par Louis de Montalte à un provincial de ses amis et aux RR. PP. Jésuites sur le sujet de la morale et de la politique de ces Pères*, ed. C. Louandre, Paris 1862, p. 193.

5. The contract law and anti-probabilism

Comitoli's anti-probabilist position was strongly linked to his contractual doctrine, as is evident from the fact that he was heavily dependent on Summenhart's treatise in this regard, and from the cases involving contracts that followed Comitoli's description of the requirements of moral certitude. At least eleven *quaestiones* from *De contractibus* contained Comitoli's speculations concerning the scope of probability of the discussed opinions.

In the discussion on nefarious promise and stipulation, Comitoli discussed the common topic of a contract for sex, i.e. an agreement with a prostitute.[29] He discussed it at length in the fifth *quaestio*, and just before presenting his opinion he added that he was afraid that from its novelty it might be seen by someone as *minus probabilis*. Nevertheless, for the sake of truth, he presented his opinion, which was complex and involved inter alia a reference to the actual local provisions issued by his brother Napoleone, the bishop of Perugia. Paolo's opinion on this issue was particularly interesting for later scholars, who referred to this passage from the *Responsa* and argued with Comitoli's arguments.[30]

On a couple of occasions Comitoli backed up his account with reference to *probabilis opinio* in *quaestiones* dedicated to aleatory contracts. In the closing remarks to the discussion on the restitution of goods transferred in aleatory contracts, he described the medieval civil law position, which was divided between two opinions.[31] Comitoli said that the first opinion should be followed, as it was more authentic and safer, due to the authority, antiquity and number of testimonies. The other one was also well justified, so Comitoli judged it to be adequate and probable. Elsewhere the Jesuit rebutted one opinion and followed the other, which, thanks to the authority of ancient

29 P. Comitoli, *Responsa*…, lib. 3, q. 5, num. 13, p. 370. For the general overview, see W. Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)*, Leiden-Boston: Brill, 2013, pp. 419–506.

30 J.P. Gury, *Compendium theologiae moralis*, ed. A. Ballerini, Roma 1884, vol. 1, *Tractatus de contractibus*, pars 1, num. 760, n. (a), pp. 628–632; A. Ballerini, *Vindiciae Alphonsianae seu doctoris Ecclesiae S. Alphonsi M. de Ligorio episcopi et fundatoris Congrationis SS. Redemptoris Doctrina moralis vindicata*, Roma 1873, pars 3, q. 14, art. 1–2, pp. 337–342.

31 P. Comitoli, *Responsa*…, lib. 3, q. 8, num. 7, p. 382.

theologians and canonists, was found to be *probabilis.*[32] In the discussion on the question of whether according to the civil law before the judgment there occurred the transfer of the ownership over the thing that was subject to the game, he stated his opinion, which seemed to be followed *probabiliter*.[33] In yet another summary, he stressed which opinion was *probabilius*, or suggested the proper action when there was a probable reason for doubts.[34]

In some instances Comitoli simply labelled the described approach as probable.[35] He also used the adjective *probabilis* without imposing its technical epistemological meanings, e.g. when he described the probable threat of barrenness, which had an influence on the taxes levied on contractual arrangements involving the use of land.[36] Comitoli described very precisely which opinion was more probable in one question linked to the contract of partnership, where one opinion was safer but the other one was probable, and according to the latter the defense of the curial praxis was more probable.[37]

We may also mention that the likely first reference to *probabilis* appeared in the somewhat untypical context when Comitoli explained that the duress effective on a constant man should be sudden, heavy and unjust. He added that his *probabilis visa* on this topic was made in a disputation on the freedom of contract.[38] This was not very precise use of the term *probabilis* and it is not certain what disputation he meant, as his *Doctrina* was published only a couple of years later. The remaining references to *probabilis opinio* were much more accurate.

Comitoli usually followed the opinion which according to him was *probabilis*, and only rarely did he have to dive into detailed weighing of the dissenting statements and choose which was *probabilioris*. This is a telling indication that complex doctrinal concepts were not necessarily relevant for solving all cases, at least not for the contractual cases. Nevertheless, there was a relation between Comitoli's

32 Ibidem, lib. 3, q. 9, num. 6, p. 385.
33 Ibidem, lib. 3, q. 10, num. 8, p. 388.
34 Ibidem, lib. 3, q. 10, num. 10–11, p. 389
35 Ibidem, lib. 3, q. 18, num. 8, p. 412; q. 19, num. 6, p. 416; q. 34, num. 2, p. 444.
36 Ibidem, lib. 3, q. 28, num. 8–9, p. 434.
37 Ibidem, lib. 3, q. 14, num. 2, p. 395.
38 Ibidem, lib. 3, q. 2, num. 6, p. 357. See P. Alexandrowicz, *Libertas contractus*…, pp. 194–195.

epistemological account and his contractual cases, as the former was developed to fit the contract law (due to the influence of Summenhart) and within the latter, the anti-probabilist approach was applied at times.

6. Conclusions

The contract law was a relevant field of expertise for Comitoli, as is proven by his two major works. His cases of conscience involving contractual issues were full of detailed theoretical elucidations and his contractual doctrine also affected the way in which he formulated his epistemological approach. His anti-probabilist attitude was also implemented within *De contractibus*, however it was not necessarily important for providing moral certitude, as the opposing opinions of learned authors, as they were presented by Comitoli, did not require very subtle evaluation, at least in this field. Still, it seems that Comitoli was epistemologically consistent while solving his cases of conscience. The description of his attitude as "anti-probabilist" is appropriate, as he opposed the prevailing probabilist doctrine without providing any complex framework of his own approach.

For solving the moral cases Comitoli applied the standard method of casuistry which employed the well-organised approach within each *quaestio*. The overall structure of *Responsa* was of little relevance for Comitoli. The cases were linked very loosely to each other, and their headings were misleading at times. There is a big difference in the relevance of the structure of Comitoli's two contractual works. In *Responsa*, the structure is almost without any significance while in *Doctrina* the structure of his discourse played a central role, as it manifested his new methodological approach to contract law. When we look at the contents of both works we can see that *Responsa* contributed to *Doctrina* – some issues which were discussed in detail in the former were not repeated in the latter, while others were presented in the later work in a much more detailed manner.[39] Some concepts of Comitoli's contract law, like his definition of the contract or the freedom of contract (as he defined it) were already noticeable in the earlier work within cases from *De contractibus*.

[39] See ibidem, pp. 187–198.

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SUMMARY

Casuistry, Antiprobabilism and Contracts: Paolo Comitoli SJ and His *Responsa Moralia*

Paolo Comitoli was a moral theologian for whom contract law was relevant (if not the most relevant) field for applying moral solutions to dilemmas arising from social and legal circumstances. This paper examines the method Comitoli used in his cases of conscience, collected in *Responsa moralia*. Though the overall structure of this work was somewhat loose, the cases themselves were approached with scholarly rigor, often featuring colorful details, references to relevant authorities and usually hints toward a resolution of the disputed case. Interestingly, the examined cases on the alienation of ecclesiastical goods also demonstrate that Comitoli's practical solutions aligned with his contractual theory, which he later presented in *Doctrina de contractu*.

Responsa moralia also addressed the question of choosing a safe opinion, a topic typical of early modern epistemological debates on justifications for selecting more or less probable opinions in cases in which learned authors presented conflicting views. Comitoli is recognised as an author who followed an anti-probabilist approach – one that consistently favored the more probable opinion rather than allowing the adoption of a less probable one. This approach was atypical among the later leading Jesuit theologians and some critiques of Comitoli's stance are noted in this paper. His discussion of the choice of a safe opinion was largely inspired by Konrad Summenhart and his extensive work on contracts, further highlighting the strong links between Comitoli's epistemological preferences and his focus on contractual cases.