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**Grotius, the Social Contract and  
Political Resistance**  
**A Study of the Unpublished *Theses LVI***

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# Grotius, the Social Contract and Political Resistance

## A Study of the Unpublished *Theses LVI*

by Peter Borschberg

### ABSTRACT

The *Theses LVI* belong to a series of hitherto unpublished early manuscripts of the Dutch humanist and juriconsult Hugo Grotius (1583-1645) that were acquired by the University of Leiden in 1864. It is not certain when the *Theses* were written, but preliminary research on the physical manuscript and the sources cited indicate two possible windows. The first is around 1602-1605, that is roughly at a time when Grotius was also working on his Commentary on the Law of Prize and Booty (*De Iure Praedae Commentarius*). The second dating places the genesis of the manuscript around 1613-1615.

In the context of Grotius' writings, the *Theses LVI* assume an important position for several reasons: They raise questions about state formation, the duty of citizens to the state and the right of political resistance in far greater detail than in any other work of the celebrated Dutch humanist. The *Theses LVI* also feature important reading notes that yield priceless insights into the sources that Grotius directly consulted and their influence on his ideas. The manuscript grants modern scholars a unique glimpse into the working mind of its author. Evidence points not only to the ferocious haste with which Grotius wrote his works, but also the occasional sloppiness of his reading and research habits.

**Contents:** 1. Grotius and the social contract: the context of the *Theses LVI* - 2. The manuscript of the *Theses LVI* and other relevant writings of Grotius - 3. Thoughts on the sources adduced by Grotius - 4. Grotius' method and program in the *Theses LVI* - 5. God, creation and the nature of man - 6. The genesis of the commonwealth (state, *respublica*) via the social contract - 7. Sovereignty in the *Theses LVI* - 8. Resisting tyranny - 9. Afterthoughts - 10. Bibliography of cited manuscripts and printed sources.

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## 1. Grotius and the social contract: the context of the *Theses LVI*<sup>1</sup>

This paper comments on an unpublished and little-known manuscript of the Dutch humanist and juriconsult Hugo Grotius (1583-1645) entitled *Theses LVI*. It clearly ranks among his early works and broadly addresses the genesis of political society, the contractual origin of political authority and explore the relationship between magistrates and citizens. He expounds his ideas on classic problems of political theory, including specifically the obedience of citizens and subjects, the state of nature, sovereignty, together with the permissible and impermissible pursuit of political resistance.

In present times, Grotius is best remembered for his contributions to modern natural rights theories and the law of nations. Born to a patrician family in Delft in 1583, young Hugo enrolled at the age of eleven at the States' College in Leiden where he pursued mainly the study of classics. He obtained a doctorate *utriusque iuris* from the University of Orléans in 1598 and in the same year opened his lawyer's practice

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<sup>1</sup> Peter Borschberg is an Associate Professor in the Department of History at the National University of Singapore. He can be reached at [HISPB@nus.edu.sg](mailto:HISPB@nus.edu.sg). The present article is the fruit of extensive research conducted since 1988 on the unpublished papers of Grotius found in Leiden University Library. Earlier drafts were presented at the Institut für Europäische Geschichte in Mainz (1995) and the Postgraduate Seminar in Politics and Government at the University of Kent at Canterbury (1998). These were radically reworked at NIAS (Wassenaar) in 2005, and later at Leiden in 2005 and 2006.

The author is grateful to Martine van Ittersum (Dundee) for exchanging ideas on the nature, purpose and possible dating of the unpublished *Theses LVI* as well as generally on the Grotius manuscripts owned by Leiden University. Thanks are also extended to Benedict Kingsbury (New York), Benjamin Straumann (New York), Jan Waszink (Leiden/ Utrecht), Edward Keene (Atlanta), and Jerry Lee (Singapore) for their constructive comments and suggestions on the present text. Several libraries across Europe deserve special mention for granting access to their manuscript and rare prints collections, especially the University of Leiden Library, Amsterdam University Library, the Royal Library and the Library of the Peace Palace in The Hague, Lund University Library, the Institut für Europäische Geschichte in Mainz, and the Bayerische Staatsbibliothek in Munich.

in The Hague. At the dawn of the seventeenth century he embarked on a steep political career in his native Holland under the patronage of Grand Pensionary Jan van Oldenbarnevelt, one of the principal politicians of the nascent Dutch Republic. In 1601 Grotius was appointed official historiographer of Holland, in 1607 *Advocaat Fiscaal* (public prosecutor), and in 1613 Pensionary of Rotterdam. He soon joined the ranks of the Dutch Estates General, and represented the Republic during the Anglo-Dutch colonial conferences of 1613 and 1615. In August 1618 Grotius was arrested and found guilty of treason the following year. He was sentenced to life imprisonment in the fortress of Loevesteyn, but managed to escape confinement in 1622. The Dutch humanist fled his homeland to Paris where he received a stipend from King Louis XIII of France. He later lived in Hamburg and also sought to return to his native Holland in 1632, only to find rehabilitation denied. After forfeiting his Dutch citizenship, he served as Swedish Ambassador to France between 1635 and 1645. Grotius died in Rostock on August 28, 1645.

In the early years of Grotius' career as a politician and official historiographer of Holland, he became preoccupied with problems of historical, constitutional and political nature closely associated with the Revolt of the Netherlands, the birth of the Dutch Republic, and the expansion of Dutch trade in the East Indies.

The *Theses LVI* are unique in the context of Grotius' early works. This is because in other treatises, the Dutch humanist makes scattered references to the contractual foundation of the *respublica* (commonwealth),<sup>2</sup> without delving deeply into the driving forces, mechanisms or dynamics of this arrangement.<sup>3</sup> Researchers

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<sup>2</sup> The actual Latin expression employed by Grotius throughout the *Theses LVI* is *respublica*. Strictly speaking, this term should be translated into English as 'commonwealth' or 'republic'. The term 'state' will be occasionally employed in the present exposé, but with caution.

<sup>3</sup> Among the scattered references in other works, see for example Leiden, University Library, Ms. Cod. B.P.L. 917, *Hugonis Grotii De Iure Praedae Commentarius*, fol. 10 verso; Grotius, Hugo, *De Iure Belli ac Pacis*, edited by Philip C. Molhuysen, Leiden: Sijthoff, 1919 (hereafter IBP) 1.3.8 et seq., pp. 75 et seq.; 1.4.7.3, p. 113; 1.4.8, p. 118; 1.4.15.1, pp. 119-120; 2.5.17 et seq. pp. 191 et seq.; 2.5.23, p. 194; 2.6.4, p. 201; Grotius, Hugo, *The Rights of War and Peace*, edited and

today are generally inclined to place the Dutch humanist among the social contract theorists, but a broad consensus among Grotius researchers is presently not at hand.<sup>4</sup> The present exposé will attempt to draw internal links to his other political, legal and historical works.<sup>5</sup> References will also be made to some of his theological and politico-religious writings, such as significantly *De imperio summarum potestatum*

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introduced by Richard Tuck, 3 vols., Indianapolis: Liberty Fund, 2005 (hereafter IBP-E) vol. 1, pp. 260-276; p. 357; pp. 372-373; p. 377; vol. 2, pp. 545-547; pp. 552-555; pp. 568-569.

<sup>4</sup> See classically Haakonssen, Knud, "Hugo Grotius and the History of Political Thought", *Political Theory*, 13.2 (1985) p. 244; Remec, Peter Pavel, *The Position of the Individual in International Law according to Grotius and Vattel*, The Hague: Martinus Nijhoff, 1960, pp. 74-76; Diesselhorst, M., *Die Lehre des Hugo Grotius vom Versprechen*, Köln-Graz, Böhlau Verlag, 1959, pp. 38-39; Höpfl, Harro and Thompson, M. P., "Contract as a Motif in Political Thought", *The American Historical Review*, 84.4 (1979) p. 935; Scheltens, D. F., "Grotius' Doctrine of the Social Contract", *Netherlands International Law Review*, 30 (1983) pp. 43-60. More recent studies include: Van Spyk, Benedict, *Vertragstheorie und Völkerrecht im Werk de Hugo Grotius. Unter besonderer Berücksichtigung von 'De iure belli ac pacis (1625)*, Hamburg: Verlag Dr. Kovač, 2005, pp. 49 et seq.; Grunert, Frank, "Der Vertrag als rechtliches Medium sozialer Gestaltung. Zum Kontraktualismus bei Hugo Grotius" in: *Staat bei Hugo Grotius*, edited by Norbert Konegen and Peter Nitschke, Baden-Baden: Nomos Verlag, 2005, Konegen, Norbert, "Hugo Grotius und die moderne Politikwissenschaft", *Staat bei Hugo Grotius* (2005) pp. 172 et seq.; Gough, J.W., *The Social Contract. A Critical Study of its Development*, second edition, Oxford: Clarendon Press, 1957, pp. 80-81; Grunert, Frank, *Normbegründung und politische Legitimität. Zur Rechts- und Staatsphilosophie der deutschen Frühaufklärung*, Tübingen: Max Niemeyer Verlag, 2000, pp. 116 et seq. But Tanaka, Tadashi, "State and Governing Power" in: *Normative Approach to War. Peace, War and Justice in Hugo Grotius*, edited by Yasuaki Onuma, Oxford: Oxford University Press, 1993, pp. 131-133, does not consider Grotius' place among the social contract theorists as conclusive.

<sup>5</sup> Grotius, Hugo, *Inleidinge tot de Hollandsche Rechts-Geleerdheid, met de te Lund teruggevonden verbeteringen, aanvullingen en opmerkingen van den Schrijver en met verwijzingen naar zijn andere geschriften*, edited by F. Dovring, H. F. W. D. Fischer and E. M. Meijers, second edition, Leiden: Universitaire Pers, 1965.

*circa sacra* (On the Power of the Sovereign in Ecclesiastical Affairs),<sup>6</sup> the epistolary treatise *Meletius*,<sup>7</sup> as well as the *Annotationes in Novum Testamentum* (Annotations to the New Testament).<sup>8</sup>

When were the *Theses LVI* written? Modern researchers are unfortunately not in a position to conclusively ascertain the date of composition based on external testimonies, such as for example Grotius' extensive correspondence. One is therefore left with assessing the date of composition based on other criteria such as paper quality, watermarks, handwriting, ink colour, comparisons with other dated documents (such as letters), as well as common themes and sources discussed in other published and unpublished works.

An evaluation of this data paints two possible scenarios, namely first the period around 1602-5, and a second around 1613-5. Evidence pointing to the latter period is Grotius' subjective employment of the term *ius* (right), and his failure to acknowledge that by nature man possesses a right to punish (*ius puniendi*) others.<sup>9</sup> Evidence supporting the earlier years include significantly the watermarks, the quality

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<sup>6</sup> Grotius, Hugo, *De Imperio Summarum Potestatum Circa Sacra*, critical edition with introduction, English translation and commentary by Harm-Jan van Dam, 2 vols., Leiden: E. J. Brill, 2001. - This treatise on the rights of the magistracy in ecclesiastical affairs and on government of the church was written between 1614 and 1618, and first published posthumously in 1648.

<sup>7</sup> Grotius, Hugo, *Meletius sive de iis quae inter Christianos convenient epistola*. Critical edition with translation, commentary and introduction by Guillaume H. M. Posthumus Meyjes, Leiden: E. J. Brill, 1988. The treatise was written in 1611.

<sup>8</sup> This work which was begun during Grotius' imprisonment in Loevesteyn (1619-1622) grew from a critical commentary to the Four Gospels into a full commentary of the New and Old Testaments. The full text is published in Grotius' *Opera Omnia Theologica*, 4 vols., Amsterdam: Johannes Blaeu, 1679. A fac-simile edition of this collection was published by Frommann-Holzboog in Stuttgart-Cannstatt, 1974.

<sup>9</sup> See: Straumann, Benjamin, "Ancient Caesarian Lawyers in a Natural State. Roman Tradition and Natural Rights in Hugo Grotius' *De iure praedae*", *Political Theory*, 34:3 (2006) p. 344 and his notes thereunto. Dr. Straumann places the genesis of the *Theses LVI* around 1613-1615, while the present author regards it as a precursor to, or early spinoff of, *De Iure Praedae*.



of the ink used for first drafting the manuscript, as well as the striking absence of certain key authors, and particularly Ferdinando Vázquez de Menchaca whom Grotius otherwise quotes on numerous occasions in *De Iure Praedae* (On the Law of Prize and Booty),<sup>10</sup> its spin-off *Mare Liberum* (Of the Freedom of the Seas),<sup>11</sup> as well as in later works such as *De Iure Belli ac Pacis* (On the Law of War and Peace). The lack of a single references to this author may be taken as an indication that the Dutch humanist was not yet (sufficiently) familiar with the writings of Vázquez, if at all. Also, judging from the themes raised and explored in the *Theses LVI*, such as specifically the nature of sovereignty and the right of political resistance, it also is possible to establish internal thematic connections with the *Commentarius in Theses XI* (Commentary to Eleven Theses) and other early, as of today largely unpublished drafts, fragments and notes that are owned by Leiden University Library.<sup>12</sup> Most of these appear to have been written during the first decade of the seventeenth century when Grotius broadly preoccupied himself with questions tightly knit to the Dutch Revolt, and after 1606, with negotiations for a truce with Spain.

## **2. The manuscript of the *Theses LVI* and other relevant writings of Grotius**

The *Theses LVI* belong to a collection of manuscripts that derive from the possession of Hugo Cornets de Groot who passed away in early 1864. He was a direct descendent of Pieter de Groot, the oldest surviving son of Hugo Grotius. In a string of

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<sup>10</sup> The original Latin text was transcribed and published as Grotius, Hugo, *De Iure Praedae Commentarius*, edited by H. G. Hamaker, The Hague: Martinus Nijhoff, 1868. The authoritative English translation of this important but frequently neglected work has been published as: Grotius, Hugo, *Commentary on the Law of Prize and Booty*, edited by Martine van Ittersum, Indianapolis: Liberty Fund, 2006. (Source hereafter abbreviated as IPC-E (2006).

<sup>11</sup> *Mare Liberum* originally formed chapter 12 of the manuscript *De Iure Praedae*. It was the only part of the larger manuscript to be published in Grotius' lifetime.

<sup>12</sup> These are contained in a bundle of papers filed as B.P.L. 922. See below notes 16 et seq.

developments that have yet to be more fully reconstructed by historians, the collection of *Grotiana* passed through the hands of two individuals: Jean-Bapiste Regouin and Chris Snelleman who were creditors of the late Hugo Cornets de Groot. The manuscript of the *Theses LVI*, together with many other pieces of *Grotiana*, were sold at a public auction at Martinus Nijhoff in The Hague in November that year with net proceeds amounting to 1,247.25 guilders.<sup>13</sup> The *Theses LVI* are not featured separately in the auction catalogue, but are among a fascicle listed as lot 78 under the heading *Diversa politica et juridica* (Miscellaneous political and legal writings). The lot sold for a strike price of 10 guilders and is presently shelved in Leiden University Library as Ms. Cod. B.P.L. 922, *Collectanea Autographa Hugonis Grotii* (Collection of autograph papers deriving from Hugo Grotius).<sup>14</sup> The bundle is currently divided into five subsections and comprises a range of treatises, fragments, and reading notes that remain largely unpublished. Among these we find significantly the *Commentarius in Theses XI* (Commentary to Eleven Theses),<sup>15</sup> *De Pace* (On Peace),<sup>16</sup> *De Societate Publica cum Infidelibus* (On Public Society with Non-

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<sup>13</sup> Noordhoff, L. J., *Beschrijving van het zich in Nederland bevindende en nog onbeschreven gedeelte der papieren afkomstig van Huig de Groot welke in 1864 te 's-Gravenhage zijn geveild*, Groningen-Djakarta, 1953, p. 12.

<sup>14</sup> *Commentarius in Theses XI* (1994) pp. 32-33.

<sup>15</sup> Borschberg, Peter, *Hugo Grotius Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, Bern: Peter Lang, 1994; Borschberg, Peter, "Commentarius in Theses XI. Ein unveröffentlichtes Kurzwirk von Hugo Grotius", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 109 (1992) pp. 450 et seq. - In the Nijhoff auction catalogue of 1864, this treatise is separately mentioned under lot 78, p. 13, as "Dissertation on the Right and Power of Princes" (*Dissertatio de Principum Iure ac Potestate*). This title does not do justice to the contents of the unpublished treatise as a whole and is based on a superficial evaluation of the text.

<sup>16</sup> Leiden, University Library, B.P.L. 922, fols. 302-307. Borschberg, Peter, "De Pace. Ein unveröffentlichtes Fragment von Grotius über Krieg und Frieden", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 113 (1996) pp. 268-292.

Christians),<sup>17</sup> *De Bello ob Libertatem Eligendo ex Thesibus Politicis M. Tullii Lib. 9 ad Attic. 4* (On War Having to be Chosen for Freedom, from the Political Theses of Marcus Tullius [Cicero], Letters to Atticus, book 9, number 4),<sup>18</sup> as well as a non-autograph commentary, believed to originally stem from the hand of Grotius, that addresses the negotiations for a truce between Spain and the Dutch Republic between 1606 and 1609. The latter was published by Willem J. M. van Eysinga as “Eene onuitgegeven nota van de Groot” (An unpublished note of Grotius).<sup>19</sup> A fuller description of B.P.L. 922 was published in 1992.<sup>20</sup> The manuscripts contained in this fascicle were restored by Leiden University in 2005.

The modern, post-auction title attributed to the manuscript reads: *Theses sive quaestiones LVI de iure hominis in actiones et res suas* (Fifty-six theses or questions concerning the right of man over his actions and possessions). It should be stated right from the start that this descriptive heading added by nineteenth century librarians is probably based on a superficial assessment of the manuscript. The modern title cannot be warranted upon closer scrutiny and reading of the *whole* text. The *Theses LVI* address issues of state formation, politics, and political resistance. Against this evidence drawn from a close reading of the text, the modern title is probably best omitted in future studies of the manuscript.

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<sup>17</sup> Leiden, University Library, B.P.L. 922, fols. 314-318. For a more in-depth discussion of this hitherto unpublished fragment, see Borschberg, Peter, “De Societate Publica cum Infidelibus. Ein unveröffentlichtes Kurzwirk von Grotius, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, vol. 115 (1998) pp. 355-393; Borschberg, Peter, “De Societate Publica cum Infidelibus. Una obra juvenil de Hugo Grocio”, *Revista de Estudios Políticos*, nueva época, 83 (1994) pp. 113-136.

<sup>18</sup> Leiden, University Library, Ms. Cod. B.P.L. 922, fols. 293-307 recto. Additional notes jotted down by Grotius are found on fol. 307 verso. See also below, notes 64 and 187.

<sup>19</sup> Van Eysinga, Willem J. M., “Eene onuitgegeven nota van de Groot”, *Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen*, afd. Letterkunde, Nieuwe Reeks, dl. 10, no. 10 (1955) pp. 235-252.

<sup>20</sup> Borschberg, “Commentarius in Theses XI” (1992) pp. 452-455.

Within fascicle B.P.L. 922, subdivision I (comprising fols. 276-317), the *Theses LVI* and its adjoining reading notes span across fols. 287 through 290 (recto and verso). The page numbering added by Grotius at the top of the pages reveal that the papers once formed part of a bound volume of (mostly autograph) manuscripts that was taken apart in 1864 to facilitate the public auction. Apart from page numbering added by Grotius at the top of the page, there is no record capturing the original sequence of the pages, nor has Grotius' customary autograph title sheet survived as may be found with many of his papers currently deposited with the Royal Library in The Hague and Amsterdam University Library.

The text of the individual theses is written on two large folio sheets that have first been folded and then inserted into each other. The paper is of superior quality. Each of the two folded sheets features a watermark depicting the Eagle of the Holy Roman Empire together with the crest and crosier of the Swiss city of Basel.<sup>21</sup> The two watermarks are very similar but not identical. The text is in Latin and is written entirely in the hand of Grotius.

Each of the four pages formed by the two folded sheets is also marked by a second vertical fold down the middle. This is a typical study aid used by Grotius found in several draft manuscripts here in fascicle B.P.L. 922 and elsewhere, such as notably his *De Societate Publica cum Infidelibus* (Public Society with Non-Christians).<sup>22</sup> The whole right-hand column created by the second fold was used for writing the running text of the individual theses; the left-hand side was kept free and used for inserting additional notes. Based on such references, marginalia as well as the different colours and shades of the ink used by Grotius for writing the text, it is

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<sup>21</sup> The watermarks are found on fols. 288 and 289; Tschudin, W. F., *Monumenta Chartae Papyraceae Historiam Illustrantia*, vol. VII, *The Ancient Paper-Mills of Basle and their Marks*, Hilversum, 1958, plate 169, Nr. 267. The eagle on fol. 288 does not have an eye, and does not feature an open mouth with beak, as is the case on fol. 289. Neither of the two watermarks is identical to the one found the reading notes that immediately precede the *Theses LVI*. Those reading notes were also consulted for evaluating the present manuscript.

<sup>22</sup> Borschberg, "De Societate Publica cum Infidelibus" (1998) p. 357.

safe to conclude that *Theses LVI* were not written, compiled or revised in a single session.

The *Theses LVI* are particularly interesting within the context of Grotius' early writings in that they are accompanied by notes that were specifically compiled for, or at least directly consulted during the composition of the text. These can be found on the adjacent two folios 290 verso and 291 recto. In his usual haste, Grotius jotted down a number of names, passages and page numbers. They are valuable to the historian and political theorist today because they grant not only a glimpse into the working habits of the famous humanist, but also into the sources he is known to have directly consulted.

### **3. Thoughts on the sources adduced by Grotius**

Any researcher perusing the published and unpublished works of Grotius can engage in speculation about the sources Grotius may have had placed before him and the extent to which he also may have cited from memory. The examination in this article seeks to avoid such speculative discourse and will concentrate instead on the notes and sources that are *expressly* mentioned and cited, in the main text of the *Theses LVI*, in the left-hand margin, as well as in the relevant reading notes. To identify and evaluate every single reference, however, would require an expanded discussion that is simply unfeasible in the context of the present article. It is thus imperative to limit the present section to a few pertinent observations. In treating the *Theses LVI* as a work of political theory or political philosophy, observations will be generally confined to evaluating references taken from sixteenth century prints and publications. Observations gleaned from these sources also assists in the dating the manuscript.

Any author writing at the eve of the seventeenth century on the subject of the social contract and the right of armed resistance would invariably defer to the literature of the French Wars of Religion from the second half of the sixteenth century. Grotius' familiarity with key works from this pool of political literature is of

course well known, not only from later works such as book 1 of *De Iure Belli ac Pacis*, but especially also from his concerns brought to paper in the *Commentarius in Theses XI*.<sup>23</sup> As expected, the reading notes pertaining to the *Theses LVI* contain several references to the pamphlet *Vindiciae contra tyrannos* (A Vindication of Liberty against Tyrants) that is written by an author who calls himself “Stephanus Junius Brutus”.<sup>24</sup> The treatise was to fuel political and constitutional debates beyond the borders of France and found its willing adherents in the Low Countries. Political pamphlets printed in the United Provinces in the late sixteenth century cite liberally from the *Vindiciae* and other works of the French monarchomachs, a point that Grotius also raises in a letter to the Heidelberg-based councillor Georg Michael Lingelsheim of September 1617:<sup>25</sup>

“Those who defend our war [against Spain] with theses from Junius Brutus, unjustly defame our good cause and transfer [these principles] to all other kings. For the comments of Brutus turn all commonwealths into democracies, which is a thing that must certainly displease [other] kings.”<sup>26</sup>

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<sup>23</sup> Borschberg, “Commentarius in Theses XI” (1992) esp. pp. 460, 463 et seq.

<sup>24</sup> On the significance of this treatise within the context of sixteenth century social contract theories generally, see Gough, *Social Contract* (1957) pp. 51 et seq.

<sup>25</sup> Letter of Grotius to Georg Michael Lingelsheim, 8 September, 1617, in *Briefwisseling van Hugo de Groot*, edited by Philip C. Molhuysen (et al eds.), The Hague: Martinus Nijhoff-Instituut voor Nederlandse Geschiedenis, 1928-2002, (Series hereafter abbreviated as BW, followed by the letter number and the page number) See BW 529, p. 582: “Qui Iunii Bruti thesibus bellum nostrum defendunt, immerito causam bonam infamant et apud reges omnes traducunt. Nam Bruti commenta omnes respublicas faciunt democraticas, quod non potest regibus non displicere. Si autem dixerimus speciatim nostros principes fuisse *hypeuthynous* et verum dicimus et aliorum principium causam non laedemus.” The expression marked in italics has been transliterated from the Greek alphabet. P.B.

<sup>26</sup> Grotius expressly mentions this, and laments its uncritical reception, in the opening lines of his *Commentarius in Theses XI*. On this point see specifically Borschberg, “Commentarius in Theses

Who exactly penned the influential political treatise *Vindiciae contra tyrannos* remains a mystery. Over time the treatise has been variously ascribed to Philippe Languet, François Hotman or Johan Junius de Jonge.<sup>27</sup> Concrete references to this work are made by Grotius both in the *Theses LVI* and the adjacent reading notes with the abbreviation *Vind.* followed by a page number and a summary of a specific point or argument. In some instances the Dutch humanist cites the source merely by indicating the capital letter *V*.

On the basis of page numbers and the reading notes it is possible to reconstruct the edition Grotius was reading. Two text versions by two different publishers qualify. The oldest text edition was printed by in 1600 by Cornelius Sutorius in the town of Oberurseln (*Ursella*) that belonged to the Duchy of Nassau.<sup>28</sup>

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XI" (1992) pp. 460-461. Concerning the reception of the *Vindiciae contra tyrannos* in the political literature of the late sixteenth and early seventeenth century Dutch Republic, see: Geurts, P. A. M., *De Nederlandse Opstand in de pamfletten, 1566-1584*, third reimpression, Utrecht: H&S, 1983, pp. 131-156; Kampinga, Herman, *De Opvattingen over onze oudere vaderlandsche geschiedenis bij de Hollandsche historici der XVIe and XVII eeuw*, The Hague: Martinus Nijhoff, 1917; Kossman, Ernst, H. and Meillink, A. F., *Texts concerning the Revolt of the Netherlands*, Cambridge: Cambridge University Press, 1974, especially documents 41, 44, 50 and 63.

<sup>27</sup> Brutus, Etienne Junius, *Vindiciae contra Tyrannos: traduction française de 1581*, edited by A. Jouanna (et al. eds.), Geneva: Librairie Droz, 1979, pp. ii-iii; Brutus, *A Defence of Liberty against Tyrants. Translation of the Vindiciae contra Tyrannos*, edited by H. J. Laski, London: G. Bell, 1924; Nijenhuis, W., *Adrianus Saravia*, Leiden: E. J. Brill, 1980, p. 245. - Concerning the authorship of this historically influential work of political thought, see Borschberg, *Commentarius in Theses XI* (1994) pp. 78-79.

<sup>28</sup> *Vindiciae contra tyrannos: sive, de principis in populum populique in principem, legitima Potestate / Stephano Jvnio Bruto Celta, auctore, Urselliis (Oberurseln): apud Cornelium Surtorium, [1600].*

The second text was printed by Lazarus Zetzner in Frankfurt (Main) in 1608.<sup>29</sup> A third edition, that admittedly falls outside the estimated date of composition of the *Theses LVI*, reprints the Zetzner edition in 1622.<sup>30</sup> All three prints feature the same format and the identical page breaks, spanning a total of 281 pages. They are of special interest to the contemporary researcher of Grotius because they comprise two political treatises. The first is the aforementioned *Vindiciae contra tyrannos* of Stephanus Junius Brutus on pages 1-187. The second is the treatise of Theodore Beza, *De iure magistratuum in subditos, et officio subditorum ergam magistratus*, found on pages 191-281.

Knowing the working habits of Grotius and how he compiled his reading notes with visible haste, gives rise to a number of important questions. How closely did Grotius actually read the texts he was working with? Did he just flip through the pages and jot down some notes as he went along? How heavily did he rely on the index that is featured at the back of the publication? Was he even aware that the booklet he had in front of him featured two separate treatises by two separate authors?

Grotius' notes cover a spectrum of different ideas he appears to have gleaned from this publication, including examples from Biblical history and classical antiquity.<sup>31</sup> He was aware that the book he generically abbreviates as *Vind.* contains two treatises. On folio 290 verso in the left-hand margin, we find the short note "Bez. 203". Indeed, on page 203, one does find a passage that fits the context and

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<sup>29</sup> *Vindiciae Contra Tyrannos: Sive, De Principis In Populum, Populique In Principem, legitima Potestate / Stephano Iunio Bruto Celta, auctore*, Francofurti: Impensis Lazari Zetzneri Bibliop. Arg. [1608].

<sup>30</sup> *Vindiciae contra tyrannos: sive de principis in populum, populique in principem, legitima Potestate*, Francofurti: Zetzner, [1622].

<sup>31</sup> Relating specifically to the text of the *Vindiciae contra tyrannos*, Grotius defers to pp. 82, 85, 113, 120, 147, 148, 176, 182, 189. The references to *De Iure Magistratuum* include pp. 203, 262, 266, 271, 273, 274, 275, 280.



addresses the power of tyrants over the faithful in ancient Israel.<sup>32</sup> The reference fits the page and the context of the discourse. The fact that none of the references jotted down proved seminal here for Grotius' argument in the *Theses LVI*, can be taken as an indication that he only flipped through the pages and at best browsed the text; even more so since the majority of his references to *De iure magistratuum* are also encountered in a handy three-page index found at the end of the publication!<sup>33</sup>

A third source adduced by Grotius is the *Defensor Pacis* (Defender of the Peace) by Marsilius of Padua. Specifically, Grotius refers to *dictio* 1, chapter 9,<sup>34</sup> where Marsilius expresses his preference for the elected form of monarchy. In appealing to the writings of Aristotle, the elective monarchy is commended as the best form of government. According to this section, the commonwealth is the deliberate design of man, established on the consensus of free men and governed by the *pars sanior* or *pars valentior* (qualitative majority). The constitution is chosen freely and does not derive from Divine Revelation or nature.<sup>35</sup> To this reference Grotius adds in his notes the subject *De Phar.* (On the Pharaohs) together with the abbreviation "Vind. 106."<sup>36</sup> The latter represents reference to the *Vindiciae contra Tyrannos*, p. 106, and when one thumbs through the Sartorius and Zetzner edition(s), this passage indeed addresses the authority of the Egyptian kings.<sup>37</sup>

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<sup>32</sup> Beza, *De Iure Magistratuum* (1600) p. 203.

<sup>33</sup> These follow after *ibid.*, p. 281.

<sup>34</sup> Marsilius of Padua, *Defensor Pacis*, edited by Previt -Orton, Cambridge: Cambridge University Press, 1928, 1.9, pp. 89 et seq.

<sup>35</sup> *Ibid.*, 1.12-13, pp. 48 et seq., 1.15, pp. 66 et seq., 1.17, pp. 89 et seq.

<sup>36</sup> The black ink of this reference - compared to the reddish-brown of the text, can be taken as an indication that this reference was added during one of the later sessions.

<sup>37</sup> Brutus, *Vindiciae* (1600) p. 106: "Propterea Pharaones Aegyptiorum, rerum privatarum cujusque, ipso jure domini non errant, sed tum demum fuisse dicuntur, cum sua quique frumento commutassent. Etsi de ejus contractus vi disputari sane et ambigi potest." Biblical reference in the margin 1. Kings chapter 21.

As is known from his other writings, Grotius frequently invokes the works of the so-called “School of Salamanca”. Francisco de Vitoria is by far the single most important author among the Salmantinos or Spanish Late Scholastics. It is known from the Dutch humanist’s surviving correspondence that he had received a copy of Vitoria from one of the directors of the VOC, evidently intended as a key source for writing his *De Iure Praedae*.<sup>38</sup> References to Vitoria’s *Relectiones XII* are made through the abbreviation *Vict.* followed by a page number. The foliation corresponds to the first edition of the *Relectiones* published in Lyon, France, in 1557.<sup>39</sup> Given Grotius’ sloppy handwriting, it is not always easy to differentiate between the abbreviations *Vict.* (for Vitoria, Latinized as *Vict[oria]*) and *Vind.* (for the *Vind[iciae contra tyrannos]*). As far as the present author is able to ascertain the *Theses LVI* invoke the authority of Vitoria on five occasions. Specifically, these refer to pages 184, 206, 208, as well as to §8 of an undisclosed relection. The first three certainly relate to Vitoria’s *De Potestate Civili*.<sup>40</sup> The fourth probably as well, given that §8 of Vitoria’s relection befits the context in which it is cited by Grotius. The fifth employs

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<sup>38</sup> See the letter of Grotius to P. Spiring Silvercrona, 9 May, 1643, BW 6205, p. 252 (under the postscript): “Nuper dum libros recenso, inuenio inter eos Relectiones Fr. Victoriae; nescio an datas mihi, an commodatas olim a dominio Grotenhusio, praetore nunc Amstelodamensi. Eum librum remittam ei ...”, letter of Grotius to his brother Willem de Groot, 27 June, 1643, BW 6282, p. 360 (toward the end of the letter): “Rogo memineris de libro Fr. Victoriae, quem nescio dominus Grotenhusius mihi donarit aut commodarit. Libens ei aut illum librum aut quem voluerit eius loco remittam.” - Concerning Grotius’ use of Vitoria in the early seventeenth century, see also: Ittersum, Martine van, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615*, Leiden: E. J. Brill, 2006, pp. 327-328, 329 note 38; Thieme, Hans, “Natürliches Privatrecht Spätscholastik”, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 70 (1953) pp. 235-236, 262-266; and Truyol y Serra, António, “Francisco de Vitoria y Hugo Grocio,” *Ciencia Tomista*, 111 (1984) p. 23.

<sup>39</sup> Borschberg, *Commentarius in Theses XI*, (1994) pp. 48-49.

<sup>40</sup> These page numbers correspond to §§5, 20, 21, 22 of Vitoria’s relection.

a reference system that does not indicate a page number and almost certainly relates to the *First Relection on the American Indians*.<sup>41</sup>

Most of the references to Vitoria, the *Vindiciae contra Tyrannos* and Marsilius of Padua are written in dark black ink, while the main text and many of the marginalia are written in ink that appears to have faded over time and now features a reddish-brown hue. The appearance of Grotius' handwriting can also be taken as an indication that these references were almost certainly added to the manuscript at a later stage of its composition. The following patterns of citation can be made: Most of the references to Vitoria relate to the establishment of the commonwealth and the choice of government or constitution. The two treatises abbreviated as *Vind.* and printed by Sartorius and Zetzner appear chiefly in theses 46-56 where Grotius discusses resistance against tyranny.

On fol. 290 verso among the reading notes, one also encounters the name of the Scottish Catholic William Barclay in specific conjunction with the question "Whether a prince may transfer power over his kingdom".<sup>42</sup> Again, the dark color of the ink can be taken as an indication that this quotation was probably added to the manuscript on a later occasion. The reference to Barclay and its meaning within the context of the *Theses LVI* will be discussed below in section 7.

Marsilius of Padua, Francisco de Vitoria, Stephanus Junius Brutus, or William Barclay are familiar authors to anyone who has studied the political works of Grotius, including of course *De Iure Belli ac Pacis*. Of special interest to modern research is not his predictable array of sources, but rather the unexpected or less unconventional authors. One of these, the treatise of Beza, has of course already been mentioned. But there are others and one source meriting special attention in the present context is the

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<sup>41</sup> See below, note 125.

<sup>42</sup> "An princeps regnum transferre possit." See also IBP (1919) 1.4.10, pp. 118-119; IBP-E (2005) vol. 1, pp. 373-375.

*True Law of Free Monarchies* by James I/VI of England/Scotland.<sup>43</sup> As is known from another early treatise of the Dutch humanist, the *Commentarius in Theses XI*, Grotius was familiar with this work of James.<sup>44</sup> Although an English dictionary could be found among Grotius' library in 1618,<sup>45</sup> it is certain that he acquired at best a very rudimentary command of English. He probably only began to familiarize himself with this dictionary on the occasion of the Colonial Conference in London (1613), on which occasion he probably also acquired the said English dictionary. Grotius' questionable working command of the English language aside, it is clear that he had a Latin summary of the treatise prepared for him. This summary, to which Grotius himself added the title *Regis Iacobi*, can be found among the papers contained in fascicle B.P.L. 922 at Leiden University Library, spanning folios 291 through 292. Based on the original folio numbering, it should be remembered that these notes immediately follow the *Theses LVI*.<sup>46</sup> Most unfortunately, it is not possible to ascertain when or even why these notes were prepared for the Dutch humanist, and a review of his voluminous correspondence also provides no firm indications or guidance. It is equally difficult to evaluate conclusively how or in what way the notes influenced Grotius' discourse on the origins of the commonwealth.<sup>47</sup> Still, a marginal insertion to thesis 38 "Potestas prius in republica quam in rege" (Political power is vested first in the commonwealth before it is vested in the monarch) refers

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<sup>43</sup> This treatise is contained in: James I/VI: *The Political Works of James I*, edited by C. B. McIlwain, Cambridge (Mass.): Harvard University Press, 1918, pp. 53 et seq.

<sup>44</sup> *Commentarius in Theses XI* (1994) pp. 44-45, 56-57.

<sup>45</sup> Molhuysen, Philip C., "De bibliotheek van Hugo de Groot in 1618", *Mededelingen der Koninklijke Akademie van Wetenschappen*, 6.3 (1943) pp. 45-63.

<sup>46</sup> Leiden, UB, Ms. Cod. B.P.L. 922, fols. 292-293; see also: *Commentarius in Theses XI* (1994) pp. 44-45, 56-57, and the specific reference to this work *ibid.*, §20, p. 218, and §70, p. 270.

<sup>47</sup> Grotius, *Theses LVI*, §38, fol. 289 recto.

specifically to Vitoria and to the *Trew Law of Free Monarchies*.<sup>48</sup> In exploring the historic origins of the monarchy in Scotland, King James clearly rebuffs the “false affirmation of such seditious writers, as would persuade us, that the Lawes and state of our countrey were established before the admitting of a king...”<sup>49</sup> He adds that the “the kings ... in Scotland were before any estates or ranks of men within the same, before any Parliaments were holden, or lawes made.” This observation is not insignificant in the context of the *Trew Law* for it does greatly facilitate its royal author in working toward a definition of a “free monarchy” that draws heavily on parallel observations between the rights and obligations of a father and the obligations of his children.<sup>50</sup> Grotius, interestingly, features a similar approach in the *Theses LVI*, but it remains uncertain to what extent, if at all, such parallels are based on a common methodology, compatible strands of thought, or whether they are purely coincidental.

On the basis of the sources reviewed by Grotius for writing the *Theses LVI* it is possible to reconstruct key points of interest raised in the unpublished manuscript. They stake out the parameters that underlie the discursive program of the theses. The preliminary conclusions one can draw from a review of the source materials specifically adduced are fundamentally these: First, the *respublica* (commonwealth) is always in some way the product of man’s free will and specifically also the

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<sup>48</sup> Reference is made here to Vitoria, p. 184, and “V. tract. de l. abs. mon.” that is “See the treatise on the law of free monarchy.” See also the argument of *Theses LVI*, fol. 287 verso, §41 where the issue is raised that the power of the state or polity is established before it is vested in the monarch. This is followed in §42 by the observation: “Neque tamen obstat quominus Principi etiam aliud ius competere possit per accidens et quidem prius Principatu.” That is “Still, there is no reason why some other right cannot belong to the Prince *per accidens*, that is prior to his installation as prince.” Interesting here is that we do not find any mention of the passage from Vázquez (*Controversiae Illustrae*, 82.1.10) cited in IPC-E (2006) p. 414: “For the princes exists through and for the state; the latter does not exist through or for the prince.”

<sup>49</sup> James I, *The Trew Law of Free Monarchies* (1918) p. 62.

<sup>50</sup> *Ibid.*, pp. 64, 65-66.

deliberate choice of free individuals.<sup>51</sup> This point is of course well known from the Protestant political literature of the French Wars of Religion - the *Vindiciae contra tyrannos* can be invoked in this context - but this is a point interestingly also conceded by some of the staunchest advocates of royal absolutism, including King James I/VI.<sup>52</sup> Two, the choice of a system imposes different types of obligations on the subjects or citizens, and reciprocally, underpins the different rights citizens enjoy. Three, according to Aristotle and Marsilius of Padua, monarchy is the preferred form of government. For Grotius and some of his acknowledged sources, like Vitoria, other forms are by all means viable and acceptable. Citizens are at liberty to select the constitution that best suits their particular circumstances and destiny.<sup>53</sup> Four, monarchs or other officeholders of the commonwealth are obliged to safeguard the interests and also foster the well-being of their subjects. Five, monarchs who overstep their power and thus lapse into tyranny may be resisted and in some cases even removed from office. However, anyone who has also diligently scrutinized the relevant passages in Grotius' other relevant works, such as for example *Commentarius in Theses XI* or *De Iure Belli ac Pacis* will be aware that the Dutch

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<sup>51</sup> See also IBP (1919) 1.1.14.1, p. 30; 1.3.1.2, p. 67; IBP-E (2005) vol. 1, p. 162, pp. 242-243; Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* 1959) pp. 38-39; Gough, *Social Contract* (1957) pp. 80, 81.

<sup>52</sup> Bodin, Jean, *The Six Bookes of a Commonweale. A Facsimile reprint of the English translation of 1606 ...* edited by K. D. McRae, Cambridge (Mass.): Harvard University Press, 1962.

<sup>53</sup> This is a point that is notably attacked by Robert Filmer in the opening pages of his work *Patriarcha*. See Filmer, Robert, *Patriarcha and other Writings*, edited by Johann P. Sommerville, Cambridge: Cambridge University Press, 1991, p. 2: "Since the time that school divinity began to flourish, there hath been a common opinion maintained as well by devines as by divers other learned men which affirms: 'Mankind is naturally endowed and born with freedom from all subjection, and at liberty to choose what form of government it please, and that the power which any one man hath over others was at the first by human right bestowed according to the discretion of the multitude'".

humanist concedes this right of political resistance with noteworthy reluctance.<sup>54</sup> Rebellion against one's legitimate feudal overlord and the ability to depose tyrannical rulers were among the hotly-disputed issues widely associated with the birth of the Dutch Republic.

In the margin to thesis 43 one finds a stray reference to Jean Bodin, that historic adversary of, and intellectual counterbalance to, the Protestant monarchomachs. It reads: "V. Bod. 201. Ex regno dominio."<sup>55</sup> Grotius' intellectual indebtedness to the famed French historian and juriconsult has found extensive interest in recent decades. It is simply not feasible within the confines of the present article to delve into this matter to the complete satisfaction of scholarly readers, and so it shall suffice to note the following. The consensus today is that Grotius was by all means a critical reviewer of Bodin's theory. While he took on board the tools of analysis, such as the marks of sovereignty (*marques de la souveraineté*, in the Latin

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<sup>54</sup> Other works of Grotius that address the right of resistance include *Annales et Historiae de Rebus Belgicis* and *De Antiquitate Reipublicae Batavae*. The latter work has been recently published in an authoritative critical edition. See: Grotius, Hugo, *The Antiquity of the Batavian Republic*. With notes by Petrus Scriverius. Edited and introduced by Jan H. Waszink, Bibliotheca Latinitatis Novae, Assen: Van Gorcum, 2000. A modern English translation of the *Annales* is at present unfortunately not extant. Readers can consult the early modern English text: *De rebus Belgicis: or The annals, and history of the Low-Country-Warrs: Wherein is manifested that the United Netherlands, are indebted for the glory of their conquests to the valour of the English; under whose protection the poor distressed states, have exalted themselves to the title of the high and mighty...* translated by Thomas Manley, London:Printed for Henry Twyford ... and Robert Paulet, 1665. This 'translation' is not without its serious problems and, where possible, readers should always reverify relevant passages against the printed Latin text.

<sup>55</sup> Folio 289 recto, margin to Thesis 43. The darker colour of the ink can be taken as a clear indication that the reference was added at a later stage. This, in turn, could also be taken that the passage was not seminal for helping Grotius formulate this thoughts in this context. On the basis of this single reference I have not yet been able to ascertain the edition Grotius was working with. It may very well be the same as the one he consulted for writing the *Commentarius in Theses XI*. See the references to Bodin's *Six Livres* on fol. 286 recto (bottom right, incip. *Marques de Souveraineté apud Bodinum*) and verso (scattered across the entire page).

edition these are called rights of sovereignty or *iura maiestatis*), the Dutch humanist clearly resisted many of Bodin's conclusions.<sup>56</sup> The most important is of course the desire that all marks or rights of sovereignty be vested as an indivisible package in the monarch. In fact, their divisible nature is now widely upheld as one of the hallmarks of Grotian theory of sovereignty. Some recent publications have highlighted this facet, underscoring at the same time its importance for properly understanding the intellectual underpinnings of his political and constitutional thought. Emphasis is also placed on Grotius' terminology which he probably chose to cleanly demarcate his own views from those of Bodin.<sup>57</sup> Grotius employs expressions such as *actus summae potestatis* (which is evidently his translation of Bodin's *marques de la souveraineté*), *iura maiestatis* (rights of majesty), *summa potestas* (highest power),<sup>58</sup> *summum*

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<sup>56</sup> Concerning Grotius' choice of terminology, see: Berns, Thomas, "Bodin: La souveraineté saisie par ses marques", *Bibliothèque d'Humanisme et Renaissance*, 62 (2000) pp. 626-627; Borschberg, "Commentarius in Theses XI" (1992) pp. 464-465, Van Gelderen, Martin, "From Domingo de Soto to Hugo Grotius: Theories of Monarchy and Civil Power in Spanish and Dutch Political Thought, 1555-1609", *Il Pensiero Politico*, 32, 2 (1999) p. 202; the article is reprinted in: Darby, Graham, *The Origins and Development of the Dutch Revolt*, London and New York: Routledge, 2001, pp. 151-170. See *ibid.*, p. 164. - On the divisibility of sovereignty as a facet of Grotian views on sovereignty, see: Grunert, *Normbegründung* (2000) pp. 137-140; Konegen, Norbert, "Hugo Grotius und die moderne Politikwissenschaft", *Staat bei Hugo Grotius* (2005) pp. 173-174; Janssen, Dieter, "Bellum iustum und Völkerrecht im Werk des Hugo Grotius", in: *Krieg und Kultur. Die Rezeption von Krieg und Frieden in der Niederländischen Republik und im Deutschen Reich, 1568-1648*, edited by Horst Lademacher and Simon Groenvelt, Münster: Waxmann, 1998, p. 140. Also: Keene, Edward, "The Dualistic Conception of Grotian International Society", paper presented at the British International Studies Association (BISA) 2000; Keene, Edward, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, Cambridge: Cambridge University Press, 2002 .

<sup>57</sup> Borschberg, *Commentarius in Theses XI* (1994) pp. 117 et seq.

<sup>58</sup> For Grotius' own definition of this term, see: The Hague, Royal Library, Ms. 131.C.21, Grotius, Hugo, *De Imperio Summarum Potestatum circa Sacra*, fol. 1, chapter 1, §1, "Summam potestatem intelligo personam aut coetum cui imperium sit in populo solius Dei imperio



*magistratum* (supreme magistracy),<sup>59</sup> or *summum imperium* (the highest power of command).<sup>60</sup> In the context of the *Theses LVI*, Grotius resorts to the term *summum imperium* without providing any additional definition.

No examination of Grotius' sources would be complete if one did not also ask the question: Who is wanting? Given the nature of the topics that are raised in the *Theses LVI*, which authors would one expect to see cited, but does not? The most striking omission is Ferdinando Vázquez de Menchaca, that "Pride of Spain," "one of the most learned Spaniards" and "Glory of Spain" as the Dutch humanist likes to call

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subditum. ... Personam dixi aut coetum, ut ostenderem non Reges tantum proprie dictos, quos absolutos plerique appellant, hoc nomine venire, sed et in Aristocratica republica optimates, sive illi Senatus, sive Ordines, seu quocunque alio vocabulo nominantur. ...." The text is also found in *Opera Omnia* (1679) vol. 4, p. 203A. - On the choice of the expression *summa potestas*, see: Haggemacher, Peter, *Grotius et la doctrine de la guerre juste*, Paris: Presses Universitaires de France, 1983, pp. 537-40, 547.

<sup>59</sup> Its meaning, according to Grotius, is the same as what is commonly referred to as *summus magistratus* (supreme magistracy): The Hague, Royal Library, Ms. 131.C.21, Grotius, Hugo, *De Imperio Summarum Potestatum circa Sacra*, fol. 1, chapter 1, §1: "Vulgus summum Magistratum vocat hunc de quo agimus ..." *Opera Omnia* (1679) vol. 4, p. 203A.

<sup>60</sup> For Grotius' definition of *imperium*, see: The Hague, Royal Library, Ms. 131.C.21, Grotius, Hugo, *De Imperio Summarum Potestatum circa Sacra*, fol. 1, chapter 1, §1, "Imperium latiore significato sumimus, non qua jurisdictioni opponitur, sed qua eam includit, quo ambitu comprehenditur jubendi, permittendi, prohibendique jus. Solius Dei imperio subdi hoc imperium dicimus: ideo enim summa potestas dicitur, quia superiorem inter homines non habet." For his definition of *summum imperium* (sovereignty), see *ibid.*, fol. 1, chapter 1, §3, ... "quod Summum est, idem nisi unum esse non possit. Praecipue vero imperii vis istam summorum multiplicationem repudiat. Nam sicut in homine una est voluntas quae cunctis membris membrorumque actionibus imperat ita in civili isto corpore quod imperat, unum est. Ars enim imitatur Naturam. Et Respublica ipsa una dicitur praecipue respectu unius summi imperantis. *Opera Omnia* (1679) vol. 4, pp. 203A, B, 204A - Concerning the relation of the Grotian conceptions of *summa potestas* and *imperium* with specific reference to *De Iure Praedae* see for example: Haggemacher, *Grotius et la doctrine de la guerre juste* (1983) pp. 537-538.

him in his major works on the law of war and peace.<sup>61</sup> The *Controversiae Illustres* of Vázquez offer ample passages on the social contract, on the obedience to princes, or on the legitimacy of political resistance that Grotius consulted and also cited in other works, but not here.<sup>62</sup> A second author the Dutch humanist invokes regularly in his works on war and peace is the sixteenth century Castilian jurisconsult Diego de Covarrubias y Leyva. Most of the references to the works of this famous bishop and royal councilor are made in the context of the law of war, but *De Iure Praedae* also contains passages relating to the abuse of princely power and tyranny.<sup>63</sup> One is faced with a simply but almost inevitable question: Why not? An answer is not easily forthcoming, but two possible scenarios are well worth exploring.

One, Grotius was not yet familiar with the writings of Ferdinando Vázquez de Menchaca or Diego de Covarrubias y Leyva. The works of these two Spaniards are admittedly not cited in the earliest (political) treatises of Grotius, such as *De Republica Emendanda* (c.1599-1601) or even the *Parallelon Rerumpublicarum* (c.1602). As evidenced in the case of Vitoria, Grotius most probably first familiarized himself with these two authors writing *De Iure Praedae*, i.e. sometime after late 1604. This being the case, then the *Theses LVI* need be placed among the earliest surviving (autograph) manuscripts of the Dutch humanist.

Two, a careful assessment of the early autograph working manuscripts of Grotius, including significantly *De Iure Praedae* as well as several shorter drafts, treatises, fragments and reading notes contained in B.P.L. 922 reveals interesting information about the working habits of their author. Grotius commences by preparing a skeleton, often featuring key schematic terms such as *theses*,

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<sup>61</sup> Grotius, Hugo, *Mare Liberum, sive de iure quod Batavis competit in rebus Indicanis*, Leiden: Raphelengius, 1609, p. 43; the most authoritative English translation of this treatise is now *The Free Sea*, edited by David Armitage, Indianapolis: Liberty Fund, 2004. See also IPC-E (2006) p. 346; IBP (1919) Proleg. §55.

<sup>62</sup> See Grotius' references to Vázquez concerning tyranny and armed resistance against tyrants in IPC-E (2006) pp. 399-400, 414-415. See also below note 188.

<sup>63</sup> Ibid., p. 399. See esp. also below, note 188.

*propositions, limitations, amplifications, or conclusions.* The fragment *De Societate Publica cum Infidelibus* offers one of the most readily visible testimonies of his procedure in its most basic, raw form, while the fragment *De Bello ob Libertatem Eligendo* exemplifies a subsequent stage of the composition. There the running text is divided into three sections that offer premises and three or four conclusions each.<sup>64</sup> But cited or mentioned in this latter fragment and the adjacent notes are only authors of classical antiquity, such as notably Cicero, Tacitus, Lucan, Suetonius, Aristotle and St. Augustine.<sup>65</sup> No medieval or sixteenth century sources are cited in the text, the margins, or the notes.

In *De Societate Publica cum Infidelibus*, the left-hand side of the paper is left blank (often demarcated by a fold down the middle) which Grotius uses to jot down additional ideas and references. Sometimes he works with pre-prepared notes, but he also evidently amended the manuscript when perusing a new source that he has acquired, taken from his personal library, or also borrowed from family members, friends and libraries. Given these working habits, it is likely that the *Theses LVI* represent a primordial or very early stage in Grotius' drafting process.

#### **4. Grotius' method and program in the *Theses LVI***

Before examining the unpublished *Theses LVI* in greater depth, it is useful to make a few observations concerning Grotius' mode of analysis.

The *Theses LVI* explore the contractual origin of the *respublica* (commonwealth) and the mutual relationship of magistrates and citizens. This is

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<sup>64</sup> Concerning the still unpublished *De Bello ob Libertatem Eligendo ex Thesibus Politicis M. Tullii Lib. 9 ad Attic. 3*, see B.P.L. 922, fols. 296 verso (part I, together with conclusions 1 and 2); fol. 297 recto (part I, conclusion 3); fol. 297 verso (part II); fol. 299 recto (part II, conclusions 1-4); fol. 299 recto (part III) fol. 300 verso (part III, conclusion 1); fol. 301 verso (part III, conclusions 2-3); see also Borschberg, "De Societate Publica cum Infidelibus" (1998) pp. 365-372.

<sup>65</sup> Concerning Grotius' reception of sources from classical antiquity in his early works, see generally Straumann, Benjamin, "Ancient Caesarian Lawyers in a Natural State" (2006).

accomplished, i.a. by focusing on classic problems of political philosophy. Taken from a broader perspective, this program bears important similarities with book 2, chapter 5, of *De Iure Belli ac Pacis*.<sup>66</sup> The latter furnishes readers an important insight into the rights and obligations that spring from various types of contracts at different levels of societal organization.

The *Theses LVI* fall back on two modes of discourse that broadly characterize Grotius' political and legal works. The first concerns the parallels spelt out between the mutual obligations of family members (e.g., husband-wife or father-children) and the commonwealth (e.g. the magistrates and the citizens).<sup>67</sup> This facet was already noted and described by Dutch jurist and legal scholar Cornelis van Vollenhoven in his 1931 study of *De Iure Belli ac Pacis* which may serve together with the excellent exposé of Peter Pavel Remec as a basis for additional exploration of the subject.<sup>68</sup>

The second characteristic feature concerns the manner in which Grotius sinks his proverbial teeth into problem complexes. As a rule, he begins with general points or premises, and breaks these down into more specific subaspects for examination. A similar method of discussion is followed in *De Societate Publica cum Infidelibus* and of course in the second chapter of *De Iure Praedae*, where he establishes, and works with, a set of premises and conclusions that are variously amplified or limited in the

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<sup>66</sup> IBP (1919) 2.5, pp. 175 et seq.; IBP-E (2005) vol. 2, pp. 508 et seq.

<sup>67</sup> *Theses LVI*, fol. 290 verso, left column under “Quaest[iones]”: “An Iure Naturali eadem sit potestas penes patres tam quae est penes magistratus.” That is: “Whether by the law of nature the same power is vested with the fathers as is vested with the magistrates.” - A very similar pattern of discourse is also found in *De Bello ob Libertatem Eligendo*. On fol. 297 verso, under *Praem. 2*, Grotius elevated his observations from the level of the individual to the commonwealth. There we read: *Et hactenus de singulis. Reipublicae autem .....*  That is: “Until now [we have spoken] of individuals. The commonwealth, however .....”

<sup>68</sup> Vollenhoven, Cornelis van, “The Framework of Grotius' Book *De iure belli ac pacis* (1625)”, *Verhandelingen der Koninklijke Nederlandsche Akademie van Wetenschappen te Amsterdam*, afd. letterkunde, nieuwe reeks, 30.4 (1931) §§13-19, p. 33; Remec, *The Position of the Individual in International Law* (1960) pp. 63 et seq.

course of his investigations.<sup>69</sup> Such a method of discourse was not uncommon and gave shape to many philosophical discourses since the Middle Ages.

The question also emerges to what extent Grotius was specifically inspired by Ramism, a method of discourse and analysis championed by Pierre de la Ramée at the end of the sixteenth century. Ramism is commonly identified with the practical art of good reasoning.<sup>70</sup> Friedrich succinctly encapsulates the essence of Ramist methodology when he writes that it “consists in the art of presenting one’s judgments and conclusions in their natural sequence and with lucidity. The method is, therefore, the arrangement and presentation of what one has found, stated as axioms and concluded through syllogism.”<sup>71</sup> Suffice it to say in the context of the present article that Ramism was *en vogue*, with whole university curricula and teaching materials structured around Ramist principles.<sup>72</sup> The classic example to this effect is perhaps

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<sup>69</sup> Borschberg, *De Societate Publica* (1998) p. 367.

<sup>70</sup> See the editorial introduction by Friedrich, Carl J., in: Althusius, Johannes, *Politica Methodice Digesta. Reprint of the Third Edition of 1614*, Cambridge (Mass.): Harvard University Press, 1932, p. lxi.

<sup>71</sup> *Ibid.*, p. lxii.

<sup>72</sup> Concerning Grotius and his application of Ramist methodology, see Haggemacher, Peter, *Grotius et la doctrine* (1986) p. 70. et seq.; Schnepf, Robert, “Naturrecht und Geschichte bei Hugo Grotius. Ein methodologisches Problem rechtsphilosophischer Begründung”, *Zeitschrift für Neuere Rechtsgeschichte* 20 (1998) pp. 1-14; Vermeulen, B. P., “Grotius’ methodology and system of international law”, *Netherlands International Law Review* 30 (1983) pp. 377-378. Useful is also the examination on Grotius’ understanding of the Aristotelian *topica* in: Hoffmann-Loerzer, Günter, *Studien zu Hugo Grotius*, doctoral dissertation, University of Munich, 1971, pp. 71-100, and also pp. 101-134 passim for Grotius’ use of Aristotle in *De Iure Belli ac Pacis*. - For an account of Ramism as a political and philosophical mode of discourse in the early-modern period, see for example: Graves, F. Pierrepont, *Peter Ramus and the educational reformation of the 16th century*, New York: Macmillan, 1912, and the now classic work: Ong, Walter J., *Ramus: method, and the decay of dialogue*, Cambridge (Mass.): Harvard University Press, 1958. For the influence of Ramus on the political thought of Althusius, see Friedrich, Carl J., *Johannes Althusius und sein Werk im Rahmen der Entwicklung der Theorie von der Politik*, Berlin:

the *Politica Methodice Digesta* of Johannes Althusius.<sup>73</sup> First published in 1602 and revised significantly in 1610 and 1614, this book structures around a Ramist framework of analysis all the pertinent questions of political theory, including the formation of the *respublica* or commonwealth based on multiple social contracts, the power of the church in ecclesiastical affairs and of course the rights of political resistance.<sup>74</sup> As a method of analysis and discourse, Ramism was sufficiently entrenched by the early seventeenth century that its principles may almost have been taken for granted. There can be little doubt that Grotius was exposed to, and also influenced by, Ramist modes of discourse. Perhaps the best-known instance from the early decades of his life can be found in a letter to his younger brother Willem de Groot, dated 18 May 1615.<sup>75</sup>

The following examination of the *Theses LVI* reconstructs three central themes that are addressed in the manuscript. One, God, creation and the nature of man (theses 1-20); two, the establishment of civil society and the nature of sovereignty (theses 21-45); and three the right of political resistance and the question of tyrannicide (theses 46-56). It should be stated from the onset that the sequence of

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Duncker & Humblot, 1975, pp. 58 et seq.; Hüglin, Thomas O., *Sozietales Föderalismus*, Berlin: Walter de Gruyter, 1991, pp. 80 et seq.

<sup>73</sup> Grotius was familiar with this work and also approved of it. See his letter to Lingelsheim, dated 3 September, 1617, BW 528, p. 579, as well as his *Memorië van Mijne Intentiën* (Memorial Concerning my Intentions) written in July 1619 shortly after beginning his sentence his confinement in the fortress of Loevesteyn. See: Grotius, Hugo, *Memorië van Mijne Intentiën en Notabele bejegening*, contained in: Fruin, Robert, “Verhooren en andere bescheiden betreffende het rechtsgeding van Hugo de Groot”, *Werken uitgegeven door het Historisch Genootschap te Utrecht*, Nieuwe Reeks, 14 (1871).

<sup>74</sup> Althusius, *Politica Methodice Digesta* (1932). See also: Schmidt von Rhein, G., “Zur Geschichte der rechtswissenschaftlichen Fakultät der Hohen Schule in Herborn”, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Germanistische Abteilung, 103 (1986) pp. 263-275. This article also contains a short contribution on the *Politica* of Althusius, see *ibid.*, pp. 270-272.

<sup>75</sup> BW 405, pp. 389-391. For the schematic breakdown of his discussion on “*Ius naturale aut sumitur*” (law of nature or supposed [law of nature]), see *ibid.*, p. 391.

the individual theses has not always been retained as this is more conducive to highlighting specific problems and generally facilitate discussion.

## **5. God, creation and the nature of man**

Part 1 of the treatise spans across theses 1 through 20 and explores the intellectual, philosophical and political parameters that underpin the founding of the commonwealth. Grotius addresses in this context the rights of God the Creator, of man, and also men to one another in a most basic and natural context. To historians of political thought, this condition is known as the “state of nature” and is believed to precede not only the creation of private property but also the forging of the social contract and thus the establishment of the commonwealth. Judging from the text as well as the adjacent reading notes to the Theses LVI, Grotius questions how and under what circumstances individuals acquire rights over one another, their bodies, lives, and possessions.<sup>76</sup> As shall be seen, however, there are important differences and nuances that come into the picture. Roughly toward the middle of the Theses LVI, Grotius elevates his observations from the level of the private and of the individual to the level of the commonwealth. This correlation of the rights enjoyed by the individual and of the commonwealth has of course long been noted by scholars of law and politics.<sup>77</sup> Insights gained and conclusions drawn in the preceding sections of the Theses LVI will facilitate Grotius’ exploration of several issues pertaining to the functioning and survival of the commonwealth, including significantly (mutual) political obligation, the nature of sovereignty and the right of political resistance.

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<sup>76</sup> In this regard, the program staked out in this first half of the theses shows some strong similarities with the argument of book 2, chapter 5, of *De Iure Belli ac Pacis* which was written some two decades later. See: IBP (1919) 2.5, pp. 175 et seq.; IBP-E (2005) vol. 2, pp. 508 et seq.

<sup>77</sup> See above note 68.

There are of course additional aspects that merit closer attention. One such notion is the state of nature and the contractual origins of the state. These are both central themes of the *Theses LVI*. Grotius never launched a thorough discourse on this problem, although the social contract is mentioned in passing, or is at least alluded to, on several occasions in *De Iure Praedae* and much later of course in *De Iure Belli ac Pacis*.<sup>78</sup> Extant discussions on Grotius' ideas on the social contract 'reconstruct' the Dutch humanist's understanding from a plethora of excerpts mined chiefly from *De Iure Belli ac Pacis* and attribute to these snippets of text removed from their original context an intellectual coherence that was almost certainly not envisaged by their seventeenth century author.<sup>79</sup>

In his understanding of nature and Creation at large, Grotius is known to have been heavily influenced by Aristotle and also Stoic philosophers of antiquity. Important is his view that man, through the use of reason, can access the eternal truths grounded in nature and Creation. Man is endowed with the ability to grasp these and through the application of free will is also placed in a position to direct his actions toward the personal and common good.<sup>80</sup> Grotius' intellectual starting point in the *Theses LVI* taps into Aristotle's differentiation of nature (or Creation) and volitional law,<sup>81</sup> uniting the two branches in the Creator: Man, who is created in the image of

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<sup>78</sup> IPC-E (2006) pp. 137-138.

<sup>79</sup> For some recent secondary literature of this genre, see the works of Grunert and Van Spyk listed in note 4.

<sup>80</sup> See IBP (1919) 1.1.10.7, p. 27; 1.2.5, p. 37; 1.3.1.1-2, pp. 66-7; 2.17.2.1, pp. 328-329; 3.9.18.1, p. 571; IBP-E (2005) vol. 1, pp. 156-157, 190-195, 240-242, vol. 2, pp. 884-885, vol. 3, pp. 1407. See also: Benöhr, Hans-Peter, "Außervertragliche Schadenersatzpflicht ohne Verschulden? Die Argumente der Naturrechtslehren und -kodifikationen", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 93 (1976) p. 209: "Der Mensch ist infolge seiner Urteilskraft auch in der Lage, dieses Gebot [der Natur, des Naturrechts] zu erkennen und sich danach zu richten. Er darf Leben, Körper, Freiheit, Ehre, Handlungsfreiheit eines anderen nicht beeinträchtigen."

<sup>81</sup> Remec, *The Position of the Individual in International Law* (1960) p. 61.



God, has the power to direct his own actions, and he possesses power over his own body, life, and possessions.<sup>82</sup> Important for unraveling the origins of civil society is how these rights can be transferred (conditionally) or even irrevocably alienated.<sup>83</sup> This occurs by tacit or express consent and also through the indication of the personal will.<sup>84</sup> Man is “empowered” over himself; he may even alienate his liberty, in which case he reduces his status to that of a mere slave. But how does one actually acquire

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<sup>82</sup> Grotius, *Meletius* (1988) §§30, 35 pp. 83-84, 84-85 (Latin) and pp. 113, 114. (English translation).

<sup>83</sup> See also IPC-E (2006) p. 137 (the rights of the commonwealth derive from the individual) p. 140 (the rights that formerly resided in other private individuals) and *ibid.*, p. 319 (the commonwealth is the creation of human will). - Implicitly, the same holds true for relations between sovereign and independent states, as Grotius himself was well aware. The conditional or complete transfer of sovereign rights forms the legal basis of the Dutch East India Company’s (VOC) treaty system with native princes in Asia. Grotius himself took a hand in constructing and endorsing this treaty system and relevant papers can be found in the same fascicle at Leiden University, B.P.L. 922. Concerning Grotius’ role in designing the VOC’s treaty system in Asia, see for example Borschberg, Peter, “Hugo Grotius, East India Trade and the King of Johor”, *Journal of Southeast Asian Studies*, 30, 2, 1999, pp. 225-248; and at large also Van Ittersum, *Profit and Principle* (2006).

<sup>84</sup> *Theses LVI*, fol. 287 recto, §3: “Lex naturalis simul et Scriptura hanc restrictionem tradunt, ut Homo [deleted: consensus] indicio voluntatis <alteri> facto obligetur, et eatenus amittat ius cum in actiones tum in res suas. §4: Hinc fit, ut quod quis promisit, nisi consensu eius cui promisit, omittere non possit nullo habito respectu ad factum aliquod antecedens eius cui facta est promissio, quia etsi respectu ad hominem non tamen proprie homini hoc ius acquiritur, sed Deo. <Unde sequitur non semper tantum esse ius in una parte, quantum obligationis in altera.> §5 Indicium voluntatis et sermone fit, et signis aliis ad indicandum ordinate se habentibus.” - Here as in all subsequent transcriptions, text marked between square brackets was deleted, text between pointed brackets was added by Grotius. See also IPC-E (2006) p. 36. Dr. Straumann highlighted to me the interesting observation, that Grotius – not unlike Hobbes later – sees man’s right restricted only by natural law. Straumann also does not see the deployment of the Latin *lex naturalis* in this specific context as a coincidence.

rights over other persons? This is the question Grotius announces as his program in the opening lines of the *Theses LVI*.

It should be stated from the onset that, while the Dutch humanist evidently has book 2 of the *Institutes/Enactments of Justinian* (On the Division of Things) at the back of his mind, he does not concern himself here with the creation or origin of private property strictly speaking.<sup>85</sup> In fact, in the *Theses LVI*, Grotius takes the existence of private property for granted (not least because in an exposé this subject clearly falls out of the scope of his proposed discourse), for man, Grotius states, may freely dispose over his own liberty, body and “things” (*res*).<sup>86</sup>

At the beginning of the *Theses LVI* the Dutch humanist states: “God has the right over life, body, actions and belongings of man, which is a right he can also transfer.”<sup>87</sup> In the left-hand margin, Grotius also jotted down the words “freedom, dominium” (*libertas, dominium*).<sup>88</sup> In the opening lines of the *Theses LVI* Grotius draws his primordial parallels and conclusions with respect to *libertas* and *dominium*. Like God, man is in an original state sovereign over himself, over his body, life and possessions.<sup>89</sup> The thesis strongly reminds of the maxim set down at the beginning of chapter 2 in *De Iure Praedae* where Grotius postulated: *Quod Deus velle significarit,*

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<sup>85</sup> See also IBP (1919) 1.1.10.4, p. 26; IBP-E (2005) p. 154; Grotius, *Inleidinge* (1965) 2.3, pp. 50-55.

<sup>86</sup> For Grotius’ early understanding of the origin of private property (esp. occupation) see also his IPC-E (2006) pp. 315-316, 320.

<sup>87</sup> *Theses LVI*, fol. 287 recto, §1: “Deus ius habet in <vitam, corpus,> actiones et res hominum, <quod ius etiam transferre potest>.”

<sup>88</sup> The present author believes that these two Latin expressions are to be read from the manuscript as completely separate expressions, capturing the gist of what is laid down in Grotius’ thesis. For this reason the two words have been separated by a comma.

<sup>89</sup> *Theses LVI*, fol. 287 recto, §2: “<Secundum Deum> Homo naturaliter ius habet in actiones et res suas tum retinendi tum abdicandi, vitam autem et corpus retinendi tantum.”

*id ius est* (What God wills, that is law).<sup>90</sup> The Dutch humanist's statement on the nature of Divine voluntarism has evoked much interest in scholarly circles in the past, mainly as a means of clearly demarcating the ideas of the young Grotius from the more mature author of *De Imperio* and *De Iure Belli ac Pacis*. His reading of Francisco Suárez and the adoption of what Hans Welzel deems a *Willensmoment* (volitional momentum) is invoked to facilitate his transition toward a more secularized idea of natural rights.<sup>91</sup> In this view the Will of the Creator assumes a subordinate role, as he can only command to or prohibit what is already good or evil. But here in the *Theses LVI* the Dutch humanist is evidently not bothered by the more intricate relations between natural right and Divine (positive) law, and the Suarezian *Willensmoment* is totally absent here. This may very well serve to underscore the comparatively early composition of the *Theses LVI*, which in its understanding of natural right and Divine right is closer to chapter 3 of *De Iure Praedae* than to *De Imperio* and *De Iure Belli ac Pacis*. Admittedly, it is not the intention of the *Theses LVI* to make statements of profound theological interest, or even explore the issue of natural rights. Grotius' main concern is to stake out the parameters for comparing divine and human agency.

Man's sovereignty over his own body, life, will, actions and worldly possessions sets the theoretical cornerstone in Grotius' political edifice, and at the same time marks an important starting point in the Dutch humanist's trail of thought concerning the state of nature. This real or hypothetical state of man is assumed to have existed prior to the establishment of civil society. But one should immediately adjoin that this is not a natural state devoid of morality or values. Like Adam and Eve in the Garden of Eden, man is to direct his actions according to nature (or, perhaps better, the reason underlying Creation) and religion (that is the revealed word of

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<sup>90</sup> IPC-E (2006) p. 19.

<sup>91</sup> See for example Welzel, Hans, *Naturrecht und Materiale Gerechtigkeit*, Göttingen: Vandenhoeck & Ruprecht, 1990, p. 128, with the relevant citations from *De Imperio*, *De Iure Praedae* and Grotius' correspondence.

God).<sup>92</sup> It is against the backdrop of these considerations that one is placed in a position to unlock the meaning and intention of thesis 2 which reads: “This right (*ius*) nevertheless flows from Divine right (*ius*), and is restricted by the same, by natural law as well as by the extrinsic and intrinsic word [of God], that is Scripture and Revelation.”<sup>93</sup>

If God’s will expressed in the immutable laws of nature and Revelation form the first layer of civil society,<sup>94</sup> man’s nature and inclinations can be taken as a second.<sup>95</sup> As has been sufficiently established elsewhere, Grotius adheres to Aristotelian and Stoic concepts of *appetitus societatis* and *oikeiosis* that is man’s natural inclination to seek the company of his fellow beings as a means of self-preservation and “to render society even more serviceable to man’s needs”.<sup>96</sup> The

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<sup>92</sup> See also IPC-E (2006) p. 28, where it is stated that civil society is based on the social impulse to live by the ‘design’ of the Creator, that is by Creation (nature) and Revelation.

<sup>93</sup> *Theses LVI*, fol. 287 recto, §2: “Hoc tamen ius a iure Dei dimanans, ab eodem restringitur, per legem naturalem et per verbum tum extrinsecum tum intrinsecum, id est Scripturam et Revelationem.” Marginal reference to Genesis 9:26 and 25:23.

<sup>94</sup> Concerning natural law (*ius naturae*) and its relation to the *ius divinum voluntarium*, see also IBP (1919) 1.1.10.6, p. 26-27; IBP-E (2005) p. 156; Wellschmied, Karl, “Hugo Grotius’ Inleidinge tot de Hollandsche Rechts-Geleerdheid und das Recht seiner Zeit”, doctoral thesis (Law), University of Göttingen, 1950, pp. 39-40, also *ibid.* pp. 46-47.

<sup>95</sup> It is insufficiently transparent from the manuscript whether the *Theses LVI* envisage something like a “natural fellowship of mankind” that exists in the “natural state” and even survives the founding of the commonwealth. Such a “natural fellowship” is expressly mentioned in *De Iure Praedae* as well as in *De Iure Belli ac Pacis*, but it may very well be implicit also in the idea of man’s natural sociability. Concerning this important facet of Grotian thought and its implications for his internationalist outlook, see Remec, *The Position of the Individual in International Law* (1960) p. 71.

<sup>96</sup> Remec, *The Position of the Individual in International Law* (1960) pp. 67, 72, 73; Welzel, *Naturrecht und Materiale Gerechtigkeit* (1990) p. 126. - For Grotius’ early ideas on the social contract, see especially also his IPC-E (2006) p. 27 (concerning the Stoic concept of the ‘brotherhood of man’); *ibid.*, p. 36 (the commonwealth is established to promote the common

Dutch humanist sees the expression of this primordial social drive taking place at different levels of societal organization. His exploration of what could be deemed “primitive associations” serve later in the *Theses LVI* to explain the origins of citizens rights and obligations.

In the state of nature, Grotius explains, man possesses rights over his own body, life, passions and belongings, but not any rights over other individuals, not even a right to inflict punishment.<sup>97</sup> He may only direct others toward their own good. What man possesses in his natural state is merely the power of language and suasion. It does not immediately transpire from the manuscript of the *Theses LVI*, but Grotius’s example of the medic and his patient may very well have been inspired by the well-known dialogues of Plato, especially *Gorgias*.<sup>98</sup> The physician employs rhetoric, persuasion and his superior knowledge of medicine to stake out a program for physical recovery. The medic has no rights proper over his patient. In turn, the

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good, the equal acquisitions of the necessities of life and the rendering of mutual aid); *ibid.*, p. 402, (the commonwealth was established by agreement to achieve what individuals could not accomplish on their own). - See also Cairns, John W., “Stoicism, slavery, and law”, *Grotiana, New Series*, 22-23 (2001-2002) esp. pp. 204-206; Straumann, Benjamin, “*Appetitus Societatis* and *oikeiosis*: Hugo Grotius’ Ciceronian Argument for Natural Law and Just War”, *Grotiana, New Series*, 24/25 (2003/2004) pp. 41-66; Gough, *Social Contract* (1957) pp. 82 (note 2) 121; Remec, *The Position of the Individual in International Law* (1960) pp. 62, 63, concerning self-preservation and Grotius’ round rejection of all views that render man naturally “unsociable”. By contrast Grunert, *Der Vertrag* (2005) p. 129, attributes a subordinate role to the *appetitus societatis* in the writings of Grotius.

<sup>97</sup> *Theses LVI*, fol. 287 recto, marginal comment to Thesis 6: “Ergo, non habet ius puniendi illo modo per se.” This comment was originally added to Thesis 7, and subsequently moved by Grotius to Thesis 6. It is not sufficiently clear to the present author whether this comment is somehow linked to the cited Biblical passage, Genesis 4:15, which is jotted down by Grotius below this comment. This verse mentions the divine command of God not to punish Cain for slaying his brother Cain. See also above, note 80.

<sup>98</sup> See for example Plato, *Gorgias*, revised text with introduction and commentary by E. R. Dodds, Oxford: Clarendon Press, 1990, 456b. For an analogy between physical wellness and justice, see also *Gorgias*, 477e-479e.

patient consents and follows the recommended course of remedy. Two important principles emerge from this doctor-patient relationship: first, the two parties do actually not interact as equals.<sup>99</sup> The medic has superior knowledge of medicine and makes a prescription that directs the patient toward his recuperation and good physical health. The patient recognizes this, accepts the advice, and follows through with the appropriate action. Two very important things happen in this context: first the medic by virtue of his medical knowledge guides the patient toward his recuperation and good health (and metaphorically toward justice and moral wellness) and the patient responds by consenting to this counsel.<sup>100</sup> The act of consent (*toesegging*) lends validity to the contract and is not contingent upon the quality or integrity of the medic's professional advice.

It is in the context of these and related considerations that one needs to appreciate Grotius' discourse on marriage and the family.<sup>101</sup> The former represents the primordial step in man's innate propensity to find comfort in the presence of other human beings, the latter springs from the union of the sexes. Both, as Grotius seeks to explain, carry with them different sets of rights and obligations for different members.

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<sup>99</sup> On the significance of equality in forging contracts, see IBP (1919) 2.11-12, pp. 252-275, and IBP-E (2005) vol. 2, pp. 698-767, generally, but specifically also 2.12.8, p. 265; Grotius, *Inleidinge* (1965) 3.3, pp. 208 et seq. on the term "toesegging"; also Grunert, *Der Vertrag* (2005) pp. 126-127.

<sup>100</sup> *Theses LVI*, fol. 287 recto, §7, "Quatenus autem eadem illa sunt media ordinata ad intra l. ad bonum cuique suum, eatenus homo alter in ea ius non habet. Atque ita sapiens et medicus consilii habent potestatem, non imperii: quod iure executionis demonstratur." - See also Grotius, *Meletius* (1988) §24, p. 81 (Latin) and (translation) p. 110: "... the strength of free will [is] in willing and doing what is best."

<sup>101</sup> Grotius' views on marriage, however, are generally deemed problematic. See for example Hervada, Javier, "The Old and the New in the Hypothesis 'Etiam si daremus' of Grotius", *Grotiana*, New Series, 4 (1983) p. 4.

In the tradition of Roman Law, marriage is seen as a contractual arrangement, but admittedly not a contract based on the equality of the spouses.<sup>102</sup> Appealing to Pauline exhortations that wives obey their husbands, Grotius also adds that this obedience is also strictly conditional upon a husband bearing the welfare of his wife in mind. In contrast to the aforementioned discussion in book 2, chapter 5, of *De Iure Belli ac Pacis*, Grotius does not expand in any significant detail on the rights and obligations of marriage in the *Theses LVI*. What he does specifically highlight in the latter, however, is that marriage should be understood in terms of a contractual relationship. This understanding is broadly in tune with the precepts of marriage anchored in Roman Law, and Grotius also elaborates extensively on this subject in his *Inleidinghe* that is the “Introduction to the Jurisprudence of Holland”.<sup>103</sup> The mutual obligations of husband and wife arise from the nuptial contract and also from Divine Will.<sup>104</sup> Specifically, by reference to the Holy Scriptures (Ephesians 21:10) Grotius underscores that a wife owes her husband obedience, and it is formally on the basis of

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<sup>102</sup> *Theses LVI*, fol. 287 verso, §18, “Ita in matrimonio inter virum et uxorem ea est obligatio quam consensus praescipit: sed a Dei voluntate accedit ut non possit eo obligatio non esse perpetua ut ius habeat alter in alterum quod ad actum coniugalem, ut alter alterorum necessitatibus succurrant, item ut mulier viro obediat. §19, Igitur etiamsi quid sibi indebitum aut uxori inutile vir praecipiat, tenetur mulier obediri: modo non sit contrarium divinum legi.” Marginal references to Exod. 21:10; Gen. 3:16, 1 Pet. 3:5 and 3:8; 1 Cor. 11:3, 11:7; Eph. 5:23 5:33. - Similar observations are made for the *Inleidinge* (1965) 1.4.6, p. 15; Wellschmied, *Hugo Grotius’ Inleidinge* (1950) pp. 55-57 passim, pp. 67 et seq.

<sup>103</sup> Grotius resorts to a series of terms in Dutch that imply a contractual relationship, see Grotius, *Inleidinge*, (1965) 1.5.16-19., pp. 19-20. It should be immediately added that the nature of the marital contract in ancient Rome and in Grotius’ on time in Holland were understood very differently. In seventeenth century Holland, the power of the *paterfamilias* was comparatively reduced, and the status of women enhanced. This was particularly the case in matters pertaining to the legal authority and responsibility of either parent over their offspring.

<sup>104</sup> See Dig. 23.2.1, “Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio.” See also Grotius, *Inleidinge* (1965) 1.5, pp. 16 et seq. and Wellschmied, *Grotius’ Inleidinge* (1950) pp. 96 et seq. as well as above, note 102.

such Biblical precepts that Grotius departs from the Roman model of a contractual marriage.<sup>105</sup> Yet it is clear from his words here as well as from his other writings, such as for example the *Annotationes in Novum Testamentum*, that obedience must necessarily remain within the parameters pegged to natural law and revelation.<sup>106</sup> A woman need only obey her husband to the extent that her obedience does not run contrary to natural reason and Christian revelation. Correspondingly, Grotius establishes in thesis 20 by express appeal to Colossians 3:18-19 that a husband can only command his wife something if he bears her own good in mind and if his instructions remain in harmony with the principles of Divine Revelation and natural equity.<sup>107</sup>

Complexity is added when the Dutch humanist turns to discuss the rights and obligations of children. The first considers the right of parents over their children.<sup>108</sup> “By God’s will, parents (but more so the father than the mother) have a right over the actions, passions and belongings of children as far as these are ordained toward their good.<sup>109</sup> This can be proven on the basis of Nature and Scripture.” The left margin contains several references to the Old Testament, such as Genesis 3:18, 4:9, 8:10,

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<sup>105</sup> See specifically also Grotius’ views on the Roman model of marriage in the epistolary treatise *Meletius* (1988) §74 p. 98 (Latin) and p. 128 (English translation).

<sup>106</sup> See Grotius, *Opera Omnia Theologica*, (1679) vol. 1, p. 5A-B (containing additional references to the New Testament); *ibid.*, vol. 2, p. 902A: “Imperium in uxorem vir habet privilegio naturae et gentium iure”; *ibid.*, p. 903A: “Quae autem in Vetere Testamento applicantur Deo, ea Christo applicantur in Novo”. - See also *ibid.*, pp. 1103B; 1104A-B; Grotius, *Inleidinge* (1965) 1.3.8, pp. 11-12; 1.4.6, p. 15; 1.5.20, pp. 20-21.

<sup>107</sup> See also Grotius, *Inleidinge* (1965) 1.5.20, pp. 20-21; 1.5.24, p. 22.

<sup>108</sup> *Ibid.*, fol. 287 recto, §9: “Dei voluntate parentes <magis autem pater quam mater> ius habent in actiones [non in vitam aut corpus], passiones et res [deleted: filiorum] <liberorum> quatenus ad bonum ipsorum ordinanda sunt, quod Natura et Scriptura demonstratur.” Marginal reference to Proverbs 13:24 and 29:15. Gellius 2.7. See also below, note 110.

<sup>109</sup> *Ibid.*, fol. 287 recto, §7. The marginal reference to Vitoria, p. 206, corresponds to *De Potestate Civili*, §20. Additionally, see Grotius, *Inleidinge* (1965) 1.3.8, pp. 11-12; 1.6.1-4, pp. 23-24.



13:7, Exodus 22:2, Proverbs 13:24 and 29:15. The additional marginal reference abbreviated as *Gell. 2.6* and subsequently corrected this to read “2.7”. A second reference to this passage is found on folio 291 verso. Here in grey ink one finds the entry “De Potestate parentum Gell. 2.7” to which Grotius adjoined “Arist. Eth. 9”, i.e. “On the power of parents”, Aulus Gellius, *Attic Nights*, 2.7 and Aristotle, *Nicomachian Ethics*, bk. 9. In the said passage Gellius indeed address a child’s obedience to his parents and the conditions under which such obedience is commanded by nature, and Aristotle discusses the issues of love, friendship and good will.<sup>110</sup> It remains insufficiently clear why Grotius deleted these two references, but perhaps they were merely intended as quick notes and that were deleted Grotius incorporated the references in the right place in the margin of the *Theses LVI*.

By nature and divine volition, specifically the Fourth Commandment, children should obey their parents. Familiar is also the idea that parents’ should strive for the good of their children. To this Grotius adjoins: “But this right lasts [only] while the children have not [yet] achieved full rational faculties.”<sup>111</sup> Parents, thus, retain rights over their children for as long as they are minors and have not yet reached full adulthood. Grotius discusses these issues of child-parental obligations in his other works as well, in his *Annotationes* (Biblical Annotations), the *Inleidinghe* (Introduction to the Jurisprudence of Holland) and of course in his *De Iure Belli ac Pacis*.<sup>112</sup> He contends that the divine mandate of parents over their children lasts until

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<sup>110</sup> Gellius, *The Attic Nights of Aulus Gellius*, Latin text with a translation into English by John C. Rolfe, 3 vols., London: Heinemann, 1927, vol. I, 2.7, pp. 143-147; Aristotle, *Nicomachian Ethics*, translated and edited by Roger Crisp, Cambridge: Cambridge University Press, 2000, 1163B-1170B, pp. 163-179.

<sup>111</sup> *Theses LVI*, fol. 287 recto, §11: “Durat autem hoc ius quamdiu liberi ad actum secundum rationem non pervenerunt.”

<sup>112</sup> IBP (1919) 2.5.7, pp. 177-178, IBP-E (2005) vol. 2, pp. 512-513, incl. Grotius’ reference to Num. 30:2 et seq. - Further Grotius’ commentary to Exodus 20:12, “Honour thy father and thy mother” in: *Opera Omnia Theologica*, vol. 1, pp. 47A-B: “Proximi Deo sunt parentes, et veluti in terris dii quidam, quorum ministerio Deus usus est, ut nos in hoc pulcherrimum Templum suum

they have fully developed their rational capabilities, in other instances he argues that the obedience of children lasts for as long as they dwell in the paternal household.<sup>113</sup> Parental rights over children, however, do not remain static, but according to Grotius in the *Theses LVI* diminish over time.<sup>114</sup> Once they reach adulthood, however, children can remain in the parental household, but in theory they do so at their own consent.<sup>115</sup> In sum, the outcome approximates the situation described by Grotius in

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introduceret.” - Grotius, *Inleidinge* (1965) 1.3.8, p. 11: “... want het zelve [wet] leert ons, dat de kinderen, als haer wezen naest God van haer ouders ontfanghen hebbende, de zelve haer ouders daer over alle eer, danck ende onderdanigheid schuldig zijn.” *ibid.* 1.6.4, pp. 24, “De kinderen op en dezer wijzen van de vaderlicke hand zijnde ontslaghen ... blijvende voorts altijd plichtig haere ouders gehoorzaamheid ende eerbiedinghe te bewijzen volgens de aengebooren ende Goddelicke gegeven wet.”

<sup>113</sup> IBP (1919) 2.5.7, p. 177: “Sic jure quod Deus Hebraeis dedit, potestas patris in filium aut filiam, ad dissolvenda vota non erat perpetua, sed durabat quamdiu liberi pars erant domus paternae.” - IBP-E (2005) vol. 2, pp. 512-513. Grotius, *Opera Omnia*, vol. I, commentary to Num. 30:4: “[Filia] quae est in domo patris sui. Idem in filio. Sed filia donec maritum haberet solebat in patris manere domo: filius quamdiu patri placeret. Quae autem sic in domo erant patris, cibo patris alebantur. Pleraque autem vota de cibo. Requiritur autem ut votum valeat, justa etiam aetas voventis, quae est annorum xiii in mare, xii in femina.” - See also Grotius, *Inleidinge* (1965) 1.6.4, p. 24: “De onbestorven kinderen werden mondig door huwelick ofte handlichtinge, de welcke geschied of in rechte, of stilzwijgende, te weten zo wanneer enig kind werd toe-gelaten op zich zelve te wonen ende neeringe te doen.”

<sup>114</sup> *Theses LVI*, fol. 287 verso, §12. Grotius’ ideas on paternal power of course differ significantly from ancient Roman law. On this see broadly Lee, R.W., *An Introduction to Dutch-Roman Law* (1961) pp. 33-49.– Further clarification on how Grotius understood this “evolving” state of dependency, see also IBP (1919) 2.5.6, p. 177: “In tertio tempore filius in omnibus est *autexousios* ‘suique iuris’, manente tamen semper illo pietatis et observantiae debito, cujus causa perpetua est. Unde sequitur regum actus irritos dici eo nomine non posse quod parentes habeant.” (Word marked in italics has been transliterated from the Greek alphabet, P.B.) IBP-E (2005) p. 512.

<sup>115</sup> *Theses LVI*, fol. 287 verso, §16: “Obligatur autem latius pater in tantum nempe quantum consensus.”

his epistolary treatise *Meletius* of 1611:<sup>116</sup> “The mutual duties of parents, children and spouses between them, a lenient leadership on the one hand and a lasting obedience on the other, must be confirmed by concord between all parties equally.”

On the basis of the above considerations on the dynamics between spouses and their offspring,<sup>117</sup> Grotius is placed in a position to draw a set of basic conclusions that ultimately serve to unlock the complex interrelationship between citizens and rulers.<sup>118</sup>

**6. The genesis of the commonwealth (respublica) via the social contract**In thesis 21 Grotius concludes his discussion on rights and obligations at the level of the individual and the family and elevates his deliberations to the plane of civil society.<sup>119</sup> As has already been mentioned, this marks a typical feature of Grotian political discourse.<sup>120</sup> Implicitly, the state as a product of the human will and constrained by divine revelation at any point in time cannot be vested with more power or authority than is exercised by the *paterfamilias* within his family.

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<sup>116</sup> Grotius, *Meletius* (1988) §73, p. 97 (Latin) and p. 128 (English translation).

<sup>117</sup> *Theses LVI*, fol. 287 recto, §4: “Unde sequitur non semper tantum esse ius in una parte, quantum obligationis in alteri.” Also: *ibid.*, fol. 287 verso, under §13: “Maior est in liberis obligatio quam ius in parentibus. Nam his exceptis quibus expressa Dei intervenit auctoritas in caeteris ius omne filiorum parentum voluntati subiectum sit etiamsi ea voluntas et directionem ad bonum liberorum et iustam recompensationem excedat.” There are added to this thesis in the left margin a series of Biblical references, including Eph. 6:1 (twice) and 6:4, Col. 3:20-21 (twice).

<sup>118</sup> On fol. 290 verso Grotius indicates the following question: “An Iure naturali eandem sit potestas penes patres tam quae est penes magistratus.” See also above, note 67.

<sup>119</sup> *Theses LVI*, fol. 287 verso. - See also Grotius, *Meletius* (1988) §71, p. 96 (Latin) and p. 127 (English translation): “The order on which human society is based has two elements: the family and the state.”

<sup>120</sup> See note 68.

Philosophers, political theorists and historians of public law have long been interested in Grotius' ideas on the origin of the commonwealth, and implicitly also on the sources of political obligation. Even among modern researchers, it has been far from clear whether or not the Dutch humanist should be ranked among a group of early modern thinkers commonly known as the 'social contract theorists'. Singular emphasis on the study of Grotius' mature work *De Iure Belli ac Pacis* (1625) has generally served to obscure rather than enlighten modern scholarship, and researchers until today have left largely untapped the celebrated Dutch humanist's pool of unpublished manuscripts and reading notes.

Where better to commence further deliberations by posing a basic but ultimately very important question: Did Grotius actually think that such a contract ever took place in history? Whilst it is true that Grotius sees commonwealths of old and of his own day grounded on some form of contract, the state of nature belongs essentially to a classically idealized past. As Peter Pavel Remec succinctly observed: "Although Grotius uses the concept of a social contract between free men to explain the logical origin of the state, he does not mean thereby that the historic origin of contemporary states must be based on such a contract."<sup>121</sup> Nor is it certain that constitutions once grounded in a social contract are necessarily static and immutable – this becomes clear especially from the Dutch humanist's discourse on sovereignty on the right of resistance. For Grotius and many of his contemporaries writing on public law and political theory, the contractual origins of the state serve to legitimize the dissolution of feudal order, and to successfully place evolving state institutions onto the plateau of constitutional government. For the Dutch humanist, it significantly also serves the function of legitimizing the birth of the Dutch Republic. Although the Dutch Revolt and its principal agents are never mentioned by name in the manuscript of the *Theses LVI*, it is evident that this monumental historic event remained very much at the back of Grotius' mind.

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<sup>121</sup> See also Remec, *The Position of the Individual in International Law* (1960) p. 74.

The *Theses LVI* not only offer fresh material and insights on state formation, political obligation, the nature of sovereignty and the right of political resistance, the manuscript contains important information on the sources that had a direct and formative impact on the early political thought of Grotius.

The central intention of the Dutch humanist to explore the means how man acquires - or is bestowed by divine revelation - certain rights over other individuals. theses 1 through 20 stake out the parameters at the inter-personal, pre-societal level, but always with an eye cast at the level of state formation and civic obligation. Two underlying principles are worth underscoring again in this context: Man is thought to possess rights over his life, actions and belongings. These rights can be transferred or alienated, in part or in full. Rights acquired over other individuals flow from divine revelation, or also spring from the act of consensus which is seen as a basic contract. Even in a state of nature man does not live in a moral vacuum but is obliged by the principles of nature and the tenets of Divine Revelation. Both precede, and are distinct from, the values of civil society, and both are necessarily binding forces of law.<sup>122</sup> Human association stems from different sources such as significantly nature, revelation and teleology. Directing others toward their happiness and respective good of course traces its roots to the philosophers of Antiquity and emerges as a primordial duty of the commonwealth among the humanists and even theologians of early modern Europe.

Consensus and revelation represent the bricks and mortar that for Grotius hold political society together in its most basic form. The commonwealth (*respublica*) is given the right over its citizens to direct civil society - and indeed each citizen - toward their respective good.<sup>123</sup> It is worth highlighting here that in the *Theses LVI*

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<sup>122</sup> Ibid., p. 70.

<sup>123</sup> *Theses LVI*, fol. 288 recto, §23, “Deinde quod ad ius attinet, illud hic singulare non ab hominum consensu (neque enim id in hominum fuit Potestate) sed a lege divina additum est ut resp. ius habeat [non modo in actions, passions et res, sed] etiam in vitam et corpus civium quatenus haec sunt media ordinata ad bonum [tum ipsorum singularium, tum] publicum.” And also in Thesis 21:

Grotius pays surprisingly little attention as to *why* people band together to form the commonwealth. The process is doubtlessly driven by the *appetitus societatis*, but the actual purpose(s) other than directing the polity and the individual toward their respective “good” (*bonum commune, bonum individuale*) is far less specific.<sup>124</sup> Of specific interest for the *Theses LVI* is the influence on Grotius of the Spanish theologian Vitoria. In marginal references the Dutch humanist observes: “[Political] power is not just human, Vitoria, 1.2.3.4” and “Something can be acceded by God to public power, [namely] the ordination of providence.”<sup>125</sup>

The teleological end of the commonwealth - and of course also of the individual - is brought to paper far more forcefully in Grotius’ mature works. In *De Iure Belli ac Pacis*<sup>126</sup> the Dutch humanist identifies two forces: first the *appetitus societatis*, that is man’s natural propensity toward friendly intercourse and the enjoyment of common benefits, and second man’s deep yearning for security and

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“Similiter in contractu civium ad remp. constituendam primum id ius est eaque obligatio quam lex consensus exprimit. ...”

<sup>124</sup> See also IPC-E (2006) p. 36.

<sup>125</sup> *Theses LVI*, “Potestatem autem non esse mere humanam, Vict. 1.2.3.4” and “Ad potestatem publicam a Deo aliquod accedere praeter ordinationem providentium.” - See also below note 141. The reference to Vitoria almost certainly pertains to §§1-4 of his *De Potestate Civili*, in *Relectiones XII* (1557) pp. 174-181. - See also IPC-E (2006) pp. 36, 137 and IBP (1919) 1.4.7.3, p. 113 and IBP-E (2005) vol. 1, pp. 358-359, where Grotius accentuates the human element in the founding of the commonwealth.

<sup>126</sup> Gelderen, Martin van, “Aristotelians, Monarchomachs and Republicans: Sovereignty and respublica mixta in Dutch and German Political Thought, 1580-1650”, in: *Republicansims, a Shared European Heritage*, vol. 1, edited by Martin van Gelderen and Quentin Skinner, Cambridge: Cambridge University Press, 2002, pp. 202-203: “The respublica refers to a multitude of private persons who have come together to improve their protection through mutual aid and to assist each other in acquiring the necessities of life. At their own free will these individuals united by way of a civil contract - Grotius uses the term foedus - in a ‘unified and permanent body’ with its own set of laws. From singuli they turn themselves into cives, citizens.”

protection of life, body and possessions.<sup>127</sup> In the *Theses LVI* Grotius is well aware of these two underlying drives, even if he does not explicitly mention or comment on them.

So much for the question: Why do people enter into an agreement to form the commonwealth? The question that now emerges is: Who or what persons ‘agree’ to establish the commonwealth? The late scholastics and humanists who follow Aristotle closely saw the *patresfamilia* or “heads of household” leading the formative process.<sup>128</sup> One of Grotius’ immediate sources for the *Theses LVI*, namely Jean Bodin, argues for precisely this point on several occasions in his famous *Six Livres de la République*.<sup>129</sup> Another school of thought that found adherence among Protestant scholars of politics, fuse Aristotelian principles with Old Testament “history”. Two classic works of the late sixteenth century can be mentioned in this context: Carolo Sigonio’s *De Republica Hebraeorum* (On the Commonwealth of the Hebrews) and Bonaventura Cornelius Bertram’s *De Republica Ebraeorum* (On the Commonwealth of the Hebrews).<sup>130</sup> One should also not forget that Grotius himself expounded

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<sup>127</sup> IBP (1919) 1.14.1, p. 30: “Est autem Civitas coetus perfectus liberorum hominum, iuris fruendi et communis utilitatis causa sociatus.” IBP-E (2005) vol. 1, p. 162. The term *civitas* here should probably be understood against the backdrop of Cicero’s definition of the *respublica* (Cicero, *Rep.*, 1.39). - IBP (1919) 2.12.9.1, p. 265: “... nam inter contrahentes propior quaedam est societas, quam quae communis est hominum.” IBP-E (2005) vol. 2, p. 737. Also IBP (1919) 2.6.4, p. 201: “Nam qui in civitatem coeunt, societatem quandam contrahunt perpetuam et immortalem. ...” IBP-E (2005) vol. 2, pp. 568-569.

<sup>128</sup> See especially Aristotle, *The Politics*, Translated with an Introduction, Notes and Glossary by Carnes Lord, Chicago and London: Chicago University Press, 1984, 1252B, p. 36.

<sup>129</sup> Bodin, *Six Bookes* (1962) Appendix B, The Principal Definitions and Distinctions, “Republica est familiarum rerumque inter ipsas communium summa Potestate ac ratione moderata multitudo.” “Diximus Rempublicam esse legitimam plurium familiarum et earum rerum, quae illis communes sunt, cum summa potestate gubernationem.”

<sup>130</sup> Editions consulted: Carolo Sigonio (Sigonius): *De Republica Hebraeorum*, Middelburg: Guilelmus Goeree, 1676; Bonaventura Cornelius Bertram: *De Republica Ebraeorum, Recensitus*

similar ideas in his *De Republica Emendanda*, an early treatise of the Dutch humanist thought to have been written around 1601 or 1602. It should be immediately adjoined, however, that despite references to a treatise by the very same title in Grotius' correspondence, his authorship of this (non autograph) piece remains inconclusive.<sup>131</sup>

The *Theses LVI* make no specific mention of clan leaders, patriarchs or heads of household, but the term *paterfamilias* or *patresfamiliarum* does appear on fol. 290 verso in some additional notes that Grotius jotted down.<sup>132</sup> What is especially interesting is that the Dutch humanist mentions only *individuals* in the *Theses LVI*.<sup>133</sup> Does this represent a break with earlier traditions in political philosophy, and possibly Grotius' own paradigms set out in the treatise *De Republica Emendanda*? In *De Iure*

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*Commentarioque illustratus Opera*, edited by l'Empereur ab Oppijck, Constantijn, Leiden: Jean Maire, 1641.

<sup>131</sup> This is also the conclusion brought forward in the forward and translation of the original Latin text published in the Netherlands in 1984. See the statements and the tone of the language in Eyffinger, Arthur et al. eds., "De Republica Emendanda. A juvenile tract by Hugo Grotius on the emendation of the Dutch polity", *Grotiana*, New Series, 5 (1984) pp. 5 (including *ibid.*, note 2) 6, 10-11, 40, 54. Concerning specifically how the Hebrew "Republican model" was understood in the Dutch Republic at the close of the sixteenth century, see *ibid.*, p. 45.

<sup>132</sup> *Theses LVI*, fol. 290 verso: "An Iure Naturali eandem sit potestas penes patres tam quae est penes magistratus." And "Qui censendi patresfam. eo iure." See also above, note 67.

<sup>133</sup> Compare this with Wolf, Erik, *Grosse Rechtsdenker*, Tübingen: Mohr, 1951, p. 258: "In manchem war Grotius auch Individualist. Aber der Einzelne erscheint bei ihm noch gebunden und gehalten von seiner korporativen Gemeinschaft. Er wird nicht als dinghaftes Subjekt, als Untertan einer übergeordneten Staatsgewalt verstanden. Kein Sozialvertrag, sondern eine geheimnisvolle Sympathie begründete für Grotius diese Urgemeinschaft unter allen Menschen. privatrechtliche Verträge der Einzelnen wie Korporationen und Institutionen des öffentlichen Lebens gründen zwar auch Gemeinschaften, aber ihr sozialer Sinn, nicht der Individualwille entscheidet über ihren rechtlichen Wert. Ursprung der Gemeinschaftsordnung unter den Menschen war also für Grotius eine wesensgesetzlich begründete Nächstenliebe als 'principium totius naturalis ordinis', nicht blosse Bedürftigkeit oder Berechnung. Das Naturrecht des Grotius ist insofern ein 'Naturrecht der Gemeinschaft'; es nahm den Einzelnen in Pflicht und berechtigte ihn nur als Glied einer Korporation."



*Praedae* the Dutch humanist identifies the constituent agents of the commonwealth as heads of household (*patresfamiliarum*),<sup>134</sup> but in *De Iure Belli ac Pacis* he is clearly less specific. Sometimes these are called individuals or variously also *patresfamiliarum* (heads of household). The one does not necessarily exclude the other, for Grotius identifies the contracting members as individuals first, and perhaps only in a second instance as members of families, clans or other primitive forms of human association. What is perhaps more interesting is not who these agents or ‘individuals’ are, but Grotius’ choice of Latin terminology in the context of the *Theses LVI*. These individuals are called *cives* (citizens) who are free and equal. Of these Dutch humanist adjoins in thesis 21: “Similarly, in the contract of the citizens to establish the commonwealth, the first right that is established is the same obligation that is expressed by the law of consensus.”<sup>135</sup> Interesting here is Grotius’ emphasis on the idea of *consensus* and not on the act of *transfer*, that is a transfer of natural rights from the individual to a corporative central authority, that is the commonwealth.<sup>136</sup> For now one shall set aside the dynamics and dimensions of this *consensus* and continue to dwell on the agents. Of these Grotius yields two additional snippets of information in thesis 22: “First, that any multitude shall be held sufficient to form a state, and every man shall adjoin himself to a commonwealth.”<sup>137</sup> This twin statement is reinforced in the left margin by a series of references to the Holy Scriptures, including Genesis 9:6, John 19:11, Romans 13:1, as well as the First Letter of Peter

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<sup>134</sup> IPC-E (2006) p. 138.

<sup>135</sup> *Theses LVI*, fol. 288 recto, §21, “Similiter in contractu civium ad remp. constituendam primum id ius est eaque obligatio quam lex consensus exprimit. Sed et haec ac superiori lege <ita> ut necessaria adiecta sunt <ut abesse non possunt.>”

<sup>136</sup> This idea of a transfer is made clear by Grotius in his IPC-E (2006) p. 137.

<sup>137</sup> *Ibid.*, §22: “Primum quod omnis sufficetur multitudo tenetur formare remp. et omnis homo se ad aliquam remp. conferre.”

2:13, and 15-17.<sup>138</sup> The commonwealth, in other words, represents the standing expression of free individuals and their consensus. It is not dependent on such factors as the number of constituent agents or even geographic location of the commonwealth.<sup>139</sup> Participation in a polity is a necessity, and no one can remain beyond the reach or jurisdiction of political authority.<sup>140</sup> The Biblical passages in the margin reinforce the view that participation in a polity is not just a simple act of choice, but is also a matter of divine providence.<sup>141</sup>

Thus so far the Dutch humanist identifies the origin of the commonwealth in the act of consensus. But the picture that ultimately emerges encompasses far more than merely the consensus reached by free contracting ‘individuals’. The compact, agreement or contract from whence the commonwealth springs also represents the permanent expression of Divine Will. All political power, Grotius concedes with deference to Romans 13:1, ultimately flows from God. The teleological objective of the commonwealth is to direct man as an individual, and as a member of the

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<sup>138</sup> Some of these Biblical references also appear in *De Potestate Civili*, in: *Relectiones XII*, 1557, §8, pp 188-189. Reference to this section in Vitoria is found at the bottom of fol. 288 verso, under Thesis 37.

<sup>139</sup> It shall be recalled here that Aristotle and many of his disciples of political philosophy in the age of Renaissance and Humanism saw the constitution of a given polity invariably influenced by geography and locational conditions that are distinct and separate of the human will. Grotius does not take such factors into consideration in the *Theses LVI*.

<sup>140</sup> IPC-E (2006) p. 43: “... for just as power over individuals and their possessions pertains to the nature of things to those individuals, even so there can be no power over all persons and over their goods unless it be a power pertaining to all.”

<sup>141</sup> A marginal reference belonging to Thesis 21 or 22, evidently added at a later stage (note the darker ink and different hand writing) reads “Potestatem autem non esse mere humanam, Vict. 1.2.3.4 [that is Vitoria, *De Potestate Civili*, §§1-4].” together with the remark “Ad potestatem publicam a Deo aliquod accedere praeter ordinationem providentium.” See IPC-E (2006) p. 59 and also above, note 125.

community of the faithful, to his own beatitude.<sup>142</sup> In the light of this insight, the commonwealth is the expression *and* instrument of Divine Providence. Grotius underscores emphatically that each and every individual *must* submit to this greater authority. The commonwealth, thus, is grounded on a might far greater than the consensus of free individuals. Providence renders the social contract both sacrosanct and indissoluble.<sup>143</sup> The duty of the citizens to the commonwealth that has its source in consensus and divine providence is treated in the same way as the obligation of children toward their parents.<sup>144</sup> Filial piety is not only natural, it is of course also sanctioned specially by Divine Will and Revelation.

As the commonwealth is treated in the *Theses LVI* as a manifestation of Divine Providence, the question inevitably emerges as to whether nature or even Revelation favour a specific form of government. Anyone weaned on the classics at the eve of the seventeenth century would have been familiar with Aristotle's *Politics* and his outspoken preference for the monarchy. As a citizen of the Dutch Republic and a staunch defender of his homeland, however, Grotius was unlikely to uphold hereditary monarchy as the ideal constitution and government, a cause that was championed notably by advocates of the divine right of kings. The right to rule flows

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<sup>142</sup> The following conclusion therefore does not hold valid for the *Theses LVI* and may be confined to Grotius' later works: Brett, Annabel, "The development of the idea of citizens' rights" in: *States and Citizens, History, Theory, Prospects*, edited by Quentin Skinner and Bo Strath, Cambridge: Cambridge University Press, 2003, pp. 104-105: The basic tool of both Grotius and Hobbes was the exploitation of the legal device of contract as a device for the exchange or the surrender of rights, together with a philosophical framework centred around the advantage to the individual in the surrender of liberty. Drawing on the Vazquezian understanding of right as liberty in the sense of a lack of limits, Grotius and Hobbes pictured the individual in the state of nature not primarily as a moral agent in pursuit of the natural good of man, but as a free agent in pursuit of his own advantage.

<sup>143</sup> Concerning the indissolubility of "promises" (and implicitly also contracts) see Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (1959) p. 40; the commonwealth as a unified and permanent body, see also IPC-E (2006) pp. 36-37.

<sup>144</sup> *Theses LVI*, §27, renumbered by Grotius from Thesis 24.

immediately and unbroken from the paternal rights of Adam, the first man. Political authority and obligation to the state, therefore, traces its origin in primogeniture and paternal authority and not, as Grotius postulated based directly on the writings of Marsilius and Vitoria, from consensus and man's free will.<sup>145</sup>

The elected monarchy was far less objectionable in Republican circles such as the Netherlands in the late sixteenth and early seventeenth century. It is against the backdrop of this evidence that one needs to specially appreciate Grotius' appeal to Marsilius and Vitoria,<sup>146</sup> whereby the latter evidently plays a far more formative role in the *Theses LVI* than the former.<sup>147</sup> This observation is confirmed by Grotius' citation of page 193 of the *Relectiones XII* (1557) and corresponding to §14 of Vitoria's *De Potestate Civili*.<sup>148</sup> Here the theologian from Salamanca establishes the foundations for a proto-democratic constitution when he - not unlike Marsilius - holds

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<sup>145</sup> See also Gough, *Social Contract* (1957) p 82.

<sup>146</sup> Gelderen, *Aristotelians, Monarchomachs and Republicans* (2002) p. 203: "Whilst the emphasis on self-preservation as the most fundamental natural law was a departure from Aristotelian political theory, Grotius's account of the origins of civil power followed the theory of the Aristotelian school of Salamanca and its more radical members quite closely. At crucial moments, including the definition of *respublica* and civil power, Grotius acknowledges his debt to Francisco de Vitoria, and, most of all, to Spain's most radical humanist jurist, Fernando Vazquez." References to the latter, as has been stated, are completely lacking in the *Theses LVI*.

<sup>147</sup> This is of course the very position that was attacked by defenders of royal absolutism, such as notably in the seventeenth century by Robert Filmer in the opening pages of his work *Patriarcha*. See Filmer, *Patriarcha* (1991) p. 2: "Since the time that school divinity began to flourish, there hath been a common opinion maintained as well by devines as by divers other learned men which affirms: 'Mankind is naturally endowed and born with freedom from all subjection, and at liberty to choose what form of government it please, and that the power which any one man hath over others was at the first by human right bestowed according to the discretion of the multitude'."

<sup>148</sup> Vitoria, *De Potestate Civili*, §14, in *Relectiones XII*, pp. 193-194: "Secunda conclusio, Sicut maior pars Reipublicae regem supra totam rempublicam constituere potest, aliis invitis: ita pars maior Christianorum, reliquis etiam retinentibus, Monarchiam unum creare iure potest, cui omnes principes et provinciae parere teneantur."

that all peoples are free to choose for themselves a constitution, even if this may not be the ‘best’ (according to the Aristotelian scheme of preferences, no doubt)<sup>149</sup> and are free to govern their interests based on decisions of the *pars sanior* or ‘qualitative majority’.<sup>150</sup> It is well worth reminding that Grotius refers to the same passage from Vitoria in his *Commentarius in Theses XI*, the original manuscript of which immediately precedes the *Theses LVI* in Leiden University Library’s fascicle B.P.L. 922.<sup>151</sup>

### **7. Sovereignty in the *Theses LVI***

The declared objective of the *Theses LVI* is to explore the acquisition of rights over other persons. In a second step, Grotius examines state formation and the right of political resistance. All peoples are free to choose for themselves a constitution that best suits their particularistic ends and needs. There are thus not only different constitutions that may be chosen, but each form will also be subject to considerable variation and adaptation from region to region, from commonwealth to commonwealth. Grotius’ brief discussion on the nature of sovereignty in the *Theses LVI* are best understood against the backdrop of this plurality of forms and variants.

But first a word about the Dutch humanists choice of terminology. The Latin expression employed by the Dutch humanist here in the *Theses LVI* to express “sovereignty” is *summa potestas*, which literally means the “highest power” or “supreme power”. According to Martin van Gelderen this expression can be traced to the Italian jurisconsult Bartolus of Sassoferrato, but it of course also features already

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<sup>149</sup> *Commentarius in Theses XI* (1994) pp. 228-229.

<sup>150</sup> See above note 144. In the context of Grotius, Gough only mentions the process of decision making by the “majority” without further specification, on this latter point, see: Gough, *Social Contract*, (1957) p. 81.

<sup>151</sup> *Commentarius in Theses XI* (1994) pp. 248-249.

in the Digest.<sup>152</sup> Why did Grotius employ this specific Latin expression? Why did he not defer to Bodin's terminology, especially since the adjacent notes and marginalia indicate that the Dutch humanist indeed consulted a copy of Bodin's *Six Livres de la République* around the time of writing the *Theses LVI*? Two explanations appear feasible.

First, Bodin himself translated the French term *souveraineté* into Latin as *ius maiestatis*, that is literally the right of majesty. As has been established elsewhere, Grotius was a critical reader of Bodin and may have thought that the Latin expression *ius maiestatis* was too closely associated with the political theories of royal absolutism. This would have rendered the expression out of place in what is doubtlessly a *republican* message for the *Theses LVI*.

Second, reliance on the terminology of Bartolus could also represent a tactical move on part of Grotius to cleanly demarcate his own ideas on sovereignty from those of his famous French counter-part.<sup>153</sup> As is known, Bodin elevated the idea of sovereignty to the identifying hallmark of an independent polity. Although Grotius may have found the concept of *souveraineté* a useful tool for analyzing and exploring ideas of political authority and civic obligation broadly speaking, the Dutch humanist is also known to have expressed his reservations on some of Bodin's largely prescriptive conclusions.

Accepting the concept of the *iura maiestatis* as a useful tool of analysis is one thing, sharing with Bodin the same "list" of what make up the "marks of sovereignty" is a different matter altogether. The Dutch humanist also rebuffs Bodin's view that the marks of sovereignty together represent an indivisible package of rights that are vested with preference in the monarch.<sup>154</sup> The strongest rejection of the

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<sup>152</sup> Gelderen, *Aristotelians, Monarchomachs and Republicans* (2002) p. 203. See also Dig. 1.11.1.

<sup>153</sup> See also above, note 56.

<sup>154</sup> Gelderen, *Aristotelians, Monarchomachs and Republicans* (2002) p. 204, sees Grotius toying with Bodin's indivisibility of sovereignty. This observation might very well hold true for *De Iure*

“indivisibility” of the marks of sovereignty may be found in the treatise *Commentarius in Theses XI*. Here the Dutch humanist explains that there is no necessary correlation between the title of an office holder and his actual authority conceded by the constitution. Some “kings are kings in name only”, the Protestant Grotius provocatively reminds with slick deference to the Cardinal Cajetan, and thus not everyone who bears the high sounding title of “prince” or “king” can be considered an absolute monarch endowed with that full and undivided package of sovereign rights.<sup>155</sup> To seasoned readers of Grotius, this point is of course familiar and well taken, especially with reference to his interpretation of the “constitution” of the province of Holland.<sup>156</sup> Moreover, it should not surprise to find this and similar

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*Belli ac Pacis*, but not for earlier works such as the *Theses LVI* or *Commentarius in Theses XI*. See also IBP 1.3.17, pp. 91-92 and IBP-E (2005) vol. 1, pp. 305-307.

<sup>155</sup> “Some kings are only kings in name” the immediate source of this concept is evidently Cajetan, Commentary to the *Secunda Secundae* of Thomas Aquinas, question 40, article 1. In the physical copy of the *Summa Theologiae* that was given as a present to Grotius by Dom Emmanuel of Portugal and presently owned the Library of the University of Lund these words are in fact underlined. See: *Summae S. Thomae Aquinatis, Doctoris Angelici, ordinis Fratrum Praedicatorum, Universam Sacram Theologiam Complectens, in tres partes divisa ad Romanum exemplar diligenter recognita: Cum Commentariis R. DD. Thomae de Vio Caietani Cardinalis S. Xysti. Nunc vero eruditissima R. F. Chrysostomi Iavelli Commentari in primam partem primum in lucem prolata, hic adiecimus*, Lyon, 1581, vol. 3, 2a-2ae, qu. 40, art. 1, p. 145, commentary of Cajetan, underlined passage: “... alicubi statute sint, talia ut Reges fere solo nomine sunt Reges.” For a description of the books from the library of Grotius that are currently found in the Library of the University of Lund in Sweden, see: Dovring, Folke, Une partie de l’héritage littéraire de Grotius retrouvée en Suède, *Mededelingen van de Koninklijke Akademie van Wetenschappen*, afd. letterkunde, nieuwe reeks, 12 (1949) pp. 237-250. The edition of Aquinas is found there, *ibid.* no. 16, p. 241. - See also IPC-E (2006) pp. 415-416; Grotius, H., *Commentarius in Theses XI* (1994) §19, pp. 216-217; Grotius, H., *Annales et Historiae de Rebus Belgicis*, Amsterdam: G. Blaeu, 1659, p. 2.

<sup>156</sup> A classic statement is found in his letter to the Heidelberg-based councilor Georg Michael Lingelsheim, dated 3 September, 1617, BW 528, p. 580: “In Belgio principes nunquam fuisse *autokratores* certissimum est: summum imperium si non actu, certe habitu, ut loquuntur, penes

strands of thought served as central tenets of republican discourse in other key works of the Dutch humanist, including invariably *De Iure Praedae* and *De Iure Belli ac Pacis*. Arguably the clearest testimony to the plurality of constitutional forms and the nature of princely government derives from a hitherto unpublished legal brief written in May 1637 for Stadholder Frederick Henry.<sup>157</sup> Written while holding the position of

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Ordines fuit, quod antehac a nobis demonstratum brevi forte documentis pluribus probabitur.” The Greek term was transliterated into Latin alphabet and italicized, P.B. The early twentieth century editors of the *Briefwisseling* point in this instance to Grotius’ *De Antiquitate Reipublicae Batavae* (On the Antiquity of the Batavian Republic) but use of the unique term *actus [summae potestatis]* may very well also fit perfectly with one of the core arguments of his politico-historical work *Commentarius in Theses XI*. A similar observation holds true for his use of the Greek term *hypeuthynos* (transliterated, P.B.) employed in a very similar context in Grotius’ letter to Lingelsheim dated 8 September, 1617, BW 529, p. 582.

<sup>157</sup> Ms. Cod. B.P.L. 919, incip. *Op ’t eerste. De Souveraineteiten syn niet al van eenerlei natuir*, fols. 212 recto - 216 recto. Fol. 217 verso contains additional notes relating to this brief which is written in Dutch. The curators of the university of Leiden, probably in the late nineteenth or early twentieth century, gave the untitled manuscript the heading: “Eigenhandig geschrift van Hugo de Groot ‘Over de Rechten van de Vorsten van het Huis van Orange op het Princedom Orange’” that is “Autograph piece of Hugo Grotius ‘Concerning the Rights of the Princes of the House of Orange over the Principality of Orange’.” A scribal copy of this brief with amendments to the text in the hand of Grotius are filed separately as Ms. Cod. B.P.L. 920, incip. *Afschrift van het vrye stuck* and bears the numbering fols. 217-223 affixed by Grotius. For a description of the piece, see: Noordhoff, *Beschrijving* (1953) pp. 56-57. The exposé is described here as a *Concept-advies ... over de bevoegdheid van de prins van Oranje en zijn mannelijke afstammelingen om over het prinsdom Oranje en hun andere goederen te beschikken in verband met de testamenten en de daarin opgenomen fidei-commissen der prinsen Philips Willem en Maurits van Orange (1637)*. The treatise was on display at the Grotius exhibition in The Hague in 1925, see: *Catalogus: Grotius-Tentoonstelling te ’s-Gravenhage, 13-28 Juni, 1925*, Leiden, 1925, p. 29, item 220. - Concerning the dating of this work, see Brandt, Caspar, and Van Cattenburgh, Adriaen, *Historie van het leven des heeren Huig de Groot, Beschreven tot den aanvang van zyn Gezantschap wegens de Koninginne en Kroone van Zweden aan ’t Hof van Vranckryk*, Amsterdam and Dordrecht: Joannes van Braam, 1727, vol. 2, pp. 87-88, 107-111; also BW 3090, p. 314, BW 3079, pp. 295-298, and BW 3108, pp. 336.



Swedish Ambassador to France, Grotius opens his brief with the following key observations:

“There are different types of sovereignty. Some are of such a nature that the owner is not in a position to dispose over it by transfer or by testament. Then there are others which the owner may dispose of, just as we have seen to have happened with many different kinds of sovereignty. Among the kingdoms we have here the examples of Jerusalem, Naples, of Cyprus, and Mallorca. Among the principalities in the East [there are] very many, such as among the Christians Achaia, Thessalia, Arcania, Athens, [and] Durazzo, not to speak of the many among the Turks and Persians and also in [the] Barbary [States]. ... In order to ascertain the power which a prince may have, or not have, to dispose over his principality, one need to investigate the nature of each principality as it originally was, or has become over the course of time.”<sup>158</sup>

Titular princes thus not always sovereigns from a constitutional vantage point. The key to unlocking their legal status within a given polity is not the divisibility or

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<sup>158</sup> Translation from Dutch by P.B. For the original text, see Leiden University Library, Ms. Cod. B.P.L. 919, fol. 212 recto: “De souverainiteiten sijn niet al van eenerlei natuir. Eenige sijn soodaenig dat den besitter daer over noch bij overdracht nochte by Testament niet en vermag te disponeren. <Daer syn anderen,> waerover den besitter macht heeft om te disponeren, gelijk wij sien van veele Souverainiteiten sulckx geschiet te sijn. Onder de Coninckrijcken hebben wij hier van Exemplen van dat van Ierusalem, <van Naples,> van Cypres, <ende van Mallorque.> Van Vorstendommen in het Oosten seer veele, als Achaie, Thessalie, Acarnanie, Athenen, Durazzo onder Christenen, om nu niet te spreekken van veele bij den Turcken, Persianen, ende in Barbarie. ... Om dan wel te oordeelen van de macht om te disponeren, die een Prins heeft ofte niet en heeft over syne Principaute, moet ingesien werden de natuir van ijder Principaute sulcx de selve oorspronckelyc is geweest, ofte met lanckheijt van tijden is geworden.” Text marked between pointed brackets was added by Grotius at a later stage of composition. - For parallel discussions in *De Iure Belli ac Pacis*, see IBP (1919) 1.3.12.1, pp. 84-85; 1.3.13, pp. 88-89; 1.3.14, p. 89; IBP-E (2005) vol. 1, p. 285, pp. 293-296, p. 296.

indivisibility of sovereign rights,<sup>159</sup> but the underlying *contractual nature* of the commonwealth. Here in the *Theses LVI* as in later works on political theory and public law, the Dutch humanist sees the commonwealth supported not by one, but two separate and distinct contractual agreements. One contract establishes the commonwealth through the association of free individuals. The second contract refers to the trust or mandate transferred by an already established commonwealth to the prince.

The dual social contract is evident from several instances across the *Theses LVI*. For example, in the left margin to thesis 38 one finds the short statement: “Political power is vested first in the state before it is vested in the monarch”.<sup>160</sup> Just as rights over one’s person, body and possessions (that have their origins in God) can be transferred to another person, the commonwealth as a corporation is capable of (partially or completely) transferring authority and administration to another party of its choice.<sup>161</sup> This idea of a contractual origin of monarchy is deeply rooted in ancient Roman political and legal tradition via the *Lex Regia*. It was revived during the Middle Ages in political literature that celebrated the elected monarchy.<sup>162</sup> This is

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<sup>159</sup> See IBP (1919) 1.3.17, p. 91 and IBP-E (2005) vol. 1, pp. 305-307, where Grotius asserts in line with Bodin the indivisibility of sovereignty, yet at the same time acknowledges that it can be divided into “different parts” which he calls *partes potentiales* and *partes subiectivas*. His example is the Roman Empire of the Constantinian era: (ibid.) “Sic cum unum esset Romanum Imperium, factum tamen saepe est, ut alius orientem, alius occidentem teneret, aut ut tres etiam tripartito orbem regerent.”

<sup>160</sup> *Theses LVI*, fol. 289 recto, “Potestas prius in republica quam in rege”.

<sup>161</sup> Concerning the nature of the commonwealth as an artificial entity with Divine sanction, see IPC-E (2006) pp. 36, 137 and also IBP (1919) 1.4.7.3, p. 113 and IBP-E (2005) vol. 1, pp. 358-359. For further background, esp. on the subject of the concept of *persona ficta* in Medieval and early modern Europe, see: Wyduckel, Dieter, *Princeps Legibus Solutus. Eine Untersuchung zur frühmodernen Rechts- und Staatslehre*, Berlin: Duncker & Humblot, 1979, pp. 71 et seq.

<sup>162</sup> See: Dig. 1.4.1 (citing the Roman lawyer Ulpian): “.... The people [i.e. of Rome] transferred to him [i.e. their King] all their power and authority.” Translation from Latin P.B. For the Medieval

especially true of the Holy Roman Empire that, according to the Golden Bull, granted the active and passive right to choose the Emperor to seven candidates known in German as the *Kurfürsten* and in English simply as the *Electors*.

In the present manuscript, however, Grotius endorses this principle in thesis 37 and again in thesis 40 by express appeal to Vitoria.<sup>163</sup> In thesis 40, Dutch humanist notes: “The commonwealth can mandate all of its power to another, or transfer [it]. If [the commonwealth] mandates [this power], it retains the right to itself, but becomes subject to the mandate of the commonwealth; if it transfers [this power], it loses this.”<sup>164</sup> For Grotius it is possible to envisage different degrees of transfer from the people and the commonwealth to the prince. These can range from a partial and strictly conditional mandate to exercise sovereignty on behalf of the commonwealth or the people, to a complete and strictly irrevocable transfer of sovereign rights. Where the latter takes place, the prince emerges as an absolute ruler.

It is now appropriate to review some of the important problems raised by Grotius in his legal brief of May 1637: To what extent, if at all, may a prince dispose of his territory and subjects? Can he sell the lands, barter them or pass them as a gift, inheritance or dowry? May he cede regions or place these inalienably under the authority of another sovereign? Can he do so without the consent of his subjects?

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and feudal context of this passage, see Gough, *Social Contract* (1957) p. 82; Spyk, *Vertragstheorie* (2005) pp. 50 et seq.

<sup>163</sup> *Theses LVI*, fol. 288 verso, §37, “Sed potest respublica, imo cogitur, totum imperium suum aut eius partem alteri administrandum concedere, quam administrationem qui accepit magistratus dicitur.” There follows a reference below the thesis in darker, black ink to “Vict., n. 8”. See above notes 40 and 138.

<sup>164</sup> *Ibid.*, fol. 289 recto, §40, “Potest autem respublica aut mandare totum imperium alieni, aut transferre. Si mandat ipse ius retinet <et mandatum reip. subicitur>, si transfert amittit.” Text marked between square brackets appear as an marginal addition to the text. See also *ibid.*, Thesis 42, “Hoc autem verum est, quatenus est Principis et quatenus Resp. neque tamen obstat quominus Principi etiam aliud ius competere possit per accidens et quidem prius Principatu <idemque de obligatione reip.>” See also above, note 48.

These are some of the central questions that are also raised in the reading notes adjacent to the *Theses LVI*. These are found on fol. 290 verso and relate mainly to the aforementioned political treatise *Vindiciae contra Tyrannos*.<sup>165</sup>

One specific reference merits additional investigation in this context. It reads: *V. Barclaij* that is “See Barclay”. Reference is made here to the classic political work of the Scottish Catholic author William Barclay: *De regno de regali potestate adversus Buchananum, Brutum, Boucherium, et reliquos Monarchomachos libri sex* or “Six books on the kingdom and royal power directed against Buchanan, Brutus, Boucher and other Monarchomachs”. A clue to unlocking the deeper meaning of this reference may be found in *De Iure Belli ac Pacis* where the work of William Barclay is invoked and cited in a very similar context. There Grotius explains: “Barclay holds the opinion that if a king alienates his kingdom, or places it in subjection to another, the kingdom is no longer his.” The Dutch humanist duly objects to Barclay’s conclusion on the grounds that, if kingship is conferred by election or succession, it is not possible for this king to cede territory to another prince. Such action must be considered null and void if a prince holds his office as a trust or usufructuary. This is a moment when the dynamics of Grotius’ dual social contract are in full swing. In *De Iure Belli ac Pacis* the Dutch humanist observes:<sup>166</sup>

“If nevertheless a king actually does undertake to alienate his kingdom, or to place it in subjection, I have no doubt that in this case he can be resisted. For the sovereign power, as we have said, is one thing, the manner of holding it is another; and a people can oppose a change in the manner of holding the sovereign power, for the reason that this is not comprised in the sovereign power itself.”

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<sup>165</sup> “Whether a prince may transfer his kingdom.” With references to Hiram and Solomon, See *ibid.* Fol. 290 verso, “An Princeps regnum transferre possit. 120 Hiram et Sal. ex 121.” The numbers correspond to pages 120 and 121 of the *Vindiciae* edition of 1600.

<sup>166</sup> *Ibid.*, fol. 290 verso.

Theses 44 through 46 address a prince's power to dispose of edifices and assets and explore whether he may use these toward his own benefit.<sup>167</sup> This topic sets the stage for Grotius' discourse on the breach of the social contract.

But what happens if a prince goes too far? What happens if he acts against his trust or mandate? To what extent are citizens obliged to obey their errant prince? Are they allowed to resist? May they depose or even kill him? There can be little doubt that in formulating his underlying questions about tyranny and the right of resistance Grotius is thinking specifically of the Revolt of the Netherlands and the birth of the Dutch Republic. Although it is clear that different commonwealths will be based on different constitutional foundations, it is also clear that these constitutions are not necessarily rigid, static, or even immutable. Indeed, Grotius concedes the possibility of constitutional change, either as a sudden jolt or at a creeping, glacial pace. Nowhere is this more evident than from his discourse on tyranny and the right of resistance.

## **8. Resisting tyranny**

The right of political resistance is a topic addressed in several works of Grotius, both in his political treatises as well as in his historical works. As is evidenced from the reading notes and marginal references belonging to the *Theses LVI*, the Dutch humanist appeared to have familiarized himself with the pertinent political literature of his day. But Grotius expressed his deep dissatisfaction over the manner in which his contemporaries cited from this pool of controversial sources in order to sanction acts of violence during the Dutch Revolt. Although he does not deny to the citizens a right of political resistance strictly speaking, readers become quickly aware that Grotius, alluding to his own troubled times, concedes in good conscience to the

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<sup>167</sup> See for example §44.

citizenry only the weapons of “patience and prayers”.<sup>168</sup> He understandably prefers a passive and law abiding citizenry, not bands of political or religious radicals who sporadically take justice into their own hands.

Had it not been for the Dutch Revolt - and probably also the domestic crisis of 1610 to 1618 - Grotius’ opposition to active political resistance would have been almost certainly far more pronounced. As is evidenced from the following examination, the main question for Grotius is not whether political resistance is permissible, but when and under what conditions active resistance is warranted, and crucially also, who may mobilize and lead active political resistance.

Theses 47 through 50 pave the way for a discussion on the right of political resistance. The marginal reference to thesis 47 invariably sets the tone: “... whether the prince is subject to the law”.<sup>169</sup> The marginalia here and nearby can be taken as a clear indication that Grotius is intellectually struggling with some central problems he either gleaned from, or found confirmation in, the political treatises of Brutus and Beza. With specific reference to the latter, thesis 48 explores the obligation of citizens and questions whether this obligation has as its immediate source the social contract.<sup>170</sup> The marginal references to 1 Samuel 8:5 and 8:20 remind that the

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<sup>168</sup> See Grotius’ notes entitled *Regis Iacobi*, in B.P.L. 922, fol. 292 recto, left column, “Preces et lacrymae sunt arma” and fol. 292 verso, right column: “Rp. Nebucad. et Nero pro quibus orare iubentur Christiani contrarium evincunt. Sola restant arma Precum.”

<sup>169</sup> *Theses LVI*, fol. 289 verso, marginal comment to Thesis 47: “In dubio Princeps *hyponomos*. Arist.” (Word marked in italics has been transliterated from the Greek alphabet, P.B.) A second comment added later in darker ink and small script reads: “Hoc minus late nonnulli extendunt, Vind. 85”. The *Vindiciae* (1600) p. 85, contend that it is in man’s nature to be free and against his nature to obey and adds: “Non itaque existimemus, electos fuisse reges, ut bona multorum sudore parta, in proprios usus convererent: quisque enim fere potentiores aut odio, aut invidia prosequere solet. At sane, ut tum singulos a mutuis, tum universos ab externis injuriis, seu jure dicundo, seu vim vi repellendo, defenderent.” - See also IBP (1919) 1.3.13, pp. 88-89.

<sup>170</sup> See the marginal reference to V. 273, that is to Beza, *De Iure Magistratum* (1600) p. 273. This is the concluding question 9: “An subditum Principibus possint pacisci”. The relevant text reads as follows (ibid.): “[N]ullam ipsi injuriam fieri, si ad officium compellatur: et ubi nullus amplius

formation of the state precedes the mandate given to the king. Citizens owe obedience to their (chosen) ruler, who derives additional legitimacy in office from the will of God. Several Biblical references are listed to underscore the validity of Grotius' claims. These include the closing verses in Deuteronomy 17, 1 Samuel 10:11 and 25, 8:11, Ecclesiastes 8:1, and Acts 25:11. There are two additional references of interest, namely Beza, p. 262, and the comment "Of Naboth. Law" accompanied below by a reference to 1 Kings 21. The story of Naboth and Achab is indeed found here in chapter 21 of the First Book of Kings<sup>171</sup> and the general principle established here finds endorsement in the *Vindiciae contra tyrannos*. King Achab of Israel could not compel Naboth to sell his vineyard, even if the latter was indeed willing, because such a sale was against God's express will.<sup>172</sup>

Thesis 50 questions whether a prince to whom the care of the commonwealth has been entrusted (*in quidem ius Reipublicae translatum*) stands "above the law" (*super leges*). A marginal addition in darker ink reveals Vitoria as a source or at least an additional inspiration on the question, whether "the legislator and the prince" are

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rationi locus superest, ulterius etiam adversus eum fiat progressus. Siquidem cum non nisi certis conditionibus administratio illi sit commissa: minime censendum est, novas pactiones cum ipso iniri, quoties interpellantur ut vel priores conditiones ratas habeat, easque deinceps observet: vel alteri locum cedat, qui de illarum observatione magis sit futurus sollicitus. Quod si exemplis probandum est arbitror satis multa supra a me allata esse, quibus constet aperte, nulla ratione nulloque usu aut bene constitutem Monarchiae ulla experientia niti, aut defendi eorum propositionem posse, qui audent affirmare, sufficere cunctis debere subditis nudam Regis sui voluntatem."

<sup>171</sup> Fol. 289, verso, §49, left margin: "De Nabotho. Lex." And below: "1. Reg. 21." See how both are cited in *Vindiciae* (1600) p. 106 cited by Grotius and mentioned above, in note 37. On p. 262 Beza addresses the resistance of manifest tyranny (*tyrannidem manifestam*) and challenges the view that the power of the magistrates is always superior.

<sup>172</sup> *Vindiciae* (1600) pp. 106-107: (ibid., pp. 106-107): "Non poterat enim Achabus rex Israel Nabothum cogere, ut vineam suam venderet: quin potius etiamsi voluisset vendere, ex lege Divina non poterat."

bound by the laws.<sup>173</sup> The passage succinctly renders the Dutch humanist's position.<sup>174</sup> Those princes who are sovereign and acknowledge no superior retain legislative power, but are bound by the laws with the following consideration: "He [i.e. the prince] is above the laws, because he can change and dispense them, but of course for the public good."<sup>175</sup> Thesis 51 elucidates the point: this prince can stand above the laws, not on the basis of any right (*non iure*) strictly speaking, but because he does not acknowledge any human authority above him as judge (*quia iudicem non habet*). To this Grotius adjoins in the margin: "It is necessary to pass down entirely to someone who is not *hypeuthynos* (accountable)."<sup>176</sup> The choice of this Greek term, which is used in the context of magisterial responsibility and accountability by

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<sup>173</sup> Ibid., marginal reference to §50, "Vict. 207", that is Vitoria, *De Potestate Civili*, §21, *Relectiones XII* (1557) p. 207.

<sup>174</sup> Ibid. pp. 206-208: "Quaeritur tandem, An leges civiles obligent legislatores, et maxime reges. Videtur enim aliquibus quod non, cum sint supra totam rempublicam, et nullus possit obligari nisi a superiori: sed certius et probabilius est, quod obligentur. Quod probatur primo, Quia facit iniuriam reipublicae, et reliquis civibus, si cum ipse sit pars reipublicae, non habeat partem oneris: iuxta personam tamen et suam qualitatem, et dignitatem. Sed ista obligatio est indirecta, et ideo aliter probatur. Nam eandem vim habent latae leges a rege, ac si ferentur a tota republica, ut supra declaratum est. Sed leges latae a republica obligant omnes: ergo etiam si ferantur a rege, obligant ipsum regem. Et confirmatur, Quia in aristocratico principatu senatusconsultum obligat ipsos senators auctores illorum, et in populari regimine plebescita obligant ipsum populum: ergo similiter leges regiae obligant ipsum regem: et licet sit voluntarium regi condere legem, tamen non est in voluntate sua non obligare, aut obligari, sicut in pactis. Libere enim quisquis paciscitur, pactis tamen tenetur. Ex omnibus dictis infertur corollarium, quod ius gentium non solum habet vim ex pacto ex conducto inter homines, sed etiam habet vim legis. Habet enim totus orbis, qui aliquando est una respublica, potestatem ferendi leges aequas, et convenientes omnibus, quales sunt in iure gentium."

<sup>175</sup> *Theses LVI*, Fol. 289 verso, §50, "Est autem supra leges quia eas mutare potest <et dispensare>: sed ad bonum duntaxat publicum." Text between square brackets added later in the margin.

<sup>176</sup> Ibid., §51, marginal comment: "Omnino necesse est ad aliquem devenire qui non sit *hypeuthunos*." (Word marked in italics has been transliterated from the Greek alphabet, P.B.)



Plutarch and Thucydides, bears strong similarity to its employment in the *Commentarius in Theses XI* and *De Iure Belli ac Pacis*, where in both cases the Dutch humanist speaks of a prince who is *anypeuthynos*, i.e. non-accountable.<sup>177</sup> This marks another instance when the Dutch humanist demarcates himself linguistically and terminologically from Bodin and his concept of *princeps legibus solutus*. According to a letter of Grotius to Lingelsheim dating from September 1617, the Greek term is also consciously selected so as not to question the legitimacy of the Dutch Revolt, not evoke the ire, or worse still seriously compromise the cause of neighboring princes.<sup>178</sup>

Citizens are of course permitted to resist with “patience and prayers”, but may they also actively take up arms against the commonwealth (*adversus rempublicam*)? Would this not be a *nefas*, an act of impiety against the commonwealth and against God?<sup>179</sup> This is the question Grotius raises in thesis 52, the beginning of his section on civil disobedience and active political resistance. He denies that taking up arms against a prince (who has abused his powers) represents an act of impiety, but hastens to clarify that private individuals are not permitted to do so without official sanction,<sup>180</sup> and most certainly not at their own initiative.<sup>181</sup> Resistance is permitted

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<sup>177</sup> Borschberg, *Commentarius in Theses XI* (1994) §7, p. 210; also IBP (1919) 1.3.16.3-4, pp. 90-91.

<sup>178</sup> BW 529, p. 582: “Si autem dixerimus speciatim nostros principes fuisse *hypeuthynous*, et verum dicimus et aliorum principum causam non laedemus.” See also above, note 25.

<sup>179</sup> Further clarification of this question posed by the Dutch humanist may very well be gleaned from *De Jure Praedae*. There he explains (IPC-E, 2006) p. 140: “Natural reason persuades us, however, that the faculty now vested in princes in consequence of the fact that civil power must have lapsed in some other possessor, formerly resided in private individuals. Moreover, whatever existed before the establishment of courts, will also exist when the courts have been set aside under any circumstances whatsoever, whether of place or of time. In my opinion, this very argument has served the basis for the belief that it is right for private persons to slay a tyrant, or in other words, a destroyer of law and the courts.”

<sup>180</sup> Grotius’ emphasis here in the *Theses LVI* appears to differ in this respect from his exposé in *De Jure Praedae* where he categorically concedes a right to private individuals to commence and

in principle, but only if the truant prince is not accountable and has not had all power and authority irrevocably transferred to him.<sup>182</sup> This latter observation is additionally underscored with a marginal reference to 1 Peter 2:14.<sup>183</sup>

The preceding deliberations set the tone for thesis 53 which specifically addresses armed resistance against “tyranny”. At this juncture Grotius notes: “Concerning tyranny, this is an old controversy, not just in the declamations and the writings of the philosophers, but an issue also disputed in the [ecclesiastical] councils.”<sup>184</sup> Indeed, with specific regard to the latter, one finds jotted down in the left hand margin “Const. Conc. Sess. 15”, i.e. Session 15 of the Council of Constance

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wage private wars when and where judicial recourse is absent. See IPC-E (2006) p. 142, conclusion 7, article 1. It transpires from a close reading of the passage concerned that such private wars may not just be directed against external (foreign) enemies. See *ibid.*, p. 143: “For it is not customary, nor is it necessary, to declare a civil war; and this statement is also applicable to warfare against tyrants, robbers, pirates and all persons who do not form part of a foreign state.”

<sup>181</sup> See also the problem formulated *ibid.*, fol. 290 verso, left margin, under “Quaest. An etiam singulis hominis” The question here asks whether it is permissible to defend oneself against princes (*ius se defendendi adversus principem*) should he command something that is openly or evidently (*aperte*) against the law. - Informative in this context is also Grotius’ letter to Georg Michael Lingelsheim, councilor in Heidelberg, dated 8 September, 1617, in: Grotius, *Briefwisseling* (1928) p. 582. In his attempt to shake off the charge that he closely follows the political teachings of William Barclay, he states (*ibid.*): “Scimus ex Barclaii sententia ... nefas esse privatos obtentu religionis arma in eos sumere, quibus armorum ius a Deo concessum est; et inferiores potestates pro privatos haberi respectu superiorum ita clarum est, ut non multis egeat defensoribus. Neque id Barclaius tantum, sed quotquot in Anglia sunt protestantes, in Germania quoque plurimi certissimis Scripturae argumentis aliisque rationibus demonstrarunt.”

<sup>182</sup> *Theses LVI*, fol. 290 recto, §52, “Adversus Principem ita distinguendum est, ut id privato non liceat nisi reip. <aut legum> auctoritate ac ne huic quidem aut ipsi reip. si imperium omne in eum translatum fuit.”

<sup>183</sup> *Ibid.*, marginal comment to §52, “Arg. ex Pet. 2.14.”

<sup>184</sup> *Ibid.*, §53, “De Tyrannis vetus est Controversia, non in declamationibus tantum et scriptis Philosophorum, sed et in Conciliis disputata.”

(1414-1418). As is known, this fifteenth session of the famous fifteenth century Council concerned itself with Jean Petit's *Quilibet tyrannus*.<sup>185</sup> The historical background of this text appears to be significant to Grotius in the *Theses LVI*, and shall thus merit closer attention here.

*Quilibet tyrannus* is closely associated with the assassination in 1407 of the Duke of Orléans, the brother of King Charles VI of France. A certain theologian by the name of Jean Petit (Latinized: *Parvus*) was commissioned to write a legal apology of this murder. He did this at the time by conceding the right to all subjects to assassinate any ruler who was "evidently a tyrant". In 1416, the Chancellor of the University of Paris, Jean Gerson, pushed for the suppression of political doctrines legitimizing the liquidation in cold blood of such evident tyrants. Gerson is not so much concerned about the assassination of tyrants as he is about raising such doctrines to excuse any cloak and dagger operation. Gerson's exertion of political pressure at the Council of Constance did not yield the results he had hoped for. A clear and unambiguous condemnation of the doctrine of political assassination that would have permitted its suppression by the force of law was not adopted. Instead, the Council resolved on 6 July, 1415 - just shortly after the condemnation of the Christian reformer Jan Hus - that the *quilibet tyrannus* was simply deemed heretical.<sup>186</sup> The failure to condemn the clause of Jean Petit paved the way for justifying the assassination of tyrants on moral and political grounds and set the stage for radical political doctrines to mushroom during the French Reformation and Wars of Religion in the sixteenth century.

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<sup>185</sup> Labbé, Philip, *Sacrosancta Concilia ad Regiam editionem Exacta*, Venice: Sebastian Coleti, 1731, vol. 16 (1414-1418) cols. 250-266: *Articuli dogmatizati per Joannem Wiclef et Joannem Hus; condemnatio illius propositionis, 'quilibet tyrannus'*. Concerning specifically the *Quilibet tyrannus*, see *ibid.*, col. 262.

<sup>186</sup> Concerning the debate over tyrannicide at the Council of Constance in general, see Bess, Bernhard, "Die Lehre vom Tyrannenmord auf dem Konstanzer Konzil", *Zeitschrift für Kirchengeschichte*, 36.1 (1915), pp. 1-61; Friedenthal, Richard P. C., *Ketzer und Rebell. Jan Hus und das Jahrhundert der Revolutionskriege*, Munich: Piper, 1972, pp. 333 et seq.

Thesis 53 differentiates two types of tyranny and clears the theoretical ground for different responses to them.<sup>187</sup> As in his other works, Grotius distinguishes as already in classical antiquity between two basic types of tyranny, the *tyrannus absque titulo*, that is a ruler who has obtained power by force such as through a coup d'état; and the *tyrannus absque exercitio*, that is a ruler who was legally installed, but abuses his authority in the state and over religion.<sup>188</sup> In the political world of Greek and Roman antiquity, this distinction generally ignored a moral judgement in distinguishing “good” from “bad” tyrants, and the ancients showed surprisingly little

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<sup>187</sup> Grotius struggled with the topic of armed resistance against tyrants in another draft treatise contained in ms. B.P.L. 922, namely *De bello ob libertatem eligendo ex thesibus politicis M. Tullii, Lib. 9 ad Attic. Ep. 3* (On war having to be chosen for freedom. From the political theses of Marcus Tullius [Cicero's] Book 9 of the [Letters] to Atticus, number 4). For details, see above note 18. Resistance against tyranny is explored extensively on fols. 299 recto and verso. Grotius develops his arguments in this particular manuscript strictly from sources of classical antiquity, especially Cicero, Livy and Lucan and some references to the Holy Scriptures. See also above, note 88.

The Greek text found at the top of fol. 293 recto represents a citation found in letter 9.4. and sets the stage for Grotius' deliberations. The English translation of the relevant text reads as follows: Cicero, Marcus Tullius, *Letters to Atticus*, with an English translation by E. O. Winstedt, vol. 2, London: Heinemann, 1928, pp. 187-189: “Whether one should remain in one's country, even under a tyranny. Whether any means are lawful to abolish tyranny, even if they endanger the existence of the State. Whether one ought to take care of that one who tries to abolish it may not rise too high himself. Whether one ought to assist one's country, when under a tyranny, by seizing opportunities and by argument rather than by war. Whether one is doing one's duty to the State, if one retires to some other place and there remains inactive, when there is a tyranny; or whether one ought to run every risk for liberty. Whether one ought to invade the country and besiege one's native town, when it is under a tyranny. Whether one ought to enroll oneself in the ranks of the loyalists, even if one does not approve of war as a means of abolishing tyranny.”

<sup>188</sup> See IPC-E (2006) p. 399-400: “For he who abuses sovereign power renders himself unworthy of sovereignty, and ceases to be a prince, in consequence of the very act by which he converts himself into a tyrant.” This definition is doubtlessly the *tyrannus absque exercitio*. Very interesting in this context of this paper are Grotius' specific references that follow: Vázquez [de Menchaca, *Controversiae Illustres*], 1.8, (first case) 8.11 and 18.10, Covarrubias [y Leyva], *Pract[icae] Quaest[iones]* 1.6 (near end) argument of *Decretum [Gratiani]*, 2.2.7.29. Questions relating to the complete absence of these and related references to both Vázquez de Menchaca and Covarrubias y Leyva were raised earlier in this exposé and are deemed important for dating the *Theses LVI*.

concern for the manner in which political power was exercised. The hallmark of a tyrant was ultimately the manner in which he acquired his authority. Grotius' own ideas on tyranny broadly mirror these concerns, although in the notes belonging to the treatise *De Bello ob Libertatem Eligendo* the Dutch humanist does indeed distinguish between “just” and “unjust” tyrants.<sup>189</sup> Resisting the *tyrannus absque titulo* or “usurper” posed few legal and moral obstacles to most of the theorists of the sixteenth and seventeenth century, and Grotius is certainly no exception here.<sup>190</sup> “Usurpers” are of course most efficiently dealt with by invoking laws and provisions already in place. Enforcement of laws facilitated the “removal” of an usurper from office, providing always that his right to rule (*ius regendi*) had not (yet) been formally confirmed by law, or even sanctioned by tacit consent. Grotius, always keen to back up his observations with copious evidence, added to the left margin of the *Theses LVI* a number of such incidents most of which were evidently plucked from the *Vindiciae contra tyrannos*.<sup>191</sup>

Dealing with the *tyrannus absque exercitio* proved far more challenging in theory as well as in practice. The prime example in Grotius' own time was surely the “tyranny” of Philip II of Spain and his representative in the Low Countries, the Duke of Alba. With reference to the latter, Grotius used the idea of divisible sovereignty and the theory of the just public war to explain the historical events that unraveled into the Revolt of the Netherlands and eventually led to the deposition of Philip II as

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<sup>189</sup> Grotius, *De bello ob libertatem eligendo*, fol. 301 recto, “Tyrannis duplex: iusta et iniusta”. Taking up arms against tyrants is an issue extensively discussed in part III of that treatise, spanning *ibid.*, fols. 299 recto to 300 recto.

<sup>190</sup> See also IPC-E (2006) p. 413.

<sup>191</sup> *Theses LVI*, fol. 290 recto, §53, in the left margin Grotius jotted down a number of names and examples with the corresponding page numbers of the *Vindiciae* edition, esp. p. 82 (on the acquisition of political power by prescription under Julius Caesar) p. 147 (On Nebuchadnezzar and Senacheribus of Assyria) and p. 148 (on the absolution of Brutus and Cassius for their assassination of Julius Caesar).

the legitimate hereditary ruler in constituent provinces of the Dutch Republic.<sup>192</sup> Suffice it here to refer to the classic exposé along these lines encountered in the *Commentarius in Theses XI* and also *De Iure Praedae*.<sup>193</sup> The arguments expounded in those two early works are of considerable importance for unlocking the themes and problems raised by Grotius across the *Theses LVI*.<sup>194</sup>

Subjects owe obedience to their prince as long as he has not broken his “contract” with them, and providing also that he does not command anything that is explicitly against Divine Revelation. This offers clear parallel between the obedience owed by the subjects to their prince and, as Grotius noted earlier in the *Theses LVI*, the obedience owed by a wife to her husband.<sup>195</sup> Judging from the manuscript and the reading notes contained in BPL 922, the parameters and dynamics of obedience is an issue Grotius struggled with on several occasions. In the reading notes entitled *Regis Iacobi*, Grotius underlined with his pen a section that highlighted how religiously errant kings need be obeyed, unless they infringe a direct mandate of God.<sup>196</sup> The point is also raised in theses 53,<sup>197</sup> where the Dutch humanists adds the proviso “nihil adversus fidem fiat aut expressum aut tacitum” that means “he [the prince] may not do anything against the faith, either expressly or tacitly”. But if the prince commands something against Divine Revelation, orders idolatry, or fails to suppress errant practices and beliefs, it is not up to the individual to swing into action. In fact no person may judge these errant princes, but only God.<sup>198</sup> In this particular respect,

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<sup>192</sup> Similarly, on the topic of political resistance where the constitution features a divided sovereignty, see IBP (1919) 1.4.13, p. 119.

<sup>193</sup> IPC-E (2006) pp. 400, 411-412.

<sup>194</sup> See especially Grotius’ commentary to theses 9-11, in: Borschberg, *Commentarius in Theses XI* (1994) pp. 268-283.

<sup>195</sup> See above, notes 101 and 102.

<sup>196</sup> B.P.L. 922, fol. 292 recto.

<sup>197</sup> *Theses LVI*, fol. 290 recto.

<sup>198</sup> See also B.P.L. 922, fol. 292 recto.

Grotius here in the *Theses LVI* appears to be closer to dominant Calvinist political theories of resistance than in latter statements on the subject. This insight may also possibly serve to underscore the earlier dating of the manuscript, that is 1602-1605.

Political resistance is thus not an impious (*impius*) act for the Dutch humanist, but perfectly justifiable if directed against certain tyrants, providing such resistance is not initiated at the behest of private individuals.<sup>199</sup> In this context, Grotius examines whether the initiative may be taken by the “subaltern”, “inferior” or lesser magistrates.<sup>200</sup> Both the theme and terminology are of course familiar from the political literature of the Protestant monarchomachs.<sup>201</sup> As is known from his other works, Grotius does not concede to the subaltern magistrates the right to initiate political resistance and recourse to arms, and the *Theses LVI* clearly echo this position. He only concedes to the magistrates a right to resist tyrants if they are indeed the supreme (i.e. sovereign) bureaucratic authority. In this case the magistracy is deemed to be acting in self-defense: “Therefore, in those things in which they are superiors, no doubt, they shall be followed.”<sup>202</sup> Much the same holds true for the estates (*ordines*) and Grotius acknowledges their rights in thesis 55, but expressly cautions against errors of judgement.<sup>203</sup> One surmises that this sense of caution is

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<sup>199</sup> On this see also Paul the Jurisconsult in: Dig. 50.17.176 and IBP (1919) 1.3.1.2, p. 67.

<sup>200</sup> A parallel discussion is found in IBP (1919) 1.4.6, pp. 110-112.

<sup>201</sup> *Theses LVI*, fol. 290 recto, §54, “An subalternorum, quos dicunt, Magistratum auctoritate sumi arma debeant, quaestio hic redit ....” See also the additional notes and comments in the left margin, under §56, concerning the power of the subaltern magistrates, *Vindiciae contra tyrannos*, pp. 176, 182, 189. - On Beza’s work generally, see Gough, *Social Contract* (1957) pp. 52 et seq.

<sup>202</sup> *Ibid.*, §54, “Igitur in his quibus illi superiores sunt, non dubie erunt sequendi.” - See also the reference to Beza, p. 262, and above, note 171.

<sup>203</sup> See Grotius’ commentary to theses 3 and 9, §§21 and 66 et seq. in *Commentarius in Theses XI* (1994) pp. 222, 268 et seq.

firmly rooted in Grotius' interpretation of the historical events that erupted into the Revolt of the Netherlands and subsequently led to the deposition of Philip II.<sup>204</sup>

In the final thesis 56, Grotius turns from the legitimate agents to the motives and causes of armed political resistance. He opens with the observation "Concerning religion, that is an old controversy."<sup>205</sup> Here the question is raised to what extent citizens must heed false religious precepts endorsed or enacted by a ruling monarch. The reading notes in the left-hand margin contain several references to the *Vindiciae contra tyrannos* that focus on obedience in the realm of the religious. Grotius contends that subjects must obey a tyrannical monarch, unless he "contravenes a direct mandate from God".<sup>206</sup> The Dutch humanist's notes in the left-hand margin add additional questions and problems: If a prince issues an edict that clearly infringes upon revealed religion, what can be, or should be, done? Grotius reminds that a law which clearly infringes Divine Revelation need not be obeyed,<sup>207</sup> but he seriously cautions against seizing the initiative to punish the errant ruler. Injustice is committed, according to the Dutch humanist, in taking (rash) action against the ruler, not in living with and ignoring an impious law.

Grotius is comfortable with the idea of actively resisting rulers who become usurpers. In this case resistance is a viable option and recourse to violence or the force of arms is permissible.<sup>208</sup> But the Dutch humanist visibly shies away from

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<sup>204</sup> See *ibid.*, commentary to Thesis 11, §§82 et seq., pp. 280 et seq.

<sup>205</sup> *Theses LVI*, fol. 290 verso, §56, "De religione vetus est controversia."

<sup>206</sup> Ms. Cod. B.P.L. 922, incip. "Regis Iacobi", fol. 291 verso - 292 recto. These notes and excerpts in Latin immediately follow the *Theses LVI*. See above, notes 46 and 48.

<sup>207</sup> This is evidently a parallel to what has been already stipulated in Thesis 25 that a wife only need obey her husband, if he has her welfare in mind and does not command anything against the commandments and laws of God. In any case citizens are obliged to obey in their action and in their conscience.

<sup>208</sup> One would have expected here some reference to the *Controversiae Illustres*, where it is stipulated that a prince who issues manifestly unjust commands should not be obeyed. See:



assassination, especially if such politically motivated murders are driven primarily by purist religious agenda. The late sixteenth and early seventeenth century was highly polarized between Roman Catholics and different branches of Evangelical Christianity, not least over concerns of religious orthodoxy and the desire to establish Biblically inspired political regimes. Grotius is extremely wary of such purist agendas and aspirations and openly scandalized groups for bandying about religious slogans with little afterthought. He also criticizes groups who fail to abide by the law and the constitution as can be evidenced from the introduction to the *Commentarius in Theses XI*.

But, *caveat lector*, let the reader beware! Grotius is most certainly not a “prince of peace”, neither here nor in any of his other early writings dating from the period before his incarceration in 1618. The Dutch humanist sees war as a genuine option to depose or deal with tyrannical rulers, but he drives home the message that any war and any armed resistance against a tyrannical prince must be fought on nothing less than solid legal grounds. The argument of Grotius in the *Theses LVI*, in other words boils down to three basic questions: When and in what context is resistance permissible? Who may initiate and participate in the process of political resistance? And what end should such resistance serve?

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Vázquez de Menchaca, Ferdinando, *Conversiarum illustrium aliarumque usu frequentium libri tres/ Controversias fundamentales y otras de mas frecuente uso: remprese por acuerdo de la Universidad de Valladolid, transcript and translation into Spanish by Fidel Rodríguez Alcalde, 4 vols., Valladolid: Cuesta, 1931-1934, esp. 2.12, vol. 2, p. 123: “Tale mandatum exequi non debet, si notorie contrarium apparuerit” that is “... one ought not to obey a prince who is issuing a manifestly unjust command”. Grotius refers to this classic well-known passage in his IPC-E (2006) p. 117, albeit in a marginal reference that appears to have been added at a later stage of the revision and in the main text does not mention Vázquez by name. Here in the *Theses LVI* it could have been cited in a context far closer to the original text than in *De Iure Praedae*. See also above note 188.*

## 9. Afterthoughts

The *Theses LVI* belong to a series of hitherto unpublished early manuscripts of the Dutch humanist and juriconsult Hugo Grotius that were acquired by the University of Leiden in 1864.

This article evaluates the sources, reading notes, marginalia as well as the text of the *Theses LVI*. It is hoped that the present study serves not only to draw attention to the inherently interdisciplinary nature of Grotius' humanist thinking, but also to pinpoint some of the important parallels (and sometimes discontinuities) that are found among his different works on politics, public law, history and theology. Significantly also, the present author finds it imperative to wean modern researchers from their overreliance on Grotius' best-known work, *De Iure Belli ac Pacis*.

Much can be learnt from the thousands of pages of notes and excerpts prepared by Grotius during his lifetime, the overwhelming amount of which remains unused and unstudied in present times. Grotius' notoriously sloppy handwriting is far from encouraging, but that should not pose a barrier to serious scholars who recognize that there is still much challenging and ultimately rewarding research to be done.

## 10. Bibliography of cited manuscripts and printed sources

### 10.1 Manuscripts

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