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Zeger-Bernard van Espen

Jan Hallebeek

BIOGRAPHICAL INTRODUCTION

Zeger-Bernard van Espen was born in Leuven 8 July 1646 as son of the legal practitioner Joannes van Espen and his wife Elisabeth Zegers. He was the youngest of nine children. In 1656 he began attending the college of the Oratorians in Temse. In 1663 he entered *'t Varken* (Pig College) in Leuven to study Philosophy at the Faculty of Arts. In 1665 he assumed clerical status, received a scholarship at the *Heilige-Geestcollege* (Holy Spirit College) and pursued his studies at the Faculty of Law. In 1670, after five years of studying canon law, he obtained the licentiate in both laws. In 1673, he was ordained priest and one year later he was appointed to the chair of the so-called 'six weeks lectures', an extraordinary professorship, meant for teaching an annual course during the academic holiday (August and September). In 1675 van Espen took his doctoral examinations and was promoted to doctor in both laws. From 1677 until 1703 he also delivered a weekly lecture in Church History in the *Pauscollege* (Pope's College).

From the outset, van Espen took a clear stand in the various debates which dominated the intellectual climate at Leuven University.[1] He can be considered an adherent of Jansenism, in the sense that he adopted a critical attitude toward moral laxism and did not accept the Formulary of Alexander VII (1656) or the constitution *Unigenitus* (1713), not even at an advanced age, when seriously ill and put under pressure. The Formulary condemned five propositions, allegedly derived from the *Augustinus* of Cornelius Jansenius (1585–1638). *Unigenitus* condemned 101 propositions derived from the *Réflexions morales* of Pasquier Quesnel (1634–1719). In France, and later also

[1] Sometimes van Espen is also considered to adhere to Conciliarism, but that can be questioned.

in the Southern Netherlands, clerics were expected to sign or accept under oath these documents, for example, when making confession.

His Gallican sympathies made van Espen an advocate of the competency of the local church and its diocesan bishop against claims laid by regular clerics, appealing to their exempt status, and by the central ecclesiastical authorities in Rome. As a practical consequence of this view he supported the Catholic Church in the Northern Netherlands that is, the Church of Utrecht and its Vicars Apostolic in their efforts to maintain their position.

His regalist views made van Espen an advocate of the *ius placiti* of the sovereign and the so-called *recursus ad principem*. The former was the right of the sovereign to grant binding force to ecclesiastical legislation. The latter was an appeal to secular courts in case ecclesiastical authorities did not observe procedural rules or lacked competence. It was either aimed at possessory protection of prebends (*manutenentia*) or at cassation of ecclesiastical judgements (*appellatio ab abusu* or *appel comme d'abus*). It was up to the sovereign and his magistrates to defend the local church and her clerics against any kind of violence, including abuse of authority by bishops and ecclesiastical officers.[2] More than once, protection by secular courts played a part in van Espen's own academic or personal life. He delivered legal advice to Willem van de Nesse (†1716), parish priest of Saint Catherine's in Brussels, who, in 1706, was suspended by Humbertus Willem de Précipiano (1627–1711), Archbishop of Malines. Van de Nesse successfully contested the suspension before the Council of Brabant.[3] Moreover, Bernard Désirant (1656–1725), an opponent of van Espen's who had spread falsified letters indicating that van Espen was involved in a political conspiracy (the so-called 'Villainy of Leuven' or *Fourberie de Louvain*), was in 1718 sentenced by the Council of Brabant. Furthermore, in a civil trial before the Great Council of Malines, van Espen sued the Vicar Apostolic of 's-Hertogenbosch, Pieter Govaerts (1644–1726), because of reputational injury. In a letter Govaerts had branded van Espen 'this heretical yeast' (*hoc novum fermentum*) because of his unwillingness to sign the constitution *Unigenitus*. Van Espen demanded retraction of the insulting words and in 1722 won the case.

In his *Responsio epistolaris* of 1725, van Espen defended the validity and legitimacy of the election and consecration of Cornelis Steenoven (1661–1725) as Archbishop of Utrecht, which had been condemned by the Pope. The

[2] Bart Wauters, 'Zeger-Bernard Van Espen. Regalisme, conciliarisme en corporatisme. Bijdrage tot de kerkrechtsgeschiedenis in de Nederlanden', *Pro Memorie* 3 (2001): 213.

[3] Van Espen supported more clerics in their appeal against ecclesiastical sanctions, such as inter alia Jérôme Zegers, Willem van Roost (1661–1746), and Jean-Charles Leydecker.

Council of State declared this writing to be injurious toward the briefs and decrees which the Holy See had issued on the matter. In 1727, van Espen was ordered by the *rector magnificus* of Leuven University to retract his opinion within three weeks. Van Espen appealed that decision to the university tribunal but did not await the eventual outcome. He left his native city and, after a stay at Maastricht, took up residence in the seminary of the Church of Utrecht in Amersfoort, where he died on 2 October 1728. The epitaph designed for his tomb was reminiscent of the departure from Leuven: '*Patriam maluit in extrema senectute quam justitiam et veritatem deserere*'.

MAJOR THEMES AND CONTRIBUTIONS

Introduction

The major themes, characteristic of van Espen's teachings, mentioned above, were also determinative of his life story. Roughly speaking, we can bring his main scholarly writings under three headings. First, there is his principal and most influential work, which appeared in 1700, the *Jus Ecclesiasticum Universum*. Virtually all other works were written with reference to certain events or in order to defend controversial opinions. Some of these emphasize regalist premises, while others are of a more Gallican or Episcopalistic nature. A strict separation between the second and third categories cannot be made. Regalism is sometimes an instrument in the service of Gallicanism, that is, when sovereigns set themselves up as protectors of the rights of the local church.[4] Such a subdivision into three categories may create the impression that van Espen discussed only certain distinct issues but that is not the case. In his extensive oeuvre, he deals with the entire canon law of his days. The issues mentioned here are just characteristic of this oeuvre. Within the three categories we have observed the chronological order in which the various works came into being. It is also advisable to read and analyze van Espen's writings in chronological order since his views often progressed with time.

The *Jus Ecclesiasticum Universum*

The *Jus Ecclesiasticum Universum* deals with all possible questions related to the polity of the Catholic Church. The work is systematically structured. The

[4] The paragraphs below do not contain an exhaustive enumeration of the works of van Espen, but the most important ones. A complete survey can be found in the monographs of Leclerc and Nuttinck.

subject matter is discussed not according to the sequence of the titles in the *Liber Extra* but split up into three parts, that is, (i) persons (*de personis*), (ii) things (*de rebus*), and (iii) litigation, delicts, and ecclesiastical sanctions (*de judiciis, delictis, et poenis ecclesiasticis*).[5] The second part (things) is subdivided again into four sections: sacraments (*de sacramentis*), churches and feasts (*de ecclesiis et festis*), prebends (*de beneficiis*), and temporal goods (*de bonis*).

Van Espen pays considerable attention to the historical development that resulted in the rules of canon law in force in his own days. Time and again he emphasizes the fact that in the twelfth century, spurious texts, the so-called Pseudo-Isidorian decretals, had snuck into the compilations of canon law. In his treatment of many issues, these texts constitute the dividing line between the 'old law', based on the canons of the early ecumenical and regional councils, and the 'new law', primarily based on papal decretals. Due to the false decretals, the 'new law' ascribes a much stronger position to the Roman Pontiff than was possible according to 'old law'. In many cases, van Espen adopts the 'old law' as a kind of ideal and in accordance with the *ressourcement*-theology, as practised at Leuven University, he takes the original sources as a starting point to explain the 'old law', thus not just the fragments as they were, deprived from their context and sometimes reworded, adopted in the *Decretum Gratiani*.

Most of the subjects dominating van Espen's later writings can already be traced in the *Jus Ecclesiasticum Universum*. The *Jus Ecclesiasticum Universum* contains clear traces of regalist theories. The church has competence only in the spiritual realm. As regards secular affairs and temporal goods, the sovereign is competent.[6] Also the *ius placiti* and the *recursus ad principem* are dealt with already.[7] His episcopalist theory, however, is not elaborated as in later works. Van Espen mentions and describes the prerogatives which the canon law of his days attributed to the Roman Pontiff but does not say what the source of such competency is. Moreover, he does not yet maintain that all bishops, including the bishop of Rome, have equal authority, although he does say that bishops have a plenitude of power, which is not described as derived from the Pope. It finds its limits and restrictions in the church (*Ecclesia*).[8] Also, as regards the origin of jurisdiction, the *Jus Ecclesiasticum Universum* does not yet display van Espen's later, more particularized, thoughts. It states that

[5] Such a structure is clearly reminiscent of the outline of Justinian's Institutes.
[6] *Jus Ecclesiasticum Universum*, Pars III, Tit. II, Cap. I, n. V.
[7] *Jus Ecclesiasticum Universum*, Pars II, Sect. III, Tit. VII, Cap. VI and *Jus Ecclesiasticum Universum*, Pars III, Tit. X, Cap. IV.
[8] *Jus Ecclesiasticum Universum*, Pars I, Tit. XVI, Cap. I, n. IX.

bishops acquire their plenitude of power through their consecration, which is at odds with statements in later works, as we shall see below.

In 1704, the *Jus Ecclesiasticum Universum* was condemned by a decree of the Holy Office, reissued in 1713 and 1732, because of its regalist ideas.[9] Despite being put on the index, the work was reprinted many times and had considerable influence in major parts of continental Europe. Pope Benedict XIV (1675–1758) in his work *De synodo diocesana* (1755) referred to the work several times.[10] A supplement was published posthumously. In some later editions of van Espen's *Opera omnia* this *Supplementum* was not edited separately but incorporated into the text of the *Jus Ecclesiasticum Universum* itself.[11]

Regalist Works

In 1699, Pieter Govaerts, at the time vicar general of the archdiocese of Malines, published his *Certamen immunitatis sacerdotum Belgii in causis personalibus*, which was directed against parish priests who appealed to secular courts after being suspended from their office and/or deprived of their prebend for alleged Jansenism. Govaerts accused these priests of revolting against the ecclesiastical authorities. In response to this writing, in around 1700 van Espen wrote two treatises, in which he pronounced upon the rights of the sovereign. Both were published only in 1721. The first, *Concordia immunitatis ecclesiasticae et juris regii*, deals with the protection by secular courts of the unhampered possession of prebends. Van Espen bases the appeal to these courts on Natural Law, which allows anyone to defend himself. The second, *Dissertatio de asylo templorum*, is specifically directed toward Govaert's opinion that ecclesiastical immunity has its origin in the sacred character of the church building. It was prompted by the case of Frans van Ophoven who in March 1700 shot a Spanish officer and subsequently took refuge in a Dominican monastery.[12] Van Espen teaches that asylum in churches is

[9] Also, many other writings of van Espen were put on the *Index*.

[10] Especially for van Espen's accurate description of the customary law of the Southern Netherlands.

[11] The additions from the *Supplementum* are recognizable by the 'hands' at the beginning and end of each fragment. When investigating van Espen's teachings on the basis of such editions, one has to realize that the fragments derived from the *Supplementum* were not written as early as 1700, but towards the end of van Espen's academic life.

[12] Carlotta Latini, 'Le droit d'asile dans la pensée de Van Espen. Profils juridiques de la formation du ius publicum ecclesiasticum dans les Pays-Bas catholiques', in *Zeger–Bernard Van Espen at the crossroads*, eds. Guido Cooman, Maurice van Stiphout, and Bart Wauters (Leuven: Peeters, 2003), 115–132. Jan Hallebeek, 'Church asylum in late Antiquity. Concession

a concession granted by the secular authorities.[13] Although some decretals which may substantiate ecclesiastical immunity were received in the western church, van Espen maintains that the sovereign is still entitled to determine the extent of church asylum and the way it is practised.

The case of van de Nesse was already briefly mentioned above. It triggered van Espen to write a thorough legal opinion on the possessory remedy van de Nesse brought before the Council of Brabant. This reply, the *Motivum juris pro van de Nesse* (1707), describes the facts, justifies the refusal to accept the Formulary of Alexander VII, and discusses both the remedy used, that is, the possessory action against the non-regulatory and thus violent infringement of unhampered possession of a prebend (*manutenentia*), and the protective competency of the secular authorities. This includes an ideological justification for appealing to the sovereign and his magistrates.[14] In 1707, the Council of Brabant decided in favour of van de Nesse.

Regalist tendencies can also be found in the *Tractatus de censuris ecclesiasticis* (1709), a treatise on ecclesiastical sanctions primarily written in view of measures taken by the authorities in Rome against clerics in the Northern Netherlands (see below). It not only describes which procedural rules the ecclesiastical authorities must observe when sentencing someone but also deals with what can be done if these rules are violated. Apart from appealing to a superior ecclesiastical instance, there is again the possibility of bringing a possessory action before a secular court.[15]

The *Tractatus de promulgatione legum ecclesiasticarum* of 1712 is a treatise on the *ius placiti*, mentioned above. The work was largely provoked by the fact that in 1705, the bull *Vineam Domini* was promulgated in the Southern Netherlands without *placet*. This bull ruled that it was no longer permissible to accept the condemnation of the five propositions from Jansenius's *Augustinus* with a restriction (viz. that the propositions cannot be found in the book and that the author had not taught these in their heretical sense). The *Tractatus de promulgatione legum ecclesiasticarum* deals extensively with the controversial question of whether a royal *placet* is also obligatory for bulls of

by the Emperor or competence of the Church?' in *Secundum Ius: Opstellen aangeboden aan prof. mr. P. L. Nève*, ed. Chris Coppens (Nijmegen: Gerard Noodt Instituut, 2004), 163–182.

[13] According to the bull *Cum alias nonnulli* (1591) of Pope Gregory XIV (1535–1591) churches could offer asylum, but this bull was controversial and in many territories, like the Southern Netherlands, it had not received a *placet*.

[14] See further Bart Wauters, '"*Sonder eenige ordre van 't recht te onderhouden*". Een analyse van een zaak van recursus ad principem voor de Raad van Brabant in het begin van de 18de eeuw: Bezitsvordering of buitengewoon rechtsmiddel', *Tijdschrift voor rechtsgeschiedenis* 73 (2005): 111.

[15] Van Espen may have written this treatise in view of the threatening excommunication of van Erckel for not obeying the brief of 7 April 1703. See below.

a doctrinal nature, something which had not yet been discussed in the *Jus Ecclesiasticum Universum*. Here, van Espen follows the opinion of Pieter Stockmans (1608–1671), defended in the latter's *Jus Belgarum circa bullarum pontificiarum receptionem* (1645). According to van Espen, no ecclesiastical rule may be promulgated under the pretext of religion whenever this may disturb public order. A doctrinal bull has an external and an internal aspect. The sovereign will judge the former: is the content of the bull sufficiently clear? What are the sanctions for subjects who do not accept the bull? Are there other clauses which may be detrimental for the inhabitants of his realm? Etc.[16]

The *Tractatus de ecclesiastica et politica potestate* (1718) – notes resulting from a series of lectures on secular and ecclesiastical powers and published only posthumously – is composed of two parts. The first part deals with ecclesiastical competence. It emphasizes that the only purpose of the church is eternal salvation of the faithful, which can only be aimed at by spiritual means. Accordingly, in temporal affairs, the church has no power whatsoever. The second part deals with the rights of the sovereign in relation to the church. Here we again find regalist teachings: the foundations of royal jurisdiction (Pars II, Caput I), the subordination of clerics to secular authority (Caput II), ecclesiastical freedom (Caput III), restricted immunity of ecclesiastical persons (Caput IV), the sovereign supervising the temporal goods of the church (Caput V), this supervision making the sovereign an 'external bishop' (Caput VI), and the merely spiritual nature of ecclesiastical competence (Caput XI).

In the case file of the civil procedure against Pieter Govaerts, mentioned above, which was edited in 1724 under the title *Aequitas sententiae Parlamenti Mechliniensis*, van Espen replies to the accusation of having taught that doctrinal bulls are not binding in conscience before being promulgated. Van Espen answers that he did not pronounce on such a theological question. As a specialist in canon law, he maintained only that doctrinal bulls cannot be promulgated or gain force of law without *placitum* (*additionalis deductio*).

At an advanced age, van Espen wrote his most outspoken and thorough treatise on the principles of regalism, the *Tractatus de recursu ad principem*, published in 1725. The immediate cause for taking up his pen was the ruling of Emperor Charles VI (1685–1740) of 26 May 1723 that *Unigenitus* should be considered lawfully promulgated in the Southern Netherlands and that opponents should be prosecuted before ecclesiastical courts. At the same time, the Emperor encouraged the bishops to observe some restraint and his own

[16] *De promulgatione legum ecclesiasticarum*, Pars II, Cap. II, § I–III and Pars V, Cap. II, § I–IV.

magistrates not to thwart the bishops.[17] According to van Espen such a ruling is not in conformity with the sovereign's obligation to do justice to his subjects. Time and again, he expounds copiously the responsibility which rests on Catholic rulers. He criticizes the regular ecclesiastical remedy of appeal, which is factually not capable of putting an end to injustice but rather makes appeal to the secular courts (*recursus ad principem*) necessary.[18] In earlier works, van Espen had primarily dealt with possessory protection against abuse of power. Now he also extensively discusses the special remedy of requiring the royal magistrate to declare judgments of ecclesiastical courts null and void (*appel comme d'abus*) from lack of competence or breach of procedural prescriptions (*remedium cassationis*). In order to enforce such cassation the secular authorities are competent to confiscate ecclesiastical goods. Also, in ecclesiastical affairs the sovereign has unlimited coercive powers (*potestas coactiva*). As a restraint upon the lust for power (*libido dominandi*) of certain clerics, temporal goods of the church can also be seized. The sovereign may use the temporal sword to punish abuse by those who hold the spiritual sword. To support all this, reference is made to the legal practice in the Southern Netherlands, the German realm, France, and Spain.[19] Some scholars had argued that canon 3 of session XXV of the Council of Trent (1535–1563) would be an obstacle to royal protection of oppressed subjects, but van Espen follows the opinion of Francisco Salgado de Somoza (†1664) that the sovereign's obligation to offer protection derives from Natural and Divine law. Referring to Diego Covarruvias de Leyva (1512–1577), who had attended the Council, he maintains that it could not have been the Council's genuine intent that this canon be interpreted as such an obstacle.[20]

The concluding chapter of the *Tractatus de recursu ad principem* almost constitutes an emotional culmination of the entire treatise. Van Espen now addresses the royal magistrates and officers who, in fear of ecclesiastical sanctions, are hesitant to take cognizance of the appeal made to them by the

[17] Maurice van Stiphout, 'Van de paus of van de koning? Zeger-Bernard Van Espen en het appel comme d'abus', *Pro Memorie* 1 (1999): 100–114. Remco van Rhee, 'De obligatione principis protegendi subditos … Some remarks on recursus ad principem', in *Zeger–Bernard Van Espen at the crossroads*, eds. Guido Cooman, Maurice van Stiphout, and Bart Wauters (Leuven: Peeters, 2003), 147–158. Bart Wauters, *Recht als religie. Canonieke onderbouw van de vroegmoderne staatsvorming in de zuidelijke Nederlanden* (Leuven: Universitaire Pers Leuven, 2005), 266–285. Jan Hallebeek, 'Appel comme d'abus dans l'oeuvre de Zeger-Bernard van Espen. Principes, contexte, développements', in *Justices croisées. Histoire et enjeux de l'appel comme d'abus (XIVe–XVIIIe siècle)*, eds. Anne Bonzon and Caroline Galland (Rennes: PUR, 2021), 251–269.

[18] *Tractatus de recursu ad principem*, Cap. VII, § V.

[19] *Tractatus de recursu ad principem*, Cap. VI, §§ I–VII.

[20] *Tractatus de recursu ad principem*, Cap. VI, § VIII.

oppressed. They should trust in God, even when the servants of the church would brand them as disbelievers. When excommunicated, they are as banished from the Synagogue for the sake of the name of Christ (John 16.2). If they are reluctant to confirm the truth out of fear for excommunication, they are as the chief rulers, in the Gospel according to Saint John, who did not openly confess Jesus in order not to be banished from the Synagogue (John 12.42–43). Similarly, the parents of the man, blind from his birth, had no courage to speak the truth out of fear of being expelled from the Synagogue (John 9.21–23). However, the man born blind himself spoke the truth and subsequently he was cast out. He said to Jesus 'Lord, I believe' (John 9.39). Saint Augustine stated that the Pharisees had expelled him, but the Lord had accepted him, since rather than being an outcast he had become a Christian. Accordingly, magistrates and officers who fight for justice will similarly be welcomed by the Lord, when they are by unjust sanctions banished from the worldly community of faithful. They are expelled from the Synagogue of the wicked but enter the community of saints.[21]

Writings in Defence of Gallicanism, Episcopalism, and the Rights of the Church of Utrecht

In van Espen's view, the local church, that is, the diocese, is the most important element in the constitution of the church. Its bishop, clergy, and faithful should never be subordinated to a coercive superior authority. Apart from some prerogatives of the Roman Pontiff, the jurisdiction of the diocesan bishop is restricted only by the universally received doctrines and canons of the church. The bishop's responsibility and competency should also be observed by clerics with an exempt status. In van Espen's works, more tersely in his later works, we trace various ecclesiological principles which support this view: such as the idea that the local church has her own indefeasible rights (Gallicanism); that all diocesan bishops have equal authority (Episcopalism); and that it is the local church herself which entrusts jurisdiction to her bishop.

Van Espen did not deal with these ecclesiological principles only in a doctrinal or theoretical way. They were also determinative for his stand in various controversies in legal practice, including those related to the Church of Utrecht, that is, the Church Province in the Northern Netherlands, which since the establishment of the Reformed Church as the privileged religion, was deprived of her former church buildings, monasteries, and other ecclesiastical goods. Moreover, the presence of diocesan bishops was no longer

[21] The statement of Saint Augustine can be found in his *Tractatus in Joannem* (Tract. 44, § 15).

permitted by the secular authorities and in 1622 the congregation *De propaganda fide* in Rome started to exercise supervision. Nevertheless, major parts of the pre-reformation structures continued to exist. The dioceses and archprebyterates were extant, while many parishes continued to function or were reorganized. The Chapter of Haarlem still functioned and the Chapters of Utrecht were in 1633 reorganized as the 'Vicariate', since all canonries were henceforth given to Protestants. A Vicar Apostolic, appointed by the Pope but usually also elected and in any case accepted by the 'Vicariate', took the place of the Archbishop. These Vicars Apostolic had to face various difficulties. Not only was the Catholic Church oppressed by the Protestant authorities, but its inalienable traditional rights were also increasingly ignored by both the Roman authorities and the regular clerics, especially the Jesuits. Van Espen, being the advocate of the local church, on many occasions hastened to assist the Church of Utrecht by producing sound scholarly support for her position toward Rome. There were already longstanding relations between the Church of Utrecht and Leuven. Since seminaries or theological colleges were not permitted in the Dutch Republic, many secular clerics from the North received their theological training in Leuven, where since 1617 the diocese of Haarlem had the college *Pulcheria*. Furthermore, between 1670 and 1680, the college *Alticollense* of the Utrecht diocese was transferred to Leuven from Cologne.

In an early work, the *Repagulum canonicum adversus nimiam exemptionum a jurisdictione episcoporum extensionem* (1688), van Espen had already dealt with the exact extent of the exempt status of regular clerics. He argues that in many matters these clerics are still subordinate to the jurisdiction of the diocesan bishop. In the *Jus Ecclesiasticum Universum* of 1700 he maintains, as stated above, that diocesan bishops have a plenitude of power of their own (*per se*), thus not derived from the Pope, but at the same time this authority would be received by virtue of their consecration (*vi suae ordinationis*).[22] It has to be noted, though, that the latter is not entirely in conformity with later thinking, as outlined below.

Van Espen also intervened in the internal debate within the Church of Utrecht concerning a number of topical questions. In 1702, after having summoned him to appear in Rome, the Pope suspended Vicar Apostolic Petrus Codde (1648–1710) and appointed Theodorus de Cock (1650–1720) as pro-vicar to replace him. Moreover, he restrained Codde from returning to the Netherlands. For the Chapter of Haarlem and the Vicariate of Utrecht, de Cock was not an acceptable successor. In this situation questions were first

[22] *Jus Ecclesiasticum Universum*, Pars I, Tit. XVI, Cap. I, n. IX.

raised as to whether one should invoke the help of the secular, Protestant authorities, more specifically the States of Holland, to secure Codde's return. Van Espen was quite hesitant about this.[23] Nevertheless, the States, which had already forbidden Catholics to acknowledge de Cock, issued a resolution demanding the return of Codde.[24] The second question had to do with the four pro-vicars appointed by Codde himself before going to Rome. Could these priests appeal to the Pope against the appointment of de Cock? Van Espen provided the arguments to support their position. The four pro-vicars, he argued, derived their jurisdiction not only from the now-deposed Vicar Apostolic but also from the Chapter and the Vicariate.[25] Here, we touch upon an important basic principle in the teachings of van Espen: ecclesiastical jurisdiction resides in the local church and *sede vacante* or *sede impedita* is exercised by the Chapter. He expounded this principle extensively in a letter to the dean of the Chapter of Haarlem, who was in doubt whether the Chapter was competent to appoint administrators of parishes, since there was no longer a Vicar Apostolic in office.[26] Van Espen repeated his arguments in the *Motivum juris pro capitulo Harlemensi* of 1703, arguing that the diocese of Haarlem was extant and that, since its see was vacant (from 1587), all jurisdiction was exercised by the Chapter. The Vicar Apostolic could only exercise jurisdiction in the diocese of Haarlem through delegation by the Chapter. In the archdiocese of Utrecht this was apparently different. Van Espen acknowledged that the Vicariate could exercise jurisdiction, albeit not *sede vacante* but *sede impedita*. The underlying thought was that Codde was the *Ordinarius* of the diocese and accordingly the see could not be considered vacant. A third controversial question had to do with the brief which the Pope had issued on 7 April 1703, threatening Catholics with excommunication *lata sententia* if they refused to accept the suspension of Codde.[27] According to van Espen, excommunication could not result from the mere fact of

[23] *Epistola* XLV of 7 February 1703.

[24] In approaching informally the civic authorities a major role was played by Joan Christian van Erckel (1654–1734), member of the Utrecht Vicariate. He had studied law in Leuven, was a kindred soul of van Espen and may even have encouraged the latter's regalist ideas.

[25] A letter from the summer of 1702. There is a reference to this letter in *Epistola* XLIII.

[26] *Epistola* XLIV of 17 January 1703.

[27] This brief may have been one of the events which prompted van Espen to write his *Tractatus de censuris ecclesiasticis* of 1709. By that time van Erckel was threatened with excommunication for not obeying this brief. On 16 January 1711 he was excommunicated by the nuncio at Cologne. Van Espen considered this excommunication null and void and advised van Erckel not to petition absolution from this excommunication, since that was entirely redundant. See *Epistola* C of 6 August 1711.

disobedience but required a proper procedure.[28] A fourth question, which emerged after Codde returned from Rome in June 1703, was whether he should reassume office. Van Espen answered this question in the affirmative. Codde should not resign but should take up office again.[29] Van Espen considered all sanctions taken against Codde as null and void for lack of proper procedure and probably also contrary to the *ius de non evocando* of secular law, which prohibited inhabitants of the Republic being summoned before a foreign court. Codde, however, definitively dismissed in 1704, refused to resume office and it appeared difficult to find a successor acceptable to all who would administer the church for a longer period. As a consequence, the Church of Utrecht was for many years administered by the Vicariate.

The *Tractatus de promulgatione legum ecclesiasticarum* of 1712, mentioned above, not only deals with the *ius placiti* of the sovereign but also lays down that without publication by the diocesan bishop, papal decrees have no binding force.[30] Again such an opinion is indicative of van Espen's episcopalist teachings.

From 1715 onwards, van Espen was consulted about the question whether the Utrecht Vicariate could exercise jurisdiction in the diocese of Haarlem if the Chapter of Haarlem refused to do so. In 1705, the Chapter of Haarlem had resigned itself to Rome, and no longer performed its ecclesiastical duties. Van Espen replied that the rights of the Chapter of Haarlem can devolve to the Vicariate because *sede impedita* the rights of the Metropolitan are exercised by the Metropolitan Chapter. This was confirmed by the fact that the Vicariate exercised jurisdiction in the diocese of Deventer. Moreover, extreme necessity may justify it, van Espen argued.[31] At the same time the Vicariate started, as van Espen previously had advised,[32] to issue *litterae dimissoriales* for candidates for the priesthood, so that they could obtain their ordinations from foreign bishops. In order to convince these bishops of the legitimacy of such requests, in 1717 van Espen composed a treatise under the title *Resolutio doctorum Lovaniensium*. It was signed by four other scholars from Leuven and later approved by scholars from the Sorbonne. In short, the treatise maintained that the archdiocese of Utrecht was still in existence and that the Metropolitan Chapter lived on in the Vicariate, which now had the right to issue dimissorial letters and to appoint parish priests and administrators of

[28] *Epistola XLVIII* of 4 May 1703 by Joannes Opstraet (1651–1720) also on behalf van Espen.
[29] *Epistola* LIV of 13 June 1704 and *Epistola* LVI of 20 July 1704.
[30] *Tractatus de promulgatione legum ecclesiasticarum*, Pars I, Cap. III, § VI.
[31] *Epistola* CVIII of 27 September 1716 by Opstraet also on behalf of van Espen and others and *Epistola* CXII of 26 February 1719.
[32] *Epistola* CIII of 1715 by Opstraet on behalf of van Espen.

parishes. Moreover, bishop and Chapter derive their jurisdiction from the church.[33] Again van Espen pointed out that *sede vacante* jurisdiction is retained in the local church and exercised by the Chapter, for which opinion he referred to the French theologian and Oratorian Louis Thomassin (1619–1695).

In the *Tractatus de ecclesiastica et politica potestate* of 1718, van Espen further develops his episcopalist thought. Bishops, including the Pope, basically have the same position as regards ecclesiastical jurisdiction. Everything Christ had spoken to Saint Peter concerning the guidance of the church was, in the person of Peter, addressed to all Apostles.[34] Christ gave the power of the keys directly to the church, although only the pastors use and apply it. The *Tractatus* is less clear regarding the way pastors acquire their jurisdiction: 'Immediately from God' the *Tractatus* says, 'but through the ministry of those who elect and consecrate them'.[35] It may be that van Espen is more cautious here than in the *Resolutio doctorum Lovaniensium* but that is difficult to say, since the *Tractatus* is only a posthumously edited series of lecture notes.

In 1722, van Espen, together with two other scholars from Leuven, produced an extensive legal and ecclesiological treatise to justify and substantiate the intention of the Vicariate of Utrecht to elect an Archbishop. In this writing, the *Casus resolutio sive dissertatio de misero statu Ecclesiae Ultrajectinae*, it is argued that the bishop elect could be consecrated in default of papal confirmation. In case neighbouring bishops are unwilling to cooperate, any bishop ready to rescue the Church of Utrecht would be competent to perform the consecration, if necessary without the assistance of two other bishops.[36] Accordingly, the Vicariate elected Cornelis Steenoven (1661–1725) Archbishop of Utrecht and had him consecrated in 1724 by the French missionary bishop Dominique-Marie Varlet (1678–1742), who stayed in Amsterdam. Pope Benedict XIII (1649–1730) declared the election to be void and illegal, and the consecration illicit and reprehensible. He did not deny, though, the validity of the consecration. In his *Responsio epistolaris* (1725) van Espen defended the view that in cases of emergency one consecrating bishop could suffice and that the consecration of Steenoven was permissible. As stated above, this *Responsio epistolaris* had far-reaching consequences for van Espen's position in Leuven.

[33] For the latter statement van Espen was criticized by Laurent Boursier (1679–1749).
[34] *Tractatus de ecclesiastica et politica potestate*, Pars I, Cap. VI, propositio I–II.
[35] *Tractatus de ecclesiastica et politica potestate*, Pars I, Cap. VI, propositio III.
[36] Jan Hallebeek, 'Questions of canon law concerning the election and consecration of a bishop for the Church of Utrecht: The casus resolutio of 1722', *Bijdragen: International Journal in Philosophy and Theology* 61 (2000): 17.

At an advanced age, he also justified the intention to again occupy the see of Haarlem. In his *Responsum juris circa institutionem Episcopi Harlemensis* he argued that if the Chapter of Haarlem neglects its duty to elect a bishop, the Archbishop is obliged to assume this task of the negligent Chapter and consecrate a bishop for the diocese of Haarlem.

At the end of his life van Espen wrote a doctrinal work, revisiting his defence of the rights of the Vicariate ten years earlier in the *Resolutio doctorum Lovaniensium*. This work, entitled *Vindiciae resolutionis doctorum Lovaniensium* (1727) is, in many respects, more outspoken than earlier works. The source of all spiritual jurisdiction is the church. As the church fathers taught, Christ had spoken to the church when he gave Saint Peter the power of the keys. Jurisdiction is derived from the church and, accordingly, the Vicars Apostolic in the Northern Netherlands were genuine Archbishops of Utrecht.[37] Here, we also trace van Espen's episcopalism in its further elaborated form: all bishops are 'vicars of Christ', 'high priests', and 'successors of Saint Peter'. Since all are successors of the Apostles, there cannot be any hierarchy between bishops.[38] Also, his doctrine on the origin of jurisdiction can be found here in its ultimate shape and in terser form than in the *Tractatus* of 1718: Saint Peter represented the church when he received the power of the keys. As a consequence, ecclesiastical jurisdiction resides fundamentally with the entire church. By electing a bishop, the local church entrusts and grants only the exercise of such jurisdiction to the bishop. *Sede vacante* jurisdiction remains with the church and is exercised by the Chapter or the clergy.[39]

The Principles and Religious Motives Underlying van Espen's Work and Life

The focus on the Early Church seems to constitute the most important motive underlying van Espen's thoughts and acts. It appeared to be determinative for his scholarly work as well as for his personal life. In his works on canon law he followed the *ressourcement* of the Leuven theology and focused, beyond the medieval law of the decretals, on the roots of the legal sources in the Early

[37] *Vindiciae resolutionis doctorum Lovaniensium*, Disquisitio II, § VII. It was the purpose of the entire *Disquisitio secunda* to demonstrate that the Vicars Apostolic were in fact diocesan bishops.

[38] *Vindiciae resolutionis doctorum Lovaniensium*, Disquisitio II, § VII, n. IV–XI.

[39] *Vindiciae resolutionis doctorum Lovaniensium*, Disquisitio III, § V. Many opinions as formulated in the *Vindiciae resolutionis* can also be found in the *Supplementum* to the *Jus Ecclesiasticum Universum*. See Jan Hallebeek, 'Die Autonomie der Ortskirche im Denken von Zeger-Bernard van Espen', *Internationale Kirchliche Zeitschrift* 92 (2002): 87–89.

Church. He adopted this Ancient Church, that is, Scripture. the Early Ecumenical Councils. and the authoritative writings of the church fathers, time and again as a normative ideal, albeit not in order to reject the canon law in force but to interpret and apply it. In such a way, legal history served as an interpretative principle. In his days the Pseudo-Isidorian decretals were exposed and in van Espen's opinion these spurious texts had depraved canon law, just as the probabilism of the Jesuits had depraved moral theology. Within the limits offered by canon law as in force and the decrees of the Council of Trent, van Espen aimed at purging canon law of the belief that such things would be beneficial for the church.

Moreover, van Espen's personal life was permeated with this ideal. He held to premises which he, based on his own scholarly investigations and insight, considered to be the right ones, as long as they could be legitimately defended in conformity with the Catholic theology and canon law of his days. As he grew older and encountered increasing opposition, he accentuated his points of view and phrased them more succinctly. In so doing, he by no means denied, as did Protestants, that it is the church that holds the power of the keys, but held the opinion that such competence may not be abused or employed for political aims that do not answer to the truth. As far as possible, it is compulsory to search for the truth and follow that truth in conscience. For van Espen, who abhorred any probabilism or laxism, it was not an option to make concessions to the truth. The safe course he adopted, however, appeared not to be an easy one: he suffered continuous attacks on the legitimacy of his views, there was no prospect of a full chair at Leuven University, and eventually he was obliged to make an involuntary retreat to the Northern Netherlands.

GENERAL APPRAISAL AND INFLUENCE

In the Northern Netherlands, where separation between Catholics took a definite shape, those faithful to Rome commonly described van Espen as the evil genius behind the schism whereas the followers of the Vicariate saw him as the dedicated mainstay of the church. In the Southern Netherlands it was rather van Espen's teachings concerning relations between church and state which were prominent, especially in the nineteenth-century debate as to whether, under the Belgian Constitution of 1831, there was still room for the *appel comme d'abus* of the *ancien régime*.[40] Since the middle of the twentieth century, however, a non-polemical approach, characterized by scholarly

[40] Leo Kenis, 'Un jurist et canoniste de cour. The prevailing image of Zeger-Bernard Van Espen in the theological faculty of Louvain during the 19th century', in *Zeger–Bernard Van Espen at*

distance, has gained the upper hand, although the traditional sentiments are not yet entirely gone.

Outside the Low Countries, the works of van Espen were considerably influential, especially during the eighteenth century. In the German lands van Espen's defence of Episcopalism was taken up and further elaborated. The famous work *De statu Ecclesiae et legitima potestate Romani Pontificis*, written by Johannes Nikolaus von Hontheim (1701–1790) under the pseudonym Justinus Febronius, claimed full autonomy for the diocesan bishop. Hontheim had studied in Leuven and became auxiliary bishop of Trier. So-called Febronianism, based on his teachings, sought to restrict the jurisdictional primacy of the Pope in a similar way to what van Espen had done.[41] It had an enormous influence in Austria, especially under the reign of Emperor Joseph II (1741–1790), where it became an organic part of the Emperor's domestic policy, so-called Josephinism.

Soon the works of van Espen were read and taught in Spain, where many of his ideas were received by politicians and scholars. In this way, his teachings were disseminated and affected the religious policy of King Charles III (1716–1788), while during the reign of Charles IV (1748–1819) attempts were made to put his regalist principles into practice.[42]

At first sight it seems striking that van Espen is only occasionally quoted by French authors. It was sometimes suggested that this was caused by the fact that van Espen published in Latin.[43] In present-day secondary literature

the crossroads, eds. Guido Cooman, Maurice van Stiphout, and Bart Wauters (Leuven: Peeters, 2003), 331–345. See also Maurice van Stiphout, 'Legal continuity and discontinuity in the Low Countries in search of a recursus ad principem in ecclesiastical cases in the 1990s', in *Zeger–Bernard Van Espen at the crossroads*, eds. Guido Cooman, Maurice van Stiphout, and Bart Wauters (Leuven: Peeters, 2003), 441–476, at 449–451. Arguments to support the idea that the Church is subordinate to the State were derived from the works of van Espen, see François Laurent, *Van Espen. Étude historique sur l'eglise et sur l'état en Belgique* (Brussels: Lacroix, 1860).

41 Wolfgang Seibrich, 'Aufgeklärtes Kirchenrecht als restaurative Reform: Die deutschen Episkopalisten und Johann Nikolaus von Hontheim und ihre Beziehung zu Zeger-Bernard Van Espen', in *Zeger–Bernard Van Espen at the crossroads*, eds. Guido Cooman, Maurice van Stiphout, and Bart Wauters (Leuven: Peeters, 2003), 229–265. Michael Printy, *Enlightenment and the Creation of German Catholicism* (Cambridge: Cambridge University Press, 2009), 31–36.

42 Antonio Mestre Sanchis, 'La influencia del pensamiento de Van Espen en la España del siglo XVIII', *Revista de historia moderna: Anales de la Universidad de Alicante* 19 (2001): 405–430. Antonio Mestre Sanchis, 'El católico y sapientísimo Van Espen. La réception de la pensée de Zeger-Bernard van Espen dans l'Espagne du XVIII[e] siècle', in *Zeger–Bernard Van Espen at the crossroads*, eds. Guido Cooman, Maurice van Stiphout, and Bart Wauters (Leuven: Peeters, 2003), 267–297.

43 Jean-Claude Lucet (1755–1806) published in 1788 under the title *Principes du droit canonique universel, ou manuel du canoniste*, a French compendium of the *Jus Ecclesiasticum Universum*, which soon passed into oblivion.

various other explanations are put forward. For typical Gallican ideas, it is argued, the French did not need another authority to refer to. Moreover, van Espen's strong Episcopalism was not always compatible with the mainstream opinions of the French Gallican theologians. In his conception of the constitution of the church, the exercise of jurisdiction was entirely concentrated in the hands of the diocesan bishop or the Chapter, whereas in France much more authority was ascribed to the 'second order' (*second ordre*), that is, the parish priests. Moreover, van Espen taught, at least in his later works, that bishop and Chapter derive their jurisdiction immediately from the church, whereas France stuck to the older opinion of Edmond Richer (1559–1631) that the exercise of jurisdiction is directly acquired from Christ.[44]

In many Italian territories, the works of van Espen were widely known. Their dissemination was surely supported by the Neapolitan edition of van Espen's *Scripta Omnia* (1766–1769) and the five editions of the same collected writings which appeared in Venice between 1732 and 1782. In the Kingdom of Naples, a partial reception of his thoughts can be traced, especially the doctrine that jurisdiction in the proper sense is that of the state, since the state has the monopoly on violence and only the state has genuine coercive competence. Moreover, there were scholars who attempted to revive the pastoral role of the diocesan bishop. Similarly, theologians such as Pietro Tamburini (1737–1827) and Giovanni Battista Zanzi (1758–1835) argued a new kind of Synodality, based on among other things episcopalist and regalist premises: the pastoral mission of the diocesan bishop and the sovereign's competence to grant synodical decrees force of law. Such ideas could have been inspired by van Espen's works.[45]

RECOMMENDED READINGS

Bilsen, Bertrand van. *De invloed van Zeger-Bernard van Espen op het ontstaan van de kerk van Utrecht*. 's-Gravenhage: Algemeene Landsdrukkerij, 1944.

Cooman, Guido, Maurice van Stiphout, and Bart Wauters, eds. *Zeger-Bernard van Espen at the Crossroads of Canon Law, History, Theology, and Church-State Relations*. Leuven: Peeters, 2003.

[44] Jaques Grèzs-Gayer, 'Un "auteur à bons principes": Zeger-Bernard Van Espen en pays gallican', in *Zeger–Bernard Van Espen at the crossroads*, eds. Guido Cooman, Maurice van Stiphout, and Bart Wauters (Leuven: Peeters, 2003), 211–228.

[45] For the reception of van Espen's doctrines by the Synod of Pistoia (1786) see Pietro Stella, 'Espenius inter canonistas princeps: Débats doctrinaux et combats politiques autour de Zeger-Bernard Van Espen dans l'Italie du XVIIIe siècle', in *Zeger–Bernard Van Espen at the crossroads*, eds. Guido Cooman, Maurice van Stiphout, and Bart Wauters (Leuven: Peeters, 2003), 299–330.

[Dupac de Bellegarde, Gabriel], *Vie de M. van Espen*. Naples: Antoine Cervone, 1770.
Hallebeek, Jan. 'Die Autonomie der Ortskirche im Denken von Zeger-Bernard van Espen'. *Internationale Kirchliche Zeitschrift* 92 (2002): 76–99.
Leclerc, Gustave. *Zeger-Bernard van Espen (1646–1728) et l'autorité ecclésiastique*. Zürich: Pas Verlag, 1964.
Nuttinck, Michel. *La vie et l'œuvre de Zeger-Bernard van Espen: Un canoniste janséniste, gallican et régalien à l'Université de Louvain (1646–1728)*. Louvain: Université de Louvain, 1969.
Schulte, Johann Friedrich von. *Die Geschichte der Quellen und Literatur des canonischen Rechts* III/1. Stuttgart: Enke, 1880. Reprint Graz: Akademische Druck- u. Verlaganstalt, 1956, 704–707.
Wauters, Bart. *Recht als religie. Canonieke onderbouw van de vroegmoderne staatsvorming in de zuidelijke Nederlanden*. Leuven: Universitaire Pers Leuven, 2005.