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THEOLOGIANS AND CONTRACT LAW
THE MORAL TRANSFORMATION OF THE *IUS COMMUNE* (ca. 1500-1650)

VOL. 1

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That general aim of all law is simply referable to the moral destination of human nature, as it exhibits itself in the Christian view of life; then Christianity is not to be regarded merely as a rule of life for us but it has also in fact changed the world so that all our thoughts, however strange and even hostile they may appear to it, are nevertheless governed and penetrated by it.

Friedrich Carl von Savigny[1]

[1] *System of the modern Roman Law*, Translated by W. Holloway, Madras 1867, vol. 1, p. 43.

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Extremely vast. Extremely difficult. Extremely useful. These unambiguous adjectives prominently appear in the introduction to the Spanish Jesuit Pedro de Oñate's (1568-1646) four-volume treatise *On contracts*. They are meant to capture the essential features of contract law. The myriads of contracts concluded every day, Oñate warned his readership, make up an ocean that is deep, mysterious and capricious. Contracts are the inevitable means enabling man to navigate his way either to the salvation or to the destruction of his material goods – and of his soul. Therefore, he considered expert knowledge of the complex field of contract law to be indispensable for confessors who needed a nuanced solution to practical cases of conscience. Each contract was thought to express a moral choice for either virtue or vice, for avarice or liberality, for justice or fraud. To live is to enter into contracts, according to Oñate, and to live a God-pleasing life is to conclude contracts in a manner that is consistent with the imperatives of Christian morality. To help confessors decide how Christians of all trades, including princes and businessmen, have to live their lives, this Spanish Jesuit expounded what such a Christian view of contracts should look like.

Oñate's work stands at the end of a vibrant tradition of scholastic contract law, which will be subject to meticulous analysis in the chapters that follow. Scholastic contract law evolved all across Europe over a period of more than half a millenium. By the 1650s, it had come to fruition in the works of major theologians of the Spanish Golden Age, such as Domingo de Soto (ca. 1494-1560), Tomás Sánchez (1550-1610), and Leonardus Lessius (1554-1623). It had left its mark not only on the Catholic moral theological tradition, but also on canonists such as Diego de Covarruvias y Leyva (1512-1577), civilians such as Matthias van Wezenbeke (1531-1586) and natural lawyers such as Hugo Grotius (1583-1645). Slowly but effectively, the Roman law of the late medieval period used all across Europe, the *ius commune*, was transformed into the image of Christian morality. The consequence of this transformation, in Oñate's own words, was the restoration of 'freedom of contract' (*libertas contrahentibus restituta*). This 'freedom of contract' granted contracting parties the possibility to enter into whatever agreement they wanted on the basis of their mutual consent. They could then have their contract enforced before the tribunal of their choice. The following pages intend to analyze theologians' conception of this principle of 'freedom of contract' and its limits.

NOTES ON THE TEXT AND ITS MODES OF REFERENCE

We have followed the conventions for bibliographical reference as recommended by the *Tijdschrift voor Rechtsgeschiedenis (The Legal History Review).* References to modern journals or dictionaries have not been abbreviated so as to make sure that the text remains as accessible as possible to scholars coming from different academic backgrounds. The Latin and Greek are cited as they occur in the quotations, except for the punctuation, which has been slightly modernized. The most emblematic quotations have been translated into English, usually in a freer style than that used in the rendering of Latin texts in school exercises. For the form of names, the vernacular has been preferred to the Latinized forms unless the Latin name was more common. For example, Lenaert Leys is cited as Leonardus Lessius, while Charles Du Moulin is employed rather than Carolus Molinaeus. Sometimes both versions are used for stylistic purposes, particularly when the name is equally well-known in its vernacular as in its Latinized form, e.g. Martín de Azpilcueta besides Dr. Navarrus. The following abbreviations have been used for the citation of ancient and medieval legal texts:

D. 1,1,1	Digestum Justiniani, book 1, title 1, lex 1
C. 1,1,1	Codex Justiniani, book 1, title 1, lex 1
Inst. 1,1,1	Institutiones Justiniani, book 1, title 1, lex 1
Nov.	Novellae
Dist.1, c.1	Decretum Gratiani, Distinctio 1, canon 1
C.1, q.1, c.1	Decretum Gratiani, Causa 1, quaestio 1, canon 1
De pen.	Decretum Gratiani, De penitentia
X 1,1,1	Decretales Gregorii IX, book 1, title 1, canon 1
VI 1,1,1	Liber sextus Bonifatii VIII, book 1, title 1, canon 1
Clem.	Constitutiones Clementis V, book 1, title 1, canon 1

1 METHOD AND DIRECTION

1.1 Research hypothesis

The basic assumption that underlies this dissertation is that the moral transformation of the *ius commune* in the writings on contracts of moral theologians led to the birth of a principle called 'freedom of contract'. 'Contractual freedom' is understood as the power of individuals to impose contractual obligation upon themselves by virtue of their wills and mutual consent alone. They can then enforce this agreement in court. This assumption is not thought of in a nineteenth-century, dogmatic manner. As is sufficiently well-known, the will theories of contract that were developed in modern times were held to be characterized by the absence of moral considerations. For example, the modern will theorists considered the idea of fairness in exchange to be at odds with 'freedom of contract'[2]. Needless to say, considerations of justice in exchange still played a major role for the theologians. However, it appears that in the work of the theologians there was no conflict between emphasizing the autonomy of the will and understanding contractual exchange in moral terms.

The move towards a consensualist doctrine of contract in the writings of theologians is brilliantly illustrated in Pedro de Oñate's treatise *On contracts*. Expounding on the bindingness of all agreements, Oñate happily concludes[3]:

> Consequently, natural law, canon law and Hispanic law entirely agree, and innumerable difficulties, frauds, litigations and disputes have been removed thanks to such great consensus and clarity in the laws. To the contracting parties, liberty has very wisely been restored (*contrahentibus libertas restituta*), so that whenever they want to bind themselves through concluding a contract about their goods, this contract will be recognized by whichever of both courts [i.e. the civil or the ecclesiastical court] before which they will have brought their case and it will be upheld as being sacrosanct and inviolable. Therefore, canon law and Hispanic law correct the *ius commune*, since the former grant an action and civil obligation to all bare agreements, while the latter denied them just that.

We wish to flag three elements in this quotation. First, Oñate praises the evolution toward the general enforceability of all willful agreements. Second, he considers the universal adoption of this principle as a victory for the freedom or liberty of the contracting parties.

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[2] E.g. M.J. Horwitz, *The transformation of American law, 1780-1860*, Cambridge Mass. – London 1977, p. 160. For a good and critical synthesis of some of the major theses of this work, see C. Desan, *Beyond commodification, contract and the credit-based world of modern capitalism*, in: D.W. Hamilton – A.L. Brophy (eds.), Transformations in American legal history, Essays in honor of professor Morton J. Horwitz, Cambridge Mass. 2010, vol. 2, p. 111-113.

[3] Pedro de Oñate, *De contractibus*, Romae 1646, tom. 1, tract. 1, disp. 2, sect. 5, num. 166, p. 40 : 'Unde lex naturalis, lex canonica et lex Hispaniae omnino consentiunt et innumerae difficultates, fraudes, lites, iurgia hac tanta legum consensione et claritate sublata sunt, et contrahentibus consultissime libertas restituta ut quandocumque de rebus suis voluerint contrahere et se obligare, id ratum sit in utroque foro in quo convenerint et sancte et inviolabiliter observetur. Quare ius canonicum et ius Hispaniae corrigunt ius commune, concedentes pactis nudis omnibus actionem et obligationem civilem, quam illud negabat.'

Third, he explains the emergence of this principle through the transformation of the *ius commune* after the model of canon law.

The assumption that theologians played an important role in the development of an idea of 'contractual freedom' builds on previous scholarship by eminent legal historians such as Paolo Cappellini, Klaus-Peter Nanz, Robert Feenstra, James Gordley, Italo Birocchi and Thomas Duve, They have shown that the moral theologians played a vital role in the development of a so-called 'general category of contract'[4]. Such a 'general category of contract' is at odds with Roman contract law, which dominated legal thinking all through the Middle Ages. Roman contract law did not universally recognize the principle that agreements are enforceable by virtue of mutual agreement alone[5]. Roman contract law accepted the actionability on consensualist grounds alone only in regard to a limited set of contracts such as sale, lease, mandate and partnership. According to James Gordley, in particular, the foundations for a modern, consensualist doctrine of contract in both civil and common law jurisdiction were laid in the treatises of scholastics such as Domingo de Soto, Luís de Molina and Leonardus Lessius[6]. They achieved a great synthesis of Aristotelian-Thomistic moral principles and the medieval *ius commune* which led to the formulation of this 'general category of contract'.

In modern times, economic development is seen as the fundamental rationale behind 'freedom of contract'[7]. Therefore, if one asks for the reasons why a principle of 'freedom of contract' was gradually introduced in the sixteenth century, the obvious answer seems to be 'for the sake of economic progress'. As a matter of fact, historians have already argued that there is a connection between the rise of liberal economic views in the early modern scholastic writers and their profound engagement with contract law. For example, Paolo Prodi adheres to the thesis that the moral theological literature is a witness both to the rise of market

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[4] See P. Cappellini, *Sulla formazione del moderno concetto di 'dottrina generale del diritto'* (a proposito di Martin Lipp, *De Bedeutung des Naturrechts für die Ausbildung der allgemeinen Lehren des deutschen Privatrechts*, [Schriften zur Rechtstheorie, 88], Berlin 1980), Quaderni fiorentini per la storia del pensiero giuridico moderno, 10 (1981), p. 323-354; K.-P. Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*, [Beiträge zur neueren Privatrechtsgeschichte, 9], München 1985, p. 135-148; R. Feenstra – M. Ahsmann, *Contract, aspecten van de begrippen contract en contractsvrijheid in historisch perspectief*, [Rechtshistorische Cahiers, 2], Deventer 1988², p. 19-23; J. Gordley, *The philosophical origins of modern contract doctrine*, Oxford 1991, p. 69-111; I. Birocchi, *Causa e categoria generale del contratto, Un problema dogmatico nella cultura privatistica dell'età moderna, I. Il cinquecento*, [Il Diritto nella Storia, 5], Torino 1997, p. 203-269; Th. Duve, *Kanonisches Recht und die Ausbildung allgemeiner Vertragslehren in der Spanischen Spätscholastik*, in : O. Condorelli – F. Roumy – M. Schmoeckel (eds.), Der Einfluss der Kanonistik auf die Europäische Rechtskultur, Band 1: Zivil- und Zivilprozessrecht, [Norm und Struktur, 37], Köln-Weimar-Wien 2009, p. 389-408.

[5] H. Dilcher, *Der Typenzwang im mittelalterlichen Vertragsrecht*, Zeitschrift für Rechtsgeschichte der Savigny-Stiftung, Rom. Abt., 77 (1960), p. 270-303. A standard account of Roman contract law can be obtained from reading any textbook on Roman law.

[6] Gordley, *The philosophical origins of modern contract doctrine*, p. 3-4 and 69-71. For a critical assessment of Gordley's thesis, see I. Birocchi's review in Tijdschrift voor Rechtsgeschiedenis, 61 (1993), p. 132-137. The argument has been extended to other fields of private law in J. Gordley, *Foundations of private law, property, tort, contract, unjust enrichment*, Oxford 2006, critically reviewed by M. Graziadei in The American Journal of Comparative Law, 58 (2010), p. 477-486.

[7] P.A. Foriers, *Espaces de liberté en droit des contrats*, in: Les espaces de liberté en droit des affaires, Séminaire organisé à l'occasion du 50e anniversaire de la Commission Droit et Vie des Affaires, Bruxelles 2007, p. 25-28.

capitalism and to the birth of a general law of contract[8]. He argues that new commercial transactions which could not be captured under the headings of the Roman body of legal texts, the *Corpus iuris civilis*, were regulated systematically for the first time in the moral theological literature. It remains to be seen in this dissertation whether 'economic development' effectively was the main driving force behind theologians' advocating a principle of 'contractual freedom.'

Research into the economic thought of the scholastics has blossomed over the past decades[9]. Importantly, the idea of the market was increasingly 'objectivized' and 'depersonalized' in the moral theological literature of the second half of the sixteenth century[10]. Studies show that the theologians valued economic prudence, the protection of private property, and the pursuit of self-interest[11]. This claim is confirmed by careful reading of the primary sources. A Jesuit such as Lugo stimulates commercial behavior that is driven by economic prudence (*prudentia oeconomica*) and private gains (*private commoda*)[12]. In other words, it is not improbable that the principle of 'freedom of contract' is tied to a liberal economic paradigm that also emerges in the work of sixteenth and seventeenth century theologians. By and large, there was a decidedly liberal element inherent in both the economic and legal theory espoused by the theologians. This was reflective of a more general liberal

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[8] P. Prodi, *Settimo non rubare, Furto e mercato nella storia dell'Occidente*, Bologna 2009, e.g. p. 237 and p. 246. See also Prodi's concluding remarks in: D. Quaglioni – G. Todeschini – M. Varanini (eds.), Credito e usura fra teologia, diritto e amministrazione (sec. XII-XVI), [Collection de l'École française de Rome, 346], Roma 2005, p. 291-295.

[9] It would be impossible to give an exhaustive list of the research done in recent years on the economic thought of scholastics from the 12th until and including the 16th century. Major works include O.I. Langholm, *Economic freedom in scholastic thought*, History of Political Economy, 14 (1982), p. 260-283; O.I. Langholm, *Economics in the medieval schools, Wealth, exchange, value, money and usury according to the Paris theological tradition, 1200-1350*, [Studien und Texte zur Geistesgeschichte des Mittelalters, 29], Leiden 1992; F. Gómez Camacho, *Economía y filosofía moral, La formación del pensamiento económico europeo en la Escolástica española*, [Historia del pensamiento económico, 1], Madrid 1998; S. Piron, *Parcours d'un intellectuel franciscain, d'une théologie vers une pensée sociale, l'oeuvre de Pierre Jean d'Olivi (ca. 1248-1298) et son traité De contractibus*, Paris 1999 [unpublished doct. diss. EHESS]; G. Ceccarelli, *Il gioco e il peccato, economia e rischio nel tardo Medioevo*, Bologna 2003.

[10] O.I. Langholm, *The legacy of scholasticism in economic thought, Antecedents of choice and power*, Cambridge 1998, p. 99. This thesis has been confirmed through a study of the case of the Merchant of Rhodes in W. Decock, *Lessius and the breakdown of the scholastic paradigm*, Journal of the History of Economic Thought, 31 (2009), p. 57-78.

[11] Cf. H. M. Robertson, *Aspects of the rise of economic individualism, A criticism of Max Weber and his school*, [Cambridge Studies in Economic History, 1], Cambridge, 1933; W. Weber, *Wirtschaftsethik am Vorabend des Liberalismus, Höhepunkt und Abschluss der scholastischen Wirtschaftsbetrachtung durch Ludwig Molina SJ (1535-1600)*, [Schriften des Instituts für christliche Sozialwissenschaften der westfälischen Wilhelms-Universität Münster, 7], Münster 1959; A.A. Chafuen, *Faith and liberty, the economic thought of the late scholastics*, Lanham 2003 [= slightly re-worked version of A.A. Chafuen, *Christians for freedom, late-scholastic economics*, San Francisco 1986]; M. N. Rothbard, *An Austrian perspective on the history of economic thought*, vol. 1: *Economic thought before Adam Smith*, Aldershot – Brookfield 1995.

[12] For a good illustration from the primary sources themselves, see Juan de Lugo, *De iustitia et iure*, Lugduni 1642, tom. 2, disp. 26, sect. 8, par. 2, num. 143, p. 337 : 'Usus autem scientiae non est usus vel exercitium potestatis, sed est actus prudentiae oeconomicae, quae ordinatur ad privata commoda. Quare nullus est abusus, quod in ea commoda ordinetur.' See also W. Decock – J. Hallebeek, *Pre-contractual duties to inform in early modern scholasticism*, Tijdschrift voor Rechtsgeschiedenis, 78 (2010), p. 89-133.

atmosphere[13]. Certainly in the first half of the seventeenth century, this liberalism is apparent also in the doctrine of moral probabilism, which was primarily, albeit not exclusively, the province of the Jesuits[14].

However intriguing, the explication of the rise of 'freedom of contract' in terms of the concomitant rise of a liberal economic paradigm is not the immediate goal of this dissertation. There are certainly parallels between both phenomena, yet this dissertation concentrates on the argumentations developed by theologians themselves to advocate 'freedom of contract'[15]. It turns out that their explicit reasoning relies upon religious and juristic arguments much more than upon economic policy considerations. The ambition of this dissertation is to reveal the explications given by theologians themselves for their advocating 'contractual freedom'. These religious and juristic arguments merit attention, because they are likely to be highlighted less than the economic factors that were undoubtedly also at play. The internal, theological logic on which their argumentation relies, grants us a better insight into the idiosyncratic nature of the theologians' enterprise. It turns out that theologians were primarily concerned with the salvation of souls.

Oñate's statement on the restoration of 'freedom of contract' clearly indicates that moral theologians' defense of 'freedom of contract' is not wholly identical with modern versions of it. Oñate starts from a different logic. Modern conceptions of 'freedom of contract' are structured around the philosophy that private markets are the economic institutions which are best fit for the purpose of the efficient allocation of scarce goods and services[16]. 'Freedom of contract' is then seen as the appropriate juridical framework for supporting this economic paradigm. However, what Oñate primarily cares about is finding the juridical principle that best fosters peace and moral comfort. This logic approximates the canonical understanding of freedom[17]. It is the freedom to develop virtuousness, to express moral responsibility, and to strengthen mutual trust amongst human beings. Moreover, the moral theologians shared with the canonists a concern for the salvation of the soul (*cura animarum*), which has nearly disappeared in modern times.

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[13] F. Carpintero Benítez, *Los escolásticos españoles en los inicios del liberalismo político y jurídico*, Revista de estudios histórico-jurídicos, 25 (2003), p. 341-373.

[14] See Ph. Schmitz, *Probabilismus – das jesuitischste der Moralsysteme*, in: M. Sievernich – G. Switek (eds.), Ignatianisch, Eigenart und Methode der Gesellschaft Jesu, Freiburg-Basel-Wien 1990), p. 354-368; and Ph. Schmitz, *Kasuistik, Ein wiederentdecktes Kapitel der Jesuitenmoral*, Theologie und Philosophie, 67 (1992), p. 29-59. Probabilism will be discussed in the next chapter.

[15] H. Fleischer, *Informationsasymmetrie im Vertragsrecht, eine rechtsvergleichende und interdisziplinäre Abhandlung zu Reichweite und Grenzen vertragsschlussbezogener Aufklärungspflichten*, München 2001, p. 46. An example of the interdisciplinary approach which is recommended by Fleischer is offered by L. Baeck, *The legal and scholastic roots of Leonardus Lessius's economic thought*, [Leuven Centre for Economic Studies. Discussion Papers], Leuven 1999, a slightly extended version of which has been published as L. Baeck, *Die rechtlichen und scholastischen Wurzeln des ökonomischen Denkens van Leonardus Lessius*, in: B. Schefold (ed.), Leonardus Lessius' *De iustitia et iure*, Vademecum zu einem Klassiker der Spätscholastischen Wirtschaftsanalyse, [Klassiker der Nationalökonomie], Düsseldorf 1999, p. 39-61.

[16] For a critical analysis of this paradigm, see M.J. Trebilcock, *The limits of freedom of contract*, Cambridge Mass. 1993, p. 1-22, a book which is itself subject to critical assessment in F. Parisi, *Autonomy and private ordering in contract law*, European Journal of Law and Economics, 1 (1994), p. 213-227.

[17] As described by R.H. Helmholz, *The spirit of classical canon law*, Athens (Ga.) – London 1996, p. 49.

From a historiographical point of view, theologians' contract doctrines have not only been studied for their own sake[18]. Much more frequently, they have received attention in the context of scholarship on 'modern' natural lawyers such as Hugo Grotius (1583-1645)[19]. This is hardly surprising. The legal norms and concepts developed in the theological tradition were then adopted by the natural lawyers of the seventeenth and eighteenth centuries. Therefore, it will be a constant concern in this dissertation to investigate how theologians' theories of contract left their mark on Hugo Grotius. In the eyes of allegedly 'modern' natural lawyers such as Grotius, contract remained to play the central role it had gotten in the moral theological tradition as the principal tool for the regulation of all human affairs, including international relations and the relations between citizens and the public authorities[20].

The assumption of this dissertation implies that modern contract law is indebted to theologians. The history of substantive doctrines of private law – which are currently undergoing a process of '*Ent-staatlichung*' – can be understood also as a history which started

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[18] I. Birocchi, *Saggi sulla formazione storica della categoria generale del contratto*, Cagliari 1988, p. 36-41; J. Gordley, *The philosophical origins of modern contract doctrine*, p. 69-111; Birocchi, *Causa e categoria generale del contratto*, p. 203-269; A. Guzmán Brito, *La doctrina de Luis de Molina sobra la causa contractual*, in : A. Guzmán Brito, *Negocio, contrato y causa en la tradición del derecho europeo e iberoamericano*, Navarra 2005, p. 407-439; H. Rodríguez Penelas, *Ética y sistemática del contrato en el siglo de oro, La obra de Francisco García en su contexto jurídico-moral*, [Colleción de pensamiento medieval y renacentista, 82], Pamplona 2007, p. 69-121; Th. Duve, *Kanonisches Recht und die Ausbildung allgemeiner Vertragslehren in der Spanischen Spätscholastik*, p. 389-408.

[19] E.g. H. Thieme, *Natürliches Privatrecht und Spätscholastik*, in : H. Thieme (ed.), Ideengeschichte und Rechtsgeschichte, Gesammelte Schriften, Band II, [Forschungen zur neueren Privatrechtsgeschichte, 25], Köln-Wien 1986 [1953], p. 871-908 ; M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen*, [Forschungen zur neueren Privatrechtsgeschichte, 6], Köln-Graz, 1959, *passim* ; F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, Göttingen 1967, p. 293-297; R. Feenstra, *De oorsprong van Hugo de Groot's leer over de dwaling*, in : L. Jacob (ed.), Met eerbiedigende werking, opstellen aangeboden aan Prof. Mr. L.J. Hijmans van den Bergh, Deventer 1971, p. 87-101; H. Thieme, *Qu'est ce que nous, les juristes, devons à la Seconde Scolastique espagnole ?*, in: P. Grossi (ed.), La seconda scolastica nella formazione del diritto privato moderno, [Per la storia del pensiero giuridico moderno, 1], Milano 1973, p. 7-22 ; R. Feenstra, *L'influence de la Scolastique espagnole sur Grotius en droit privé, Quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause*, in : P. Grossi (ed.), La seconda scolastica nella formazione del diritto privato moderno, [Per la storia del pensiero giuridico moderno, 1], Milano 1973, p. 377-402, reprinted in his *Fata iuris romani*, Leiden 1974, p. 338-363 ; R. Feenstra, *Impossibilitas and clausula rebus sic stantibus, Some aspects of frustration of contract in continental legal history up to Grotius*, in : A. Watson (ed.), Daube noster. Essays in Legal History for David Daube, Edinburgh-London 1974, p. 77-104, reprinted in his *Fata iuris romani*, Leiden 1974, p. 364-391; Cappellini, *Sulla formazione del moderno concetto di 'dottrina generale del diritto'*, p. 323-354; Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*, p. 135-148; Feenstra – Ahsmann, *Contract*, p. 19-23; J. Gordley, *Natural law origins of the common law of contract*, in: J. Barton (ed.), Towards a general law of contract, [Comparative studies in continental and Anglo-American legal history, 8], Berlin 1990, p. 367-465; A. Somma, *Autonomia privata e struttura del consenso contrattuale, aspetti storico-comparativi di una vicenda concettuale*, [Problemi di diritto comparato, 4], Milano 2000, p. 71-73; M.J. Schermaier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB*, [Forschungen zur neueren Privatrechtsgeschichte, 29], Wien-Köln-Weimar 2000, p. 124-143; R. Feenstra, *Grotius' doctrine of liability for negligence, Its origins and its influence in civil law countries until modern codifications*, in: E.J.H. Schrage (ed.), Negligence, The comparative legal history of the law of torts, [Comparative Studies in Continental and Anglo-American Legal History, 22], Berlin 2001, p. 129-172.

[20] R. Zimmermann, *The law of obligations, Roman foundations of the civilian tradition*, Cape Town – Wetton – Johannesburg 1990, p. 544.

with the '*Ver-staatlichung*' in modern times of doctrines originally developed by actors other than the State[21]. It appears that those actors were not only learned jurists of the medieval *ius commune*. They were also moral theologians of subsequent centuries who transformed the civilian tradition. They belonged to an institution, the Roman Catholic Church, which, for centuries, vied for normative power with the secular authorities. In Prodi's historical analysis, the State emerged as the winner from this intense power struggle with the Church, but, in the process, absorbed a lot of the normative structures which had been developed by the moral theologians[22]. If it is permitted to employ the language of company law, the temporal authority launched a 'reverse take-over' effort over its spiritual assailant, defending its body through the acquisition, at least in part, of the soul of its rival[23].

1.2 Research design

The rise of a principle of 'freedom of contract' in theological literature of the early modern period will be analyzed in three steps. First, the encounter between the legal tradition and the moral theological tradition will be contextualized. Second, the rise of 'freedom of contract' as a principle will be explained. Third, the natural, political, and moral limits to the principle of 'contractual freedom' will be explored. Sometimes these limitations are expressly mentioned by the theologians, sometimes they are implicit in their discussions of specific cases.

We will first highlight the background of the theologians' involvement with contract law in chapter 2. This effort to contextualize theologians' reflections on contracts will lead to a deeper historical understanding of the rise of 'freedom of contract.' The profound differences between the legal cultures of the past and those of the present will appear almost immediately. Moral theologians' grappling with contracts was possible because they lived in a society that was far less secularized than is the case in modern Western States. The political context was one of religious and secular authorities rivaling for normative power. The juridical context was one of legal pluralism and the parallel existence of a variety of tribunals and enforcement mechanisms. The anthropological foundations upon which the theologians' jurisprudence rested was characterized by a dualistic view of man. Individual citizens believed they were composed not only of a body but also of a soul. Presumably, the seminal encounter between moral theology and contract law has almost completely disappeared from historical accounts of private law, precisely because these contextual elements have completely changed.

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[21] R. Zimmermann (ed.), *Globalisierung und Entstaatlichung des Rechts, Teilband II: Nichtstaatliches Privatrecht, Geltung und Genese*, Tübingen 2008, p. vi.

[22] P. Prodi, *Eine Geschichte der Gerechtigkeit, Vom Recht Gottes zum modernen Rechtsstaat*, München 2003, p. 270: 'Der Kampf, der in der ersten Hälfte des 17. Jahrhunderts ausgefochten wird, findet sowohl in den katholischen wie in den reformierten Ländern als Kampf um die Errichtung eines juristischen Systems statt, das in gewisser Weise alternative oder in Dialektik zum politischen System steht. Dass der Staat ab der zweiten Hälfte des Jahrhunderts als Sieger aus diesem Konflikt hervorgeht und versucht, das neue Recht des Gewissens in seine Machtapparate aufzunehmen, ist erwiesen, und ich werde nicht darauf zurückkommen.'

[23] The metaphor is borrowed from K. Geens, *Hoe het vennootschapsrecht zich met een reverse take over verweert tegen een overnamepoging door het 'beginsel van de juiste prijs'*, in: Synthèses de droit bancaire et financier, Liber amicorum André Bruyneel, Bruxelles 2008, p. 452.

It is important to point out the differences between the past and the present. Yet at the end of the day, the legal historian is called upon to present the results of his research in a language that can be understood by scholars from other specializations within the field of law and beyond[24]. In this sense, 'freedom of contract' is a starting point which not only offers a legitimate perspective on early modern scholastic contract doctrine. It also resonates with jurists of the twenty-first century. Moreover, the concept 'freedom of contract' allows one to organize a vast and complex literature around one central idea without doing injustice to the sources. Concretely, we will first show in chapter 3 how theologians developed a general law of contract centered around the notions of freedom, the will and mutual consent. Subsequently, this book will examine the limits to this principle in chapters 4 through 7. More specifically, we will assess to what extent 'freedom of contract' was thought to be constrained through the vices of the will, formality requirements by the State, moral turpitude, and justice in exchange[25].

To begin with, the 'natural' limitations to 'contractual liberty' will be assessed in chapter 4. The moral theologians reorganized the *ius commune* tradition on contracts around the meeting of individual wills as the natural, necessary and sufficient cause to create contractual obligation. Therefore, it is only natural to find that the so-called 'vices of the will' are treated as the first possible impediment to 'freedom of contract'. Next, chapter 5 discusses the 'formal' limitations to 'freedom of contract'. Although individual citizens have the power to create any natural obligation they want through contract, the public authorities can decide to put a brake on this natural liberty for the sake of the common good. This political limitation of 'contractual freedom' occurs through the imposition of form or solemnity requirements. Chapter 6 treats the frustration of 'freedom of contract' on moral grounds[26]. One might expect that the moral restraints on the contracting parties' autonomy were of particular relevance to moral theologians. Lastly, chapter 7 explicates the impact of fairness in exchange or commutative justice on 'freedom of contract'.

A couple of preliminary warnings are needed before we can go on. They have to do with the basic methodological assumption that legal cultures and legal institutions change all the time. In particular, legal historians share a commitment to the proposition that legal concepts and institutions change over time[27]. They have an innate tendency, therefore, to resist easy generalizations and naïve conceptual genealogies. While the development of legal thought cannot be fully grasped without a profound sensitivity for the autonomy and the technicalities of the legal system, it does not entirely reveal its secrets unless it is seen also as

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[24] On the need to foster the dialogue between the wider public community and highly professional historical scholarship, see R. van Caeneghem, *Clio and the humanities, Alma Mater and prodigal sons?*, in : L. Milis et al. (eds.), Law, History, the Low Countries and Europe : R.C. Van Caeneghem, London-Rio Grande 1994, p. 27-35.

[25] This operational scheme is indebted to the framework for identifying and evaluating contract theories as proposed in S.A. Smith, *Contract theory*, Oxford 2004.

[26] These limitations are called 'substantial' after Smith, *Contract theory*, p. 245-268.

[27] Ch. Donahue, Jr., *A crisis of law? Reflections on the Church and the law over the centuries*, The Jurist 65 (2005), p. 3.

the product of particular and changing historical contexts[28]. Sound legal historical scholarship, then, needs both more history and more law[29]. In light of these caveats, this book refuses to offer a teleological account of the history of the development of 'freedom of contract' from the Romans to the present, as if history reached its natural endpoint in today's codified legal systems.

A further preliminary remark derives from Michel Foucault's (1926-1984) warning that all continuity in concepts is but apparent[30]. It pertains to the elusive genius of the law of obligations to be in constant movement and still keep up the appearance of stability. This especially true for the 'law of contract'[31]. Today, the history of contract law is usually thought of as the history of Roman contract law. Yet this view is in no small measure the fruit of the genius of the nineteenth and twenteenth century Pandectist movements, which included eminent legal historians such as Savigny, Vinogradoff and Koschaker[32]. Their erudite attempts at recovering the law of Rome in its ancient or medieval form and giving it an appropriate, systematic structure have turned out to be both impressive and extremely useful. However, it should be remembered that they served the practical purposes of their time in the first place[33]. To be sure, the texts of Roman law have provided the basis for Western thinking about obligations and contracts, but they were re-worked for many ages by many clever men coming from many different contexts before they eventually reached modern man in their systematic form.

The law of contract has not come down to us in the form of a refurbished piece of static legal architecture from Rome. Throughout the ages, the written sources of the terrific outburst of juristic activity in ancient Rome have been re-created in the image of the needs of

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[28] N. Jansen, *'Tief ist der Brunnen der Vergangenheit', Funktion, Methode und Ausgangspunkt historischer Fragestellungen in der Privatrechtsdogmatik*, Zeitschrift für neuere Rechtsgeschichte, 27 (2005), p. 227.

[29] See the plea for a renewed paradigm in the historiography of law which values both an increased openness to the intrinsic technicality of law and the contextual sensitivity going with a profound historical consciousness in E. Conte, *Diritto comune, Storia e storiografia di un sistema dinamico*, Bologna 2009, p. 40-42. A similar call for the increased complementary of both disciplines can be derived from S. Lepsius, *Rechtsgeschichte und allgemeine Geschichtswissenschaft, Zur Wahrnehmung einer Differenz bei den Historikern Burgdorf und Zwierlein*, Zeitschrift für neuere Rechtsgeschichte, 27 (2005), p. 304-310.

[30] M. Foucault, *Les mots et les choses, Une archéologie des sciences humaines*, Paris 1966, preface.

[31] J.-L. Gazzaniga, *Domat et Pothier, Le contrat à la fin de l'Ancien Régime*, Droits, 12 (1990), p. 37-38.

[32] There is no need to try to emulate Francesco Calasso's respectful yet oft-repeated critique of the legal historical method and the ideological motives underlying the work of these eminent jurists; cf. the first chapter (*Tradizione e critica metodologica*) of his *Introduzione al diritto comune*, Milano 1951, p. 3-30, and *Il problema storico del diritto comune e i suoi riflessi metodologici nella storiografia giuridica europea*, in: Storicità del diritto, [Civiltà del diritto, 15], Milano 1966, p. 205-226 [originally published in Archives d'histoire du droit oriental, Revue internationale des droits de l'Antiquité, 2 (1953), p. 441-463].

[33] For a compelling reflection on the contextual elements that help to explain the use of Roman law as European *ius commune* after the second world war, particularly in the work of Paul Koschaker, see M. Stolleis, *The influence of 'ius commune' in Germany in the early modern period on the rise of the modern state*, Rivista internazionale di diritto comune, 11 (2000), p. 275-285, especially the introduction. A detailed analysis of the fascinating attempt by the nineteenth century Pandectists to develop a systematic science of law on the basis of Roman categories for the purpose of unifying private law in the German areas, see the two-volume standard work by P. Cappellini, *Systema iuris*, [Per la storia del pensiero giuridico moderno, 17-19], Milano 1984-5.

the time[34]. For example, in the West, the law of Rome was reshaped by its medieval heirs, the civilians, from the 12th century onwards. In this regard, one should insist that the transformations which the Roman law of Antiquity underwent during medieval and early modern times need not be regarded as repugnant forms of degeneration. Francesco Calasso (1904-1965), the father of post-second World War Italian legal historical scholarship, has warned against overly negative assessments of Roman law in its medieval form. The conception of the pure and original Roman law is fallacious. Calasso invites us to see medieval Roman law as a vivid witness to the dynamic and variegated life which Roman law has lived until today[35].

Roman law lived one of its most intense, prolonged and productive stages by participating in the rich life of the Church. Not surprisingly, the Church is famously said to live by virtue of Roman law (*Ecclesia vivit lege romana*)[36]. There is a general consensus that the seeds for a profound transformation of contract law were sown by the canon lawyers. One should not underestimate, though, the impact of the ideology of *laïcité* that spread along with the *Code Napoléon* and the repression of the *ancien régime*, not only on the actual, battered relationship between State and Church, but inevitably also on legal historical scholarship[37]. The Roman law of Antiquity has often been artificially stripped of its religious, as well as its philosophical, context[38]. Textbooks often do not fail to mention the contribution of canon law

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[34] See H.J. Berman – Ch. J Reid, Jr., *Roman law in Europe and the ius commune, A historical overview with emphasis on the new legal science of the sixteenth century*, Syracuse Journal of International Law and Commerce, 20 (1994), p. 1-2, and L. Waelkens, *Civium causa, handboek Romeins recht*, Leuven 2008, p. 379-382.

[35] F. Calasso, *Diritto volgare, diritti romanzi, diritto comune*, in: Atti del congresso internazionale di diritto Romano e storia del diritto, 2, Milano 1951, p. 372. The argument has been taken up afresh by Emanuele Conte with critical observations on the ideological presuppositions that have often underlied legal historical scholarship over the last two centuries; cf. *Storia interna e storia esterna, Il diritto medievale da Francesco Calasso alla fine del XX secolo*, Rivista internazionale di diritto comune, 17 (2006), p. 299-322.

[36] J. Gaudemet, *Le droit au service de la pastorale (Décret de Gratien, C. XVI, q. 3)*, in: Formation du droit canonique et gouvernement de l'Église de l'Antiquité à l'Âge classique, Recueil d'articles, Strasbourg 2008, p. 339-340 [= reprint from *Società, istituzioni, spiritualità, Studi in onore di Cinzio Violante*, Spoleto 1994, p. 409-422]. The same author has bequeathed us an invaluable article on the impact of Roman law on the early Church fathers; cf. J. Gaudemet, *L'apport du droit romain à la patristique latine du IVe siècle*, in: Formation du droit canonique et gouvernement de l'Église de l'Antiquité à l'Âge classique, Recueil d'articles, Strasbourg 2008, p. 41-54 [= reprint from *Les transformations de la société chrétienne au IVe siècle, Miscellanea historiae ecclesiasticae*, [Bibliothèque de la Revue d'Histoire Ecclésiastique, 67], Louvain-la-Neuve 1983, p. 165-181.

[37] The dazzling impact of the strict division of State and Church today on legal historical scholarship is highlighted in G. Dolezalek, *The moral theologians' doctrine of restitution and its juridification in the sixteenth and seventeenth centuries*, in: T.W. Bennett e.a. (ed.), Acta Juridica, Essays in Honour of Wouter de Vos, Cape Town-Wetton-Johannesburg 1992, p. 104-105. The rupture in legal culture brought about by the French Revolution is aptly described in J.-M. Carbasse, *Manuel d'introduction historique au droit*, Paris 2007[5], p. 241-300.

[38] Reacting against what it calls 'the biased view' that Roman law was the first 'autonomous legal science', the forthcoming book edited by professor Olga Tellegen-Couperus, *Law and religion in the Roman Republic*, Boston-Leiden 2011 highlights the profoundly religious dimension to Roman legal thought and practice. L.C. Winkel, for his part, has recently highlighted the Aristotelian influence on Gaius' outline of the Roman system of obligations; cf. *Alcune osservazioni sulla classificazione delle obbligazioni e sui contratti nominati nel diritto romano*, in: M. Talamanca (ed.), Bullettino dell'Instituto di Diritto Romano 'Vittoria Scialoja', IIIa serie, CIII-CIV (2000-2001), Milano 2009, p. 51-66. I am grateful to professor Winkel for drawing my attention to this article.

to the development of contract law. But in such instances, canon law is limited to a relatively tiny segment in its complex history, namely the so-called 'classical' period of canon law roughly between 1140 and 1298[39]. Moreover, the contribution by the theologians to the same field has been eclipsed almost completely, perhaps due to the quite pardonable tendency of the mind to project the secular tendencies of the present onto the past.

From these preliminary remarks it will be clear that this dissertation does not purport to enter into debates provoked by sweeping statements such as Henry Sumner Maine's dictum that the movement of progressive societies is from status to contract[40]. We are reluctant to subscribe to the Enlightenment proposition that history can be understood in terms of linear progress. Much less do we wish to apply conclusions taken from observed changes in legal doctrine in the early modern period to the history of the construction of social relations in modern times[41]. The 'labor question' formed the context for the famous American jurist Roscoe Pound's (1870-1964) scathing critique of 'freedom of contract'[42]. Yet the labor question is clearly not the background against which the moral theologians promoted 'freedom of contract', The victory of *laissez-faire* capitalism also postdates the writings of the moral theologians, even though capitalism's march of conquest may have begun precisely during their lifetime.

1.3 Selection of sources

The focus of this dissertation lies on texts – printed Latin sources composed by Catholic moral theologians and canon lawyers roughly between 1500 and 1650. One should keep in mind that there is an abundant Catholic theological literature on contracts written in the vernacular, but those sources have not been employed for the present study, except for occasional references to Tomás de Mercado (c. 1530-1575)[43]. By the same token, the

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[39] Specialists are increasingly calling for more in-depth studies of the canon law in later periods, e.g. O. Condorelli, *Il diritto canonico nel tardo Medioevo, Secoli XIV-XV, Appunti per una discussione*, Rivista internazionale di diritto comune, 19 (2008), p. 263-267.

[40] H. Sumner Maine, *Ancient law, its connections with the early history of society and its relation to modern ideas*, London 1883[9], p. 168-170, also cited in R. Feenstra – M. Ahsmann, *Contract*, p. 61-63, num. 43.

[41] The modern debates in France about 'liberal' versus more 'socially responsable' accounts of contract law are aptly summarized in D. Deroussin, *Histoire du droit des obligations*, Paris 2007, p. 485-506. An elaborate study on the subject is offered by V. Ranouil, *L'autonomie de la volonté, naissance et évolution d'un concept*, [Travaux et recherches de l'Université de droit, d'économie et de sciences sociales de Paris, Série sciences historiques, 12], Paris 1980. For the Anglo-Saxon world, see P. S. Atiyah, *The rise and fall of 'freedom of contract'*, Oxford 1979. On the difference in scope between contemporary debates and the moral theologians' conceptualization of 'freedom of contract', see W. Decock, *Jesuit freedom of contract*, Tijdschrift voor Rechtsgeschiedenis, 77 (2009), p. 457-458, and W. Decock, *Freedom, The legacy of early modern scholasticism to contract law*, in: D. Heirbaut – X. Rousseaux – A.A. Wijffels (eds.), Histoire du droit et de la justice, Une nouvelle génération de recherches / Justitie-en rechtsgeschiedenis, Een nieuwe onderzoeksgeneratie, Louvain-la-Neuve 2009, p. 233-245.

[42] R. Pound, *Liberty of contract*, Yale Law Journal, 18 (1909), p. 454-487.

[43] On Mercado, see A. Botero Bernal, *Análisis de la obra 'Suma de tratos y contratos' del Dominico Tomás de Mercado*, in : A. Botero Bernal (ed.), Diagnóstico de la eficacia del derecho en Colombia y otros ensayos, Medellín 2003, p. 128-192. References to the sixteenth-century literature on contracts in Spanish are contained, amongst others, in Birocchi, *Causa e categoria generale del contratto*, p. 228-238, and Duve, *Kanonisches Recht und die Ausbildung allgemeiner Vertragslehren in der Spanischen Spätscholastik*, p. 389-408. See also I.

elaborations on contract law in protestant moral theological literature fall outside the scope of this dissertation. References to the work of civilians such as Matthias van Wezenbeke (1531-1586) and Antonio Gómez emerge occasionaly.

The appropriateness of the terms 'late scholasticism' (*Spätscholastik*)[44], 'late medieval scholasticism'[45], or 'second scholasticism' (*seconda scolastica*)[46], which are often employed to designate the moral theologians of the early modern period, is subject to endless debate[47]. Therefore, we have tried to avoid their use. In this dissertation the terms '(moral) theologians' and 'early modern scholastics' will be preferred to English variants on *Spätscholastik* and *seconda scolastica*. There are both substantive and pragmatic reasons for this preference. Scholasticism can be succinctly defined as a method of academic research chiefly inspired by Aristotelian logic. It begins with the rise of the universities in the twelfth century and it continues on in sundry forms until the twentieth century[48]. Jurists as well as theologians applied scholasticism as a method of systematically treating a particular subject[49]. Therefore, by circumscribing the *doctores* whom we will encounter in this dissertation as 'moral theologians' rather than as 'scholastics', the argument gains in precision. If the term 'scholasticism' is nevertheless preferred, then it is appropriate to limit it on a chronological basis by adding the adjective 'early modern', to designate the phase of scholasticism between approximately 1500 and 1650.

Even allowing for the aforementioned limitations that are inherent in the selection of the sources, the mass of available material remains enormous in volume and formidable in nature. Almost desperate, Karl Friedrich Stäudlin (1761-1826) confessed that a historian loses

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Zorroza – H. Rodríguez-Penelas (eds.), *Francisco García, Tratado utilísimo y muy general de todos los contratos (1583)*, [Colleción de pensamiento medieval y renacentista, 46], Pamplona 2003.

[44] E.g. F. Grunert – K. Seelmann (eds.), *Die Ordnung der Praxis, Neue Studien zur Spanischen Spätscholastik*, [Frühe Neuzeit, 68], Tübingen 2001

[45] E.g. J.H. Burns, *Scholasticism, Survival and revival*, in: J.H. Burns – M. Goldie (eds.), The Cambridge history of political thought, 1450-1700, Cambridge e.a. 1991, p. 132-133.

[46] E.g. A. Ghisalberti (ed.), *Dalla prima alla seconda scolastica, Paradigmi e percorsi storiografici*, Bologna 2000.

[47] For a critical discussion of the variegated categories that are being used, amongst which figure also 'Renaissance Aristotelianism', 'Baroque scholasticism', and 'post-Tridentine scholasticism', see M. Forlivesi, *A man, an age, a book*, in: M. Forlivesi (ed.), Rem in seipsa cernere, Saggi sul pensiero filosofico di Bartolomeo Mastri (1602-1673), Atti del Convegno di studi sul pensiero filosofico di Bartolomeo Mastri da Meldola (1602-1673), Meldola-Bertinoro, 20-22 settembre 2002, Padova 2006, p. 98-114. As the title of his contribution indicates, Jacob Schmutz proposes to use the term 'modern scholasticism' to indicate the theological and philosophical writings, associated with the 'schools', of the sixteenth and the subsequent centuries; cf. *Bulletin de scolastique moderne* (1), Revue thomiste, 100 (2000), p. 276-277.

[48] For an elaborated historical semantic analysis of the term 'scholasticism', see R. Quinto, *Scholastica, Storia di un concetto*, [Subsidia Mediaevalia Patavina, 2], Padova 2001.

[49] The tremendous influence of scholastic logic on the medieval *ius commune* is the subject of a compelling study by A. Errera, *The role of logic in the legal science of the glossators and commentators, Distinction, dialectical syllogism, and apodictic syllogism, An investigation into the epistemological roots of legal science in the late Middle Ages*, in: A. Padovani – P. Stein (eds.), The jurists' philosophy of law from Rome to the seventeenth century, [A treatise of legal philosopy and general jurisprudence, 7], Dordrecht 2007, p. 79-155. For a less recent contribution, see A. Van Hove, *De oorsprong van de kerkelijke rechtswetenschap en de scholastiek*, [Mededeelingen van de Koninklijke Vlaamsche Academie voor Wetenschappen, Letteren en Schoone Kunsten van België, Klasse der Letteren, Jaargang 6, Nr. 3], Antwerpen-Utrecht 1946.

heart when confronted with the complex and nuanced literature of the myriad Catholic moral theologians of the early modern period[50]. Indeed, the fact that the sources are so voluminous might explain why the history of the legal teachings of the Catholic moral theologians has not yet been written[51]. Another possible factor in this neglect is that, traditionally, the Catholic moral theological contribution to the history of law has been repressed both from within and from outside of the Catholic Church. Needless to say, the Jesuits, who are among the strongest advocates of the symbiosis of law and morality, have been under attack both from without and from within the Catholic Church[52]. Also, it has been submitted that the struggle between Protestantism and Catholicism, certainly during the German *Kulturkampf* (1871-1878) might have favored a bias against recognizing the Catholic legacy to juristic thought[53].

The focus on the Catholic tradition is not meant to deny the profound influence of Protestant movements on the development of legal thought. Sixteenth-century jurists with a Calvinist or Lutheran background have made fundamental contributions to several fields of law[54]. Philip Melanchton (1497-1560) and John Calvin (1509-1564) are but two of the most famous examples[55]. Generally speaking, though, there is clear evidence that the reformed theologians understood the distinction between law and morality in much stronger terms than the 'followers of the Pope' (*papistae*). Hence, reformed moral theology appears to be much less juridical in nature than the confessional literature written by Catholics. In particular, Puritan ethics was inspired by high-minded devotional literature rather than technical legal argumentation[56]. Indeed, the alienation between law and morality, the strict separation

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[50] Karl Friedrich Stäudlin, *Geschichte der christlichen Moral seit dem Wiederaufleben der Wissenschaften*, [Geschichte der Künste und Wissenschaften, 2], Göttingen 1808, p. 441.

[51] But this can quickly change, if historical scholarship in canon law is anything to go by. Compare Ch. Donahue, Jr., *Why the history of canon law is not written*, London 1986, and the response to it hardly a decade later: J. Brundage, *Medieval canon law*, London-New York 1995.

[52] S. Knebel, *Wille, Würfel und Wahrscheinlichkeit, Das System der moralischen Notwendigkeit in der Jesuitenscholastik*, [Paradeigmata, 21], Hamburg 2000, p. 20-24; H. Callewier, *Anti-jezuïtisme in de Zuidelijke Nederlanden (1542-1773)*, Trajecta, 16 (2007), p. 30-50; P.-A. Fabre – C. Maire (eds.), *Les Antijésuites, Discours, figures et lieux de l'antijésuitisme à l'époque moderne*, Rennes 2010.

[53] We are grateful to Prof. Dr. Joachim Rückert for this suggestion, which merits further investigation that goes beyond the scope of this doctorate. From the polemical tone against the *papistae* among natural lawyers such as Christian Thomasius, as will be seen infra (e.g. p. 53), one may infer that this historiographical struggle has been raging on for at least three centuries.

[54] E.g. M. Schmoeckel, *Das Gesetz Gottes als Ausgangspunkt christlicher Ethik? Zu calvinistischen Traditionen des 16. Jh.s im Hinblick auf ihre rechtshistorische Relevanz*, in: Ius commune, 25 (1998), p. 347–366; J. Witte, Jr., *Law and Protestantism, The legal teachings of the Lutheran Reformation*, Cambridge 2002; H.J. Berman, *Law and revolution II, The impact of the Protestant Reformations on the Western legal tradition*, Cambridge Mass. 2003 (with an emphasis on Lutheran legal philosophy); Ch. Strohm, *Calvinismus und Recht, Weltanschaulich-konfessionelle Aspekte im Werk reformierter Juristen in der Frühen Neuzeit*, [Spätmittelalter, Humanismus, Reformation, 42], Tübingen 2008.

[55] Among the vast, recent secondary literature on Calvin, see H.J. Selderhuis (ed.), *Calvin Handbuch*, Tübingen 2008 and B. Pitkin, *Calvin's mosaic harmony, Biblical exegesis and early modern legal history*, The Sixteenth Century Journal, 41 (2010), p. 441-466; on Melanchton, see I. Deflers, *Lex und Ordo, Eine rechtshistorische Untersuchung der Rechtsauffassung Melanchtons*, [Schriften zur Rechtsgeschichte, 121], Berlin 2005.

[56] J.F. Keenan, *Was William Perkins' 'Whole treatise of cases of conscience' casuistry? Hermeneutics and British practical divinity*, in: H.E. Braun – E. Vallance (eds.), Contexts of conscience in early modern Europe, 1500-1700, Basingstoke 2004, p. 17. On Reformed moral theology, see also C. Selzner, *Les forges des philistins, La problématique d'une casuistique réformée en Angleterre de William Perkins à Jeremy Taylor*, in: S. Boarini

between the realms of the jurists and the theologians, and the rise of the modern State would perhaps not have occurred if Luther had not condemned the legalistic outlook of medieval Christian morality in the first place. This epochal event will be discussed in chapter 3.

From a methodological point of view, priority has been given to the study of the Antwerp-born Jesuit Leonard Lessius (1554-1623). The third section of the second book of his *On justice and right* (*De iustitia et iure*) is entirely dedicated to contract law[57]. Lessius is one of the foremost representatives of scholastic moral theology in the early modern period outside of the Iberian peninsula[58]. His profound influence on the history of contract law has been confirmed by all of the abovementioned experts in the field[59]. The first edition of Lessius' treatise was published in 1605 with John Masius in Louvain[60]. In terms of chronology, this means that Lessius is an interesting starting point for yet another reason. First, the evolution of early modern scholastic contract doctrine during the sixteenth century, mainly in Spain, is already integrated in his work. Second, Lessius' treatise in turn inspired Hugo Grotius' *The right of war and peace* (*De iure belli ac pacis*), which was published only twenty years after the first edition of Lessius' *On justice and right*. Also, other Jesuit writers of the first half of the seventeenth century, such as the aforementioned Juan de Lugo and Pedro de Oñate, drew heavily on Lessius.

The initial, methodological concentration on Lessius as the main gateway to the much larger volume of moral theological literature on contracts has had a couple of consequences. First, Lessius runs as a 'red thread' through all of the chapters. The selection of other jurists and theologians has been largely, if not exclusively, based on their relevance for gaining a better understanding of the argumentation in Lessius[61]. This has not prevented us from

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(ed.), La casuistique classique, genèse, formes, devenir, Saint-Étienne 2009, p. 73-86; M. Wisse – M. Sarot – W. Otten (eds.), *Scholasticism reformed, essays in honour of Willem J. van Asselt*, [Studies in theology and religion, 14], Leiden-Boston 2010.

[57] For further discussion, see chapter 2. What follows is a preliminary overview of the titles of the chapters in Lessius, *De iustitia et iure ceterisque virtutibus cardinalibus*, Antverpiae 1621, lib. 2, sect. 3 (*De contractibus*): 17. De contractibus in genere; 18. De promissione et donatione; 19. De testamentis et legatis; 20. De mutuo et usura; 21. De emptione et venditione; 22. De censibus; 23. De cambiis; 24. De locatione, emphyteusi, et feudo; 25. De societate; 26. De ludo et sponsionibus ; 27. De deposito et commodato ; 28. De fideiussione, pignore et hypotheca.

[58] See Schmutz, *Bulletin de scolastique moderne*, p. 326-329 ; J.P. Doyle, *Hispanic scholastic philosophy*, in: J. Hankins (ed.), The Cambridge companion to Renaissance philosophy, Cambridge 2007, p. 263.

[59] Quoted supra, p. 19, n. 4.

[60] An account of the successive editions of Lessius' *De iustitia et iure* is included in T. Van Houdt, *Leonardus Lessius over lening, intrest en woeker, De iustitia et iure, lib. 2, cap. 20, Editie, vertaling en commentaar*, [Verhandelingen van de Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België, Klasse der Letteren, 162], Brussel 1998, p. xviii-xxv. Van Houdt's masterpiece has been reviewed by G.P. van Nifterik in Tijdschrift voor Rechtsgeschiedenis, 69 (2001), p. 164-166. In this dissertation, the fifth, augmented and corrected edition published in 1621 by the famous Antwerp printers Plantin-Moretus is used as a reference, since it is the last edition which appeared during Lessius' lifetime.

[61] The canonists who proved to be particularly influential on Lessius' thought appear to be Sinibaldus Flischus (Innocent IV) (c. 1195-1254), Nicolaus de Tudeschis (Abbas Panormitanus) (1386-1455), Felinus Sandaeus (1444-1503), Martinus de Azpilcueta (Dr. Navarrus) (1492-1586), Didacus Covarruvias y Leyva (1512-1577), and Tomás Sánchez (1550-1610). Among the civilians, we count Bartolus a Saxoferrato (1313-1357), Baldus degli Ubaldis (1327-1400), and Antonius Gomezius (1501-1561). There are, of course, references to the great manuals of confessors by Angelus Carlettus de Clavasio (c. 1414-1495) and Silvester Prierias (1456-1523). A

occassionaly studying the work of authors who made a significant contribution to a particular topic, even though they are not cited by Lessius[62]. The focus lies on the great sixteenth century Spanish thinkers and on the contemporaneous civilians and canonists who have handed down the *ius commune* tradition to these moral theologians. Second, the choice of perspective has often been determined by questions and cases that gained particular relevance in Lessius. Conversely, themes that no longer play a direct role in Lessius' contract doctrine are omitted, even though, originally, they were important for the development of contract law, such as vow-making[63].

Debate, disagreement, and pluralism of opinions are some of the most characteristic features of the writings of the doctors of both the *ius commune* and moral theology. From the twelfth century onward, jurists and theologians shared a method of doing research known as 'scholastic', because it was used in the schools and universities[64]. It is an essential tool for nuanced debate that both fully recognizes the existence of opposing opinions and tries to reconcile them through making distinctions, using interpretative reason and balancing the relative weight of authoritative opinions. In a dialectical manner, it seeks to discern how general moral or juridical principles apply to particular cases. Gratian's *Decretum* (c. 1140) stands out as one of the earliest illustrations of the splendid application of this method to legal argument. This method takes seriously Aristotle's warning that there is no such thing as absolute certainty to be attained in human affairs. There are several opinions with a certain degree of probability, but none of them can claim to tell the absolute truth. Generations of learned argumentations bring about a common opinion (*communis opinio*)[65]. This common opinion is highly authoritative, but it is not necessarily tantamount to eternal truth. There remains a place for debate and controversy.

The pluralistic character of legal and moral thought in the Middle Ages and the early modern period poses a challenge to the legal historian who wishes to make generalizations

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great many theologians are cited by Lessius. Among the more important figure Thomas Aquinas (1225-1274), Bernardinus Senensis (1380-1444), Antoninus Florentinus (1389-1459), Conradus Summenhart (1455-1502), Pope Adrianus VI (1459-1523), Johannes Maior (c. 1467-1550), Cajetanus (1469-1534), Franciscus de Vitoria (1483/1492-1546), Dominicus Soto (1494-1560), Joannes Medina (1490-1546), and Ludovicus Molina (1535-1600). Biographical information on these authors will be provided in the course of the exposition.

[62] E.g. the Spanish *doctor utriusque iuris* Fortunius Garcia (1494-1543) in regard to the development of general actionability of naked agreements, and the Portuguese jurist Arias Piñel (1515-1563) concerning just pricing and *laesio enormis*, the French theologian Petrus Johannes Olivi (1248-1298) in regard to prostitution agreements, the Portuguese Jesuit Fernão Rebelo (1547-1608) concerning the vices of the will, and the Spanish Jesuit Gregorius de Valentia (1549-1603) in the section on just pricing.

[63] E.g. S. Piron, *Vœu et contrat chez Pierre de Jean Olivi*, Les cahiers du centre de recherches historiques, 16 (1996), p. 43-56.

[64] On the scholastic method, see P. Koslowski – R. Schönberger, *Was ist Scholastik?*, [Philosophie und Religion, Schriftenreihe des Forschungsinstituts für Philosophie Hannover, 2], Hildesheim 1991.

[65] S. Lepsius, *Communis opinio doctorum*, in: A. Cordes – H. Lück – D. Werkmüller (eds.), Handwörterbuch zur deutschen Rechtsgeschichte, Band 1, Lieferung 4, Berlin 2006, cols. 875-877; I. Maclean, *Interpretation and meaning in the Renaissance, the case of law*, [Ideas in Context, 21], Cambridge 1992, p. 93; E. Andujar – C. Bazán, *Aequitas, aequalitas et auctoritas chez les maîtres de l'école espagnole du XVIe siècle*, in: D. Letocha (ed.), Aequitas, aequalitas, auctoritas, Raison théorique et légitimation de l'autorité dans le XVIe siècle européen, Actes du IIe colloque international (1990) du Centre de recherche en philosophie politique et sociale de l'Université d'Ottawa, [De Pétrarque à Descartes, 54], Paris 1992, p. 172-185.

about the emergence of a principle of 'freedom of contract' in the writings of moral theologians over a period of about a century and a half. Sir Edward Coke (1552-1634) complained that the *ius commune* was a 'sea full of waves', and Blaise Pascal (1623-1662) famously noted that there were few cases in which one could not find one moral theologian saying yes and the other saying no[66]. However, the respect for pluralism of opinions in scholarly debates is regarded in this dissertation as an attractive asset of the scholastic tradition in law and theology rather than as a hindrance. Much attention will be paid to conflict on a multitude of levels: conflict between arguments, conflict between principles and reality, conflict between the values underlying the choice for different legal rules.

[66] E. Coke, *Second part of the Institutes of the laws of England*, London 1642, Proeme, *in fine* (available online at *Early English Books Online*; last visited on May 20, 2011); B. Pascal, *Les Provinciales ou les lettres écrites par Louis De Montalte*, Amsterdam 1657, Lettre 5 (March 20, 1656), p. 69 (available online at *The Digital Libary of the Catholic Reformation*; last visited on May 20, 2011).

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2 THEOLOGIANS AND CONTRACT LAW: CONTEXTUAL ELEMENTS

Before delving into the technicalities of the early modern theologians' treatment of contract law, a couple of introductory notes may provide familiarity with the historical and ideological background against which these highly sophisticated legal doctrines were shaped. Sound legal history, just as sound comparative law, cannot just limit itself to the study of the history of legal concepts. That would result in the narcisstic pursuit of uncovering the image of the present in the past. Just like Don Quixote, a dogmatic legal historian is bound to wake up in a strange world, incapable of explaining why the legal universe that he is familiar with is not out there[67]. In chapters three through seven, the legal vocabulary developed by the theologians when discussing contract law will often convey a feeling of familiarity. This will lead one to feel that 'the past is never dead, it is not even past'[68]. However, the impression that is likely to dominate the reader's experience in the following paragraphs can be summarized through that fine saying that 'the past is a foreign country, they do things differently there'[69].

One of the main differences between the past and the present is the engagement with law by moral theologians. Medieval Roman and canon law were unquestioned sources of wisdom to the Spanish theologians. For one thing, the *ius commune* was one of the pillars of the secular jurisdictions they were dwelling in. For another thing, the theologians themselves expressly recognized the authority of the civilian tradition. Without meaning to be exhaustive, the first part of this chapter seeks to highlight some of the conditions that made the theologians' involvement with law possible. It will then be reminded in the second part that the symbiosis of law and morality was already intrinsic to the Catholic tradition of manuals for confessors. In the course of the sixteenth and seventeenth centuries, this synthesis grew more intense, eventually resulting in the creation of systematic legal treatises, certainly in the wake of that buoyant yet diffuse Spanish tradition of moral theological, economic and juridical thought often associated with the 'School of Salamanca'. The third and the fourth part of this chapter explain why this particular form of moral theology can be conceived of in truly juridical terms.

2.1 Theologians and the *ius commune*

2.1.1 Law and theology?

At first sight, the idea of searching for sophisticated elaborations on contract law in Lessius and in the works of other learned men who were not necessarily professional jurists might

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[67] The metaphor is borrowed from M. Adams, *Wat de rechtsvergelijking vermag, Over onderzoeksdesign*, Ars Aequi, 60, (2011), p. 195.

[68] Thus one of the famous lines from the American writer William Faulkner's (1897-1962) *Requiem for a nun.*

[69] See the almost proverbial opening sentence of the British writer Leslie Poles Hartley's (1895-1972) *The Go-between*, discussed in A. Rose, *Studying the past, The nature and development of legal history as an academic discipline*, The Journal of Legal History, 31 (2010), p. 101-102.

seem counter-intuitive. Legal positivism abhors theological narratives being inserted into the black-letter text of the law. It has taught us that law should be strictly distinguished from morality. And yet, evidence is mounting that many legal concepts are derived from theological traditions – not to mention the absolutely vital role which the canon law played in the shaping of the Western legal tradition[70]. This is an established fact in the realm of public law and international law, not in the least thanks to the late Carl Schmitt, Ernst H. Kantorowicz and James Brown Scott[71], but the legacy of theological learning in private law and commercial law has been equally recognized[72]. It is no coincidence that the great Belgian

[70] Naturally, the literature on the contribution of canon law to the civil and common law tradition is immense. In this context, of particular relevance are A. Lefebvre-Teillard, *Le droit canonique et la formation des grands principes du droit privé français*, in: H. Scholler (ed.), Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien, [Arbeiten zur Rechtsvergleichung, Schriftenreihe der Gesellschaft für Rechtsvergleichung, 177], Baden-Baden 1996), p. 9-22 ; P. Landau, *Pacta sunt servanda, Zu den kanonistischen Grundlagen der Privatautonomie*, in: M. Ascheri et al. (eds.), Ins wasser geworfen und Ozeane durchquert, Festschrift für Knut Wolfgang Nörr, Köln-Weimar-Wien 2003, p. 457-474. Also it is worthwhile mentioning the ongoing project to give a systematic overview of the legacy of canon law to different fields of the law, the first volume of which has now been published: O. Condorelli – F. Roumy – M. Schmoeckel (eds.), *Der Einfluss der Kanonistik auf die Europäische Rechtskultur*, Band 1: *Zivil- und Zivilprozessrecht*, [Norm und Struktur, 37], Köln-Weimar-Wien 2009. The influence of the canon law tradition on the common law is the subject of nuanced debate in R. Helmholz, *Roman canon law in Reformation England*, Cambridge 1990 and Ch. Donahue, Jr., *Ius commune, canon law and common law in England*, Tulane Law Review, 66 (1992), p. 1745-1780.

[71] Recent literature in what seems to be an exploding field of study includes J.P. Doyle, *Francisco Suárez on the Law of Nations*, in: M.W. Janis – C. Evans (eds.), Religion and International Law, London 1999, p. 103-120; N. Brieskorn, *Luis de Molinas Weiterentwicklung der Kriegsethik und des Kriegsrechts der Scholastik*, in: N. Brieskorn – M. Riedenauer (eds.), Suche nach Frieden, Politische Ethik in der Frühen Neuzeit, I, [Theologie und Frieden, 19], Barsbüttel 2000, p. 167-191; R. Lesaffer, *The medieval canon law of contract and early modern treaty law*, in: Journal of the history of international law, 2 (2000), p. 178-198; F. Hafner – A. Loretan – C. Spenlé, *Naturrecht und Menschenrecht, Der Beitrag der Spanischen Spätscholastik zur Entwicklung der Menschenrechte*, in: F. Grunert – K. Seelmann (eds.), Die Ordnung der Praxis, Neue Studien zur Spanischen Spätscholastik, [Frühe Neuzeit, 68], Tübingen 2001, p. 123-153; M.F. Renoux-Zagamé, *Du droit de Dieu au droit de l'homme*, Paris 2003; M. Stolleis, *Das Auge des Gesetzes, Geschichte einer Metapher*, München 2004; D. Bauer, *The importance of canon law and the scholastic tradition for the emergence of an international legal order*, in: R. Lesaffer (ed.), Peace treaties and international law in history, Cambridge 2004, p. 198-221; A. Boureau, *La religion de l'état, La construction de la République étatique dans le discours théologique de l'Occident médiéval (1250-1350)*, Paris 2006; G. Agamben, *Il regno e la gloria, Per una genealogia teologica dell'economia e del governo*, [Homo Sacer, II. 2], Vicenza 2007; M. Scattola, *Sklaverei, Krieg und Recht, Die Vorlesung über die Regula 'Peccatum' von Diego de Covarrubias y Leyva*, in: M. Kaufmann – R. Schnepf (eds.), Politische Metaphysik, Die Entstehung moderner Rechtskonzeptionen in der Spanischen Scholastik, [Treffpunkt Philosophie, 8], Frankfurt am Main 2007, p. 303-356; D. Recknagel, *Einheit des Denkens trotz konfessioneller Spaltung, Parallelen zwischen den Rechtslehren von Francisco Suárez und Hugo Grotius*, [Treffpunkt Philosophie, 10], Frankfurt am Main 2010; A. Pagden, *Gentili, Vitoria, and the fabrication of a natural law of nations*, in: B. Kingsbury – B. Straumann (eds.), The Roman foundations of the law of nations, Alberico Gentili and the justice of empire, Oxford-New York 2010, p. 340-362 ; J. Cruz Cruz, *Ius gentium bei Vitoria, Ein eindeutig internationalistischer Ansatz*, in: A. Fidora – M. Lutz-Bachmann – A. Wagner (eds.), *Lex* and *Ius*, Essays on the foundation of law in medieval and early modern philosophy, [Politische Philosophie und Rechtstheorie des Mittelalters und der Neuzeit, Series 2, Studies, 1], Stuttgart 2010, p. 301-332; J. Waldron, *A religious view of the foundations of international law*, [NYU School of Law, Public law and legal theory research paper series, 11-29], New York 2011 ; M. Koskenniemi, *Empire and international law, the real Spanish contribution*, University of Toronto Law Journal, 61 (2011), p. 1-36. A good overview of less recent literature on the Spanish contribution to international law is contained in David Kennedy, *Primitive legal scholarship*, Harvard International Law Journal, 27 (1986), p. 1-99, esp. n. 1-7.

[72] M.F. Renoux-Zagamé, *Origines théologiques du concept moderne de propriété*, [Travaux de droit, d'économie, de sciences politiques, de sociologie et d'anthropologie, 153], Genève 1987; J. Hallebeek, *The*

private lawyer René Dekkers (1909-1976) did not hesitate to include in his *Bibliotheca Belgica Juridica* the mystic Geert Grote from Deventer (1340-1384) as well as theologians such as Leonardus Lessius from Brecht and Joannes Malderus from Sint-Pieters-Leeuw (1563-1633), who became the bishop of Antwerp,[73]. In recent years, theological perspectives on the origins of the criminal law have been particularly thought-provoking[74]. The emphasis on the Reformation as a motor for the renewal of legal thought has been constant[75]. After a period of relative antinomianism in the Church, which seems to have grown stronger as the twentieth century progressed, the Catholic Church itself seems to be regaining awareness of its incredibly rich legal tradition[76].

To summarize, it is not inconceivable that the legal historian misses at least some of the steps in the development of fundamental concepts in his field by ignoring the contribution of the theologians to the Western legal tradition[77]. It has even been argued that the inner

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concept of unjust enrichment in late scholasticism, [Rechtshistorische reeks van het Gerard Noodt Instituut, 35], Nijmegen, 1996; A.S. Brett, *Liberty, right and nature, Individual rights in later scholastic thought*, [Ideas in Context, 44], Cambridge 1997; R. Savelli, *Derecho romano y teología reformada, Du Moulin frente al problema del interés del dinero*, in: C. Petit (ed.), Del 'Ius mercatorum' al derecho mercantil, Madrid 1997, p. 257-290; A. Lefebvre-Teillard – F. Demoulin – F. Roumy, *De la théologie au droit*, in: R. Helmholz et al., Grundlagen des Rechts, FS Peter Landau, Paderborn 2000, p. 421–438; H. Dondorp, *Crime and punishment, Negligentia for the canonists and moral theologians*, in: E.J.H. Schrage (ed.), Negligence, The comparative legal history of the law of torts, [Comparative Studies in Continental and Anglo-American Legal History, 22], Berlin 2001, p. 101-128; F. Grunert – K. Seelmann (eds.), *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik*, [Frühe Neuzeit, 68], Tübingen 2001; F. Carpintero Benítez, *El derecho subjetivo en su historia*, Cádiz 2003; M.I. Zorroza – H. Rodríguez-Penelas (eds.), *Francisco García, Tratado utilísimo y muy general de todos los contratos (1583)*, [Colección de pensamiento medieval y renacentista, 46], Pamplona 2003; D. Reid, Thomas Aquinas and Viscount Stair, *The influence of scholastic moral theology on Stair's account of restitution and recompense*, Journal of Legal History, 29 (2008), p. 189-214.

[73] R. Dekkers, *Bibliotheca Belgica Juridica, Een bio-bibliografisch overzicht der rechtsgeleerdheid in de Nederlanden van de vroegste tijden af tot 1800*, [Verhandelingen van de Koninklijke Vlaamse Academie voor Wetenschappen, Letteren en Schone Kunsten van België, Klasse der Letteren, Jaargang 13, Nr. 14], Brussel 1951, p. 72, p. 100, and p. 106, respectively. Geert Grote is said to have left behind a manuscript on contracts and usury (*De contractibus et usuris*).

[74] F. Grunert, *Punienda ergo sunt maleficia, Zur Kompetenz des öffentlichen Strafens in der Spanischen Spätscholastik*, in: F. Grunert – K. Seelmann (eds.), Die Ordnung der Praxis, Neue Studien zur Spanischen Spätscholastik, [Frühe Neuzeit, 68], Tübingen 2001, p. 313-332; D. Müller, *Schuld – Geständnis – Buße, Zur theologischen Wurzel von Grundbegriffen des mittelalterlichen Strafprozeßrechts*, in: H. Schlosser – R. Sprandel – D. Willoweit (eds.), Herrschaftliches Strafen seit dem Hochmittelalter. Formen und Entwicklungsstufen, Köln e.a. 2002, p. 403-420; H. Maihold, *Strafe für fremde Schuld ? Die Systematisierung des Strafbegriffs in der Spanischen Spätscholastik und Naturrechtslehre*, [Konflikt, Verbrechen und Sanktion in der Gesellschaft Alteuropas. Symposien und Synthesen, 9], Köln 2005; H. Pihlajamäki, *Executor divinarum et suarum legum, Criminal law and the Lutheran Reformation*, in: V. Mäkinen (ed.), Lutheran Reformation and the Law, [Studies in Medieval and Reformation Traditions, 112], Leiden-Boston 2006, p. 171-204; J.Q. Whitman, *The origins of reasonable doubt, theological roots of the criminal trial*, New Haven – London 2008.

[75] E.g. Berman, *Law and revolution II, The impact of the Protestant Reformations on the Western legal tradition.*

[76] E.g. J. Porter, *Natural and divine law, Reclaiming the tradition for Christian ethics*, Ottawa-Grand Rapids 1999, p. 39-75; W. Waldstein, *Ins Herz geschrieben, Das Naturrecht als Fundament einer menschlichen Gesellschaft*, Augsburg 2010; Pope Benedict XVI, *The listening heart, Reflections on the foundations of law*, Address of his Holiness Benedict XIV on the occasion of his visit to the Bundestag (Berlin, 22.09.2011) URL: http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin_en.html (last visited 23.09.2011).

[77] See the critical observations by A. Hespanha, *Panorama histórico da cultura jurídica europeia*, [Forum da história, 24], Mem Martins 1997, p. 16-22, esp. p. 21, as well as B. Clavero, *Religión y derecho. Mentalidades y paradigmas*, Historia, Istituciones y Documentos, 11 (1984), p. 67-92. See also A. Padovani, *Perché chiedi il*

renewal of legal history as a discipline will lie in a rediscovery of the theological and canonical roots of modern legal traditions[78]. The fact that theologians were preoccupied with law, particularly with contracts, might still be surprising. As Max Weber (1864-1920) noted, modern man seems to be unable to escape the tendency to underrate the impact of religion in the history of Western societies[79].

James Whitman provides us with an important clue when he observes that it is essential to realize that the salvation of the soul was a major source of preoccupation for people living in deeply Christian societies in the West until not long ago[80]. This preoccupation relied upon a fundamentally dualistic anthropology, namely the idea that man consists of body and soul (*homo ex corpore et anima constat*)[81]. Not only the body, but also the soul were subject to jurisdictional power. This view of man was deeply ingrained in the minds of the pre-Enlightenment citizen[82]. In his manual of civil procedure, Joos de Damhouder (1507-1581) from Bruges was careful to remind judges of the importance of keeping the images of paradise and hell clearly before their eyes[83]. If he had to decide on earth, the judge was himself subject to God's judgment in the afterlife. Therefore, Cardinal Hostiensis, undoubtedly the most brilliant canonist of the thirteenth century, adviced judges to keep the Gospel carefully with them at any moment during the lawsuit[84].

The second point which explicates the theologians' involvement with law is the fact that the soul was thought to be subject to rules and discipline[85]. Consequently, besides the jurisdiction over the external actions of man as we still know it today, there was a jurisdiction over man as a spiritual being that has now disappeared. The guardians of this realm of norms were the theologians. Bringing together natural law, divine law and positive law, they

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mio nome ? Dio, natura e diritto nel secolo XII, [Il diritto nella storia, 6], Torino 1997, p. 11. The latter book is a compelling attempt to enliven the theological context behind the renaissance of European legal thinking in the 12th century.

[78] See M. Schmoeckel, *Rechtsgeschichte im 21. Jahrhundert, Ein Diskussionsbeitrag zur Standortbestimmung*, Forum Historiae Iuris (2000); cf. http://www.forhistiur.de/zitat/0005schmoeckel.htm, last visited on 25 July 2011.

[79] Quoted in Clavero, *Religión y derecho*, p. 92.

[80] Whitman, *The origins of reasonable doubt*, p. 1-8.

[81] Francisco Suárez, *Tractatus de anima*, prooemium, in: Opera omnia, editio nova a D.M. André, canonico Rupellensi, Parisiis 1856, tom. 3, p. 463.

[82] The many paintings and sculptures of the Last Judgment in churches, court rooms and town halls across European cities are there to remind us that, ultimately, the soul was thought to be accountable for its acts to God on the Day of Doom; e.g. G. Martyn, *Painted Exempla Iustitiae in the Southern Netherlands*, in: R. Schulze (ed.), Symbolische Kommunikation vor Gericht in der Frühen Neuzeit, [Schriften zur Europäischen Rechts- und Verfassungsgeschichte, 51], Berlin 2006, p. 335-356; A.A. Wijffels, *Justitie en behoorlijk bestuur, Hans Vredeman de Vries' schilderijen in het stadhuis van Danzig (Gdánsk)*, Pro Memorie, 13 (2011), p. 103-118.

[83] See the *Beschrijvinghe vande Wereltsche Iustitie*, s.v. *Hel*, *Paradijs*, in: Joos de Damhouder, *Practycke in Civile Saecken*, 's Graven-hage 1626, ed. J. Monballyu – J. Dauwe, Gent 1999, [s.p.].

[84] Henricus de Segusio (*alias* Hostiensis), *Summa aurea*, Venetiis 1570, lib. 2, tit. 1, f. 117v, num. 10: 'Debet autem iudex evangelia a principio usque ad finem coram se tenere, sciturus quod sicut iudicat homines, et ipse iudicabitur a Deo.'

[85] E.g. P. Prodi – C. Penuti (eds.), *Disciplina dell'anima, disciplina del corpo e disciplina della società tra medioevo ed età moderna*, [Annali dell'Istituto storico italo-germanico, 40], Bologna 1994; R.J. Ross, *Puritan godly discipline in comparative perspective, Legal pluralism and the sources of 'intensity'*, American Historical Review, 113 (2008), p. 975-1002.

determined what the rights and obligations of persons in specific situations were, according to these different sets of norms, so as to be able to guide the flock on their earthly pilgrimage to God[86]. The tribunal where this parallel jurisdiction was 'enforced' was the 'court of conscience' (*forum conscientiae sive animae sive internum*) – confession. As will be developed later in this chapter, it is not entirely adequate to think of this parallel legal universe as being deprived of sanctions[87]. After all, the exclusive use of violence and sanctions became the monopoly of the secular State only from the moment the State had defeated – and partly absorbed – the rival sources of norms. Also, one should not forget that there were many linkages between *forum internum* and *forum externum*[88].

The juristic notion of conscience up until the early modern period, also present in the English Court of Chancery – which was alternatively called the Court of Conscience – is fundamentally at odds with the contemporary, personalized, privatized and subjective notion of conscience[89]. Yet, originally, the rules of conscience,e as well as their application to concrete cases, were thought to be the object of expert knowledge of specialists. These specialists were the moral theologians. Their literary production is the written imprint of a parallel jurisdiction which existed for centuries. These writings, therefore, are not merely 'law in the books', to use Roscoe Pound's famous expression from 1910 in a slightly different context. They are the only access we have to a 'law in action', which no longer exists and of which there is no better evidence than the manuals for confessors. It would be misleading to think of this literature as merely pertaining to doctrine or academic reflection. The moral theologians were usually actively involved in practice as advisers to princes, merchants and Christians of all walks of life[90]. They even debated whether they could bill the confessant for giving him advice in contractual affairs.

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[86] W. Decock, *From law to paradise, Confessional Catholicism and legal scholarship*, Rechtsgeschichte, Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte, 18 (2011), p. 14-20.

[87] Apart from the ultimate sanctions in the after-life, the law of conscience also legitimizes the use of self-help (*occulta compensatio*) in matters related to private law if that is the only way of obtaining the rights which are accorded to you as a matter of conscience; cf. W. Decock, *Secret compensation, A friendly and lawful alternative to Lipsius's political thought*, in: E. De Bom – M. Janssens – T. Van Houdt – J. Papy (eds.), (Un)masking the realities of power, Justus Lipsius and the dynamics of political writing in early modern Europe, Leiden-Boston 2011, p. 263-280. The 'juridical' nature of religious and moral norms in the Middle Ages is also subject to investigation in: E. Coccia, *Regula et vita, Il diritto monastico e la regola francescana*, Medioevo e Rinascimento, 20 (2006), p. 97-147.

[88] The interconnectedness between the *forum internum* and the *forum externum ecclesiasticum* can still be noticed in the ecclesiastical court of Bruges at the turn of the seventeenth century, see J. Monballyu, *Een kerkelijke rechtbank aan het werk in de contrareformatie, De rechtspraak van de officialiteit van Brugge in 1585-1610*, in: Liber amicorum Monique Van Melkebeke, Brussel 2011, p. 125-161. This is all the more true in both the secular and the ecclesiastical courts in the colonies of the Spanish empire, as the case study by Alejandro Agüero shows in *Las penas impuestas por el Divino y Supremo Juez, Religión y justicia secular en Córdoba del Tucumán, siglos XVII y XVIII*, in: Anuario de historia de América Latina, 46 (2009), p. 203-230.

[89] D.R. Klinck, *Conscience, equity and the Court of Chancery in Early Modern England*, Farnham 2010, p. 1-40.

[90] A typical example is Lessius, who was consulted on a frequent basis by businessmen and a personal adviser to the Hapsburg Archdukes Albert and Isabella (1598-1621). In the *Notitia iuris belgici*, Antverpiae 1675, lib. 4, p. 61, the jurist Zypaeus (1580-1650) from the Southern Netherlands recommends lawyers to read Lessius in order to get the best analysis of financial techniques used at the Antwerp Bourse. Lessius' private 'counsels' on specific cases have been collected posthumously by his nephew J. Wijns; cf. *Leonardi Lessii (...) in D. Thomam*

2.1.2 The *ius commune* in Spain and its theological status

Many of the preconceptions that prevent one from taking the 'texts' of the moral theologians seriously also apply to the study of the *ius commune*, which was one of the main juristic sources of inspiration for the theologians[91]. The *ius commune*, too, remains incomprehensible if the pluralistic nature of law in the pre-modern European context is not accepted[92]. Both phenomena provide evidence that it is possible to have legal order and legal reasoning in a political context different from the modern national State[93]. Incidentally, this is one of the reasons why there is currently a renewed interest in the *ius commune* and religious systems of private law[94]. After all, certainly in memberstates of the European Union, jurists are faced with the reality that the national legal order is no longer autonomous, but part of a larger normative universe[95]. Legal pluralism is again the defining characteristic of our legal universe.

It is true that the medieval canonists and civilians, as well as the moral theologians of the early modern period, did create marvellous intellectual constructs[96]. But that does not mean that they were merely intellectuals who did not exercize any form of power. The great medieval doctors of civil law and canon law were certainly not detached from legal practice. Certainly in respect to sixteenth century Spain, jurists working in the tradition of the so-called *mos italicus* were very actively engaged in practical dispute settlement[97]. The theologians, for their part, were frequent advisers to the political authorities[98]. It would fall outside the scope of this introductory chapter to go deeper into this debate. Yet the vivid, concrete arguments that were exchanged among the theologians sufficiently witness that these men, however cultivated, were not just bookish types. Not surprisingly, jurists were amazed at Luis de

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de beatitudine, de actibus humanis, de incarnatione Verbi, de sacramentis et censuris praelectiones theologicae posthumae. Accesserunt eiusdem variorum casuum conscientiae resolutiones, Lovanii 1645, ed. I. Wijns.

[91] K. Pennington, *Learned law, droit savant, Gelehrtes Recht, The tyranny of a concept*, Rivista internazionale di diritto comune, 5 (1994), p. 197-209. This article highlights some of the absurdities historical scholarship has run into by taking this doctrinal view of the Roman canon tradition too seriously. Conte, *Diritto comune*, p. 83 points out the nineteenth century origins of this kind of misconception.

[92] P. Grossi, *L'ordine giuridico medievale*, Roma-Bari, 1996[2], p. 52-56; P. Cappellini, *Storie di concetti giuridici*, Torino 2010, p. 123.

[93] P. Grossi, *Un diritto senza Stato*, Quaderni fiorentini, 25 (1996), p. 267-284.

[94] E.g. Ch. Donahue, Jr., *Private law without the State and during its formation*, in: N. Jansen – R. Michaels (eds.), Beyond the State, Rethinking private law, Tübingen 2008, p. 121-144; N. Jansen, *The making of legal authority, non-legislative codifications in historical and comparative perspective*, Oxford-New York 2010, p. 20-44.

[95] This situation is clearly sketched in M. Adams – W. Witteveen, *Gedaantewisselingen van het recht*, Nederlands Juristenblad, 9 (2011), p. 540-546.

[96] The academic institutional background of the *ius commune* is highlighted in M. Bellomo, *L'Europa del diritto comune*, Roma 1989[4], p. 119-146.

[97] F. Tomas y Valiente, *Manual de Historia del derecho Español*, Madrid 1980[2], p. 298-299. The practical edge to the jurists' writings is instantiated by the flourishing of the *Consilia*-literature; cf. M. Ascheri – I. Baumgärtner – J. Kirshner (eds.), *Legal consulting in the civil law tradition*, Berkeley 1999; U. Falk, *Consilia, Studien zur Praxis der Rechtsgutachten in der frühen Neuzeit*, [Rechtsprechung, 22], Frankfurt am Main 2006.

[98] E.g. H.E. Braun, *Conscience, counsel and theocracy at the Spanish Habsburg court*, in: H.E. Braun – E. Vallance (eds.), Contexts of conscience in Early Modern Europe, 1500-1700, Basingstoke 2004, p. 56-66.

Molina's (1535-1600) solid grasp of legal matters[99]. Franciscus Zypaeus (1580-1650), author of a book on Belgian law, recommended jurists to consult Lessius to gain a better understanding of the practice of money-exchange at the Bourse of Antwerp[100]. The local magistrates drew on Lessius and the Spanish canonists and theologians when compiling the last version of Antwerp customary law, the *Consuetudines compilatae* (1608), particularly in the field of contract law[101].

A couple of notes might be welcome here on the use of the *ius commune* by the theologians. One of the main conclusions to be drawn from this dissertation is that the Roman law of contract, as found in a great variety of fragments and texts scattered all over the *Corpus iuris civilis*, was profoundly transformed over the course of centuries. This transformation was driven, first by the canonists, and then by the moral theologians. The interpretation of the disparate Roman legal material on contracts in the Western legal tradition was profoundly shaped by the moral imperatives of Christianity. By *ius commune*, we understand, then, the juridical culture deriving from the interpretation of the Roman legal texts collected by Justinian in 529-534, which spread all across Europe from the so-called Renaissance of Roman law at the end of eleventh century until approximately the sixteenth century and beyond[102]. A fundamental role in the creation and the spread of the *ius commune* was played by the universities. The concept 'ius commune' itself developed out of teaching practices in the university law schools[103]. The late medieval *ius commune* is not to be

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[99] See F.B. Costello, *The political philosophy of Luis de Molina S.J. (1535-1600)*, [Bibliotheca Instituti Historici S.I., 38], Rome 1974, p. 21, n. 72. For biographical details on Molina, see J.P. Donnelly, *Luis de Molina*, in : C. O'Neill – J. Domínguez (eds.), Diccionario histórico de la Compañía de Jesús, Biográfico-temático, Roma-Madrid 2001, vol. 3, p. 2716-2717.

[100] Zypaeus, *Notitia iuris belgici*, lib. 4, p. 61.

[101] The allegations to the late scholastic authors have been analyzed in B. Van Hofstraeten, *Juridisch humanisme en costumiere acculturatie, Inhouds- en vormbepalende factoren van de Antwerpse Consuetudines compilatae (1608) en het Gelderse Land- en Stadsrecht (1620)*, Maastricht 2008, p. 406-410. The *Consuetudines compilatae* have been carefully examined from the point of view of their significance for the development of commercial law in D. De ruysscher, *Naer het Romeinsch recht alsmede den stiel mercantile, handel en recht in de Antwerpse rechtbank (16de-17de eeuw)*, Kortrijk-Heule 2009.

[102] There is no way in which this rudimentary and pragmatic definition could substitute for the detailed accounts of the characteristics of the *ius commune* in standard contributions such as Bellomo's textbook *L'Europa del diritto comune*. In an article expressly devoted to defining the *ius commune*, Bellomo adopts a distinction between two periods in the 'life' of the *ius commune*, namely the 12th-16th centuries, on the one hand, and the 16th-18th centuries, on the other hand, since the context of the *ius commune* in the latter period is fundamentally different from that of the former, given the rise of the national states. However, Bellomo warns against the interpretation that the *ius commune* of the first period derived its normative force from being considered the product of the legislative activity of the German emperor (*Kaiserrecht*). He argues instead that their character as authoritative and useful legal texts (*libri legales*) was decisive in their success. Importantly, Bellomo also refuses to recognize that the *ius commune* entered into a 'crisis' from the sixteenth century onwards, referring to the ongoing relevance of the *ius commune* in Latin America, on the one hand, and the *usus modernus pandectarum*, on the other hand; cf. M. Bellomo, *Condividendo, rispondendo, aggiungendo, Riflessioni intorno al 'ius commune'*, Rivista internazionale di diritto comune, 11 (2000), p. 287-296.

[103] J.A. Brundage, *Universities and the 'ius commune' in medieval Europe*, Rivista internazionale di diritto comune, 11 (2000), p. 237-253.

confounded with the present day development of a *ius commune Europaeum*, even though there are striking parallels[104].

Until the fourteenth century, the *ius commune* referred mostly to Justinian's compilation of legal texts[105]. Bartolus de Saxoferrato and Baldus de Ubaldis identified *ius commune* primarily with the Roman legal texts and not with canon law[106]. This use of the term by the doctors was confirmed in the sixteenth century by Fernanda Vázquez de Menchaca (1512-1569)[107]. A theologian such as Francisco Suárez also employed *ius commune* to designate the Roman civil law[108]. These Roman texts served as the default rules for legal practice and thinking across Europe. As such, *ius commune* contrasted with the *ius proprium*, *ius municipale*, or *ius patrium* – some of the concepts that were used to denote the legal system proper to a particular territory[109].

Even though the interpretation of those Roman rules was often mingled with canonical legal thinking, inevitably leading to the simultaneous spreading of both Roman and canon law in the culture of the *ius commune*, the term *ius commune* is mostly distinguished from the term which denotes the interconnectedness of Roman and canon law, i.e. *utrumque ius*[110]. One should be careful, however, about being too rigid in employing these terms. Thirteenth century jurists sometimes employed the term *ius commune* in a broader sense to denote the two learned laws (*utrumque ius*)[111]. Yet, in principle, the term *ius commune* was employed in the past and will be used throughout this dissertation as signifying the Roman civil law (*ius civile Romanorum*) in its received form as a common legacy to many local jurisdictions in medieval and early modern Europe.

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[104] For further discussion, see A.A. Wijffels, *Qu'est ce que le ius commune?*, in: A.A. Wijffels (ed.), Le Code civil entre ius commune et droit privé européen, Bruxelles 2005, p. 643-661; J. Smits, *The making of European private law, Toward a ius commune Europaeum as a mixed legal system*, Antwerp – Oxford – New York 2002, p. 43-45.

[105] L. Mayali, *Ius civile et ius commune dans la tradition juridique médiévale*, in: J. Krynen (ed.), Droit romain, jus civile et droit français, [Études d'histoire du droit et des idées politiques, 3], Toulouse 1999, p. 201-217; N. Warembourg, *Le 'droit commun coutumier', Un exemple paradoxal d'acculturation juridique*, in: B. Coppein – F. Stevens – L. Waelkens (eds.), Modernisme, tradition et acculturation juridique, Actes des Journées internationales de la Société d'Histoire du Droit, Louvain 29 mai -1 juin 2008, [Iuris Scripta Historica, 27], Brussel 2011, p. 162-163.

[106] N. Horn, *Aequitas in den Lehren des Baldus*, [Forschungen zur neueren Privatrechtsgeschichte, 11], Köln-Graz 1968, p. 54-55. It might be noted, however, that the canon law also aspired to be a kind of *ius commune*, namely a law common to all Christian nations; cf. Bellomo, *L'Europa del diritto comune*, p. 72-74 and p. 80-83.

[107] Fernando Vázquez de Menchaca, *Controversiae illustres aliaeque usu frequentes*, Francofurti 1668, lib. 1, cap. 45, num. 17, p. 180: '[jus commune] a doctoribus sumitur pro jure civili Romanorum'.

[108] Cf. infra, p. 44.

[109] I. Birocchi, *Alla ricerca dell'ordine, Fonti e cultura giuridica nell'età moderna*, [Il Diritto nella Storia, 9], Torino 2002, p. 51-54; A. Cavanna, *Storia del diritto moderno in Europa, Le fonti e il pensiero giuridico*, 1, Milano 1979, p. 59-62.

[110] E.J.H. Schrage, *Utrumque Ius, Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts*, [Schriften zur europäischen Rechts- und Verfassungsgeschichte, 8], Berlin 1992.

[111] Brundage, *Universities and the 'ius commune' in medieval Europe*, p. 239; E.J.H. Schrage, *Utrumque Ius, Über das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit*, Revue Internationale des Droits de l'Antiquité, 39 (1992), p. 383-412 [Reprinted in: E.J.H. Schrage, *Non quia Romanum sed quia ius, Das Entstehen eines europäischen Rechtsbewußtseins im Mittelalter*, [Bibliotheca Eruditorum, Internationale Bibliothek der Wissenschaften, 17], Goldbach 1996, p. 273-302].

The theologians drew on almost the entire legal heritage to come to grips with complex cases involving contractual transactions. They combined this legal knowledge with Aristotelian-Thomistic philosophy to formulate principles for contract law in general[112]. A factor which undoubtedly contributed to the theologians' familiarity with the civilian tradition was that legal cultures on the Iberian peninsula had undergone the influence of the renaissance of Roman law in a specifically intense way from relatively early on[113]. In fact, the Roman tradition had never really ceased to inspire local rulers. This is true of many regions across Europe, but of Spain in particular[114]. From the *Lex Romana Visigothorum* (506) to the eight-century *Liber Iudiciorum* and the *Fuero Juzgo*, its thirteenth century Spanish translation, the Roman tradition continued its presence on 'Spanish territories'[115] from late Antiquity through the Middle Ages to the early modern period. Most conspicuously, Alfonso X El Sabio (1221-1284) unified the laws in the kingdom of Castilia and Leon through the implementation of Roman law.

It is worthwhile briefly dwelling on the Spanish legal historical tradition, since the theologians often cited these sources. Alfonso X's legislative work in seven parts, the *Siete Partidas* (1265) is a jewel of juristic art which, despite its initial lack of impact on legal practice, remained influential in proto-codifications of Spanish law (*recopilaciones*) until the beginning of the nineteenth century. It also served as a source of inspiration for the *Ordenaçoes Alfonsinas* (1446) of the Portuguese king Alfonso V, intensifying the reception of the *ius commune* on Portuguese territory[116]. The *Ordenaçoes Alfonsinas* (1446), in turn, formed the basis of the *Ordenaçoes Filipinas* (1603), ordered by King Philip II of Spain, which remained in force in Portugal until 1867[117]. Interestingly, the *Siete Partidas* already combined juridical, philosophical and theological sources in a manner that was to become even more typical of the moral theological literature. In addition to references to Roman and canon law jurisprudence, the *Siete Partidas* bear the marks of thinkers such as Aristotle, Seneca, and Thomas Aquinas. One of the express aims of the Siete Partidas as mentioned at

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[112] Gordley, *The philosophical origins of modern contract doctrine*, p. 69.

[113] A. García y García, *Derecho romano-canónico medieval en la Península Ibérica*, in: J. Alvarado (ed.), Historia de la literatura jurídica en la España del antiguo régimen, vol.1, Madrid-Barcelona 2000, p. 79-132.

[114] For an overview of the persistent influence of the Roman tradition in territories other than Spain ranging from the German kingdoms to Constantinople, see, for instance, chapter 8 (*In orbem terrarum*) in Calasso, *Introduzione al diritto comune*, p. 305-340, and Waelkens, *Civium causa*, p. 81-90 and p. 381-382.

[115] We use the rather indefinite term 'Spanish territories', since the political reality of the late medieval Iberian peninsula was diffuse. When the *ius commune* started to exercise its influence in the twelfth century, the response of the various local regimes was variegated. For a detailed account of the reception of the *ius commune* in each region, see Tomas y Valiente, *Manual de Historia del derecho Español*, chapters 12-14, p. 205-262. The opposition to Roman law was particularly vehement in Navarra and Aragón, where the local *fueros* were strong. For instance, only in 1576, when they were faced with the threat of Castilia imposing its legal system, did the *cortes* of Pamplona accept the *ius commune* as subsidiary law in Navarra. Catalonia was more receptive to the *ius commune*. From the beginning, the texts of the *Corpus iuris civilis* were imported in practice to substitute for the *Liber Iudiciorum* and local *costumbres*. The *ius commune* was recognized as a subsidiary source of law in 1409 by the *cortes* of Barcelona. Compare Cavanna, *Storia del diritto moderno in Europa*, 1, p. 418-420.

[116] Cavanna, *Storia del diritto moderno in Europa*, 1, p. 426-427. The reception of the *ius commune* in Portugal is debated in M. Augusto Rodrigues, *Note sul 'ius commune'in Portogallo*, Rivista internazionale di diritto comune, 12 (2001), p. 265-287.

[117] Cavanna, *Storia del diritto moderno in Europa*, 1, p. 269.

the outset of the first law of this proto-codification, was to ensure that people knew how to keep their faith in Christ[118]. The *Siete Partidas* offer a good example, then, of the strong connections between legal and religious cultures on the Iberian peninsula – a relationship that would only be intensified in the sixteenth century.

While the *Siete Partidas* illustrate the early diffusion of the *ius commune* in the kingdom of Castilia and Leon, they also show that this reception was instrumental for the unification of contemporary Spanish legal culture. The revival of Roman law was not an end in itself. Politically speaking, the reception of the *ius commune* was even a sensitive issue, since the spread of Roman law was profoundly associated with the imperialistic tendencies of the Holy Roman Empire[119]. Alfonso X used the revived law of Rome for the purpose of unifying his kingdom, not to cede his power to the Holy Roman Emperor. He declared that he recognized no superior in temporal affairs (*non habemos major sobre nos en lo temporal*)[120]. The *ius commune* derived its authority as a subsidiary legal source from the promulgation by Alfonso X, not from the Holy Roman Emperor. Moreover, this 'nationalized' version of the *ius commune* achieved success in practice from the midst of the fourteenth century onwards. Until then, its implementation was impeded by local forces who abided by the local customary laws (*fueros*) and resisted the king's attempts to centralize power through the use of Roman law.

Eventually, the *ius commune* as absorbed into the *Siete Partidas* gained relevance as a source of law in Castilla and Leon through Alfonso XI's promulgation of the *Ordenamiento de Alcalà* (1348). The *Siete Partidas* was deemed to be subsidiary in force to the *fueros*, which occupied the second place in the hierarchy of norms, and to royal legislation, the primordial legal standard[121]. This hierarchy prevailed until the beginning of the nineteenth century, since many of the rules of the *Ordenamiento de Alcalà* were confirmed by the *recopilaciones*, the compilations of royal legislation. Two of the most famous such compilations were the *Ordenamiento de Montalvo* (1484) and the *Neuva Recopilación* (1567). The *Ordenamiento de Montalvo* was named after its drafter Alonso Díaz de Montalvo. It was also known as the *Ordenanças Reales de Castilla*. The *Neuva Recopilación* was promulgated by King Philip II[122]. In the meantime the *Leyes de Toro* (1505) were published. They contained seminal provisions of Castilian private law, and became a favorite subject of learned commentaries, for instance by Palacios Rubios (c. 1450-1524) and Antonio Gómez[123]. From the sixteenth century onward, the *ius commune* also filtered through into the laws of the

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[118] Alfonso X El Sabio, *Las Siete Partidas, cotejadas con varios codices antiguos por la Real Academia de la Historia, y glosadas por Gregorio López*, Paris 1851, tom. 1, part. 1, tit. 1, l. 1, p. 1-2 : 'Estas leyes de todo este libro son establecimientos como los homes sepan creer et guardar la fe de nuestro señor Jesu Christo complidamente asi come ella es (…).'

[119] Cf. Cavanna, *Storia del diritto moderno in Europa*, 1, p. 56-59.

[120] For discussion, see C. Petit, *Derecho común y derecho castellano*, Tijdschrift voor rechtsgeschiedenis, 50 (1982), p. 157-158.

[121] Tomas y Valiente, *Manual de Historia del derecho Español*, p. 243-244.

[122] Tomas y Valiente, *Manual de Historia del derecho Español*, p. 263-281.

[123] Petit, *Derecho común y derecho castellano*, p. 169-175, and Tomas y Valiente, *Manual de Historia del derecho Español*, p. 268-269 and p. 312-313.

Indies (*derecho indiano*)[124]. In 1805, a year after Napoleon's *Code civil* had appeared in France, the early modern Spanish compilations were absorbed into the *Novísima Recopilación*, of which the first book was still dedicated to the 'Holy Church'[125]. In brief, the Iberian legal tradition, on which the moral theologians heavily drew, was one of the stongholds of the *ius commune* tradition.

Interestingly, the ambiguous approach to the *ius commune* in the Spanish realm is still apparent in Suárez's early seventeenth century *Treatise on the laws and God the legislator* (*Tractatus de legibus et legislatore Deo*). He recalls that the *ius commune* is a direct source of norms only in the territories that are directly subject to the power of the Holy Roman Emperor and in the lands that fall immediately under the power of the Roman Church[126]. In the kingdoms of Portugal and Spain, which are sovereign countries, the *ius commune*, that is 'civil law' (*leges civiles*) or 'imperial law' (*leges imperatorum*), is not binding per se, not even as a subsidiary source of norms. In this regard, Suárez is critical of Antonio Gómez, who apparently claimed that, as a matter of custom, Roman law enjoyed subsidiary force in Spain[127]. In Suárez's view, only if there is no royal legislation on a particular matter can Roman law be used as a subsidiary source of law, provided that the King grants explicit authority to those specific, subsidiary provisions of Roman law[128]. In other words, Suárez confirms that ultimately, the King decides whether Roman law can be considered binding in a certain field. He recalls an old Spanish adage that states that 'citing from Roman law, that is the law of the Emperor, is punished with execution'. This principle was laid down by Kings Alfonso X and Alfonso XI. The *Leyes de Toro* and the *Nueva Recopilación* re-affirmed that the only laws that could be cited in court were the laws of the kingdom[129]. Consequently,

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[124] On the Spanish colonial law (*derecho indiano*) and its relationship to the *ius commune*, see Tomas y Valiente, *Manual de Historia del derecho Español*, p. 325-345; A. Pérez Martín, *Derecho Común, Derecho Castellano, Derecho Indiano*, in : Rivista internazionale di diritto comune, 5 (1994), p. 43-90 ; J. Barrientos Grandon, *El sistema del 'ius commune' en las Indias occidentales*, Rivista internazionale di diritto commune, 10 (1999), p. 53-137; M. Mirow, *Private law, lawyers and legal institutions in Spanish America, 1500-2000*, Leiden 2003 [=doct. diss.], p. 60-70, and M. Mirow, *Latin American law, A history of private law and institutions in Spanish America*, Austin, TX, 2004, esp. p. 45-53.

[125] Tomas y Valiente, *Manual de Historia del derecho Español*, p. 397-398.

[126] Suárez, *Tractatus de legibus et legislatore Deo*, lib. 3, cap. 8, num. 1, in : Opera omnia, editio nova a Carolo Berton, Parisiis 1856, tom. 5, p. 199.

[127] Suárez, *Tractatus de legibus et legislatore Deo*, lib. 3, cap. 8, num. 5, p. 201 : 'Addunt vero aliqui consuetudine receptum esse in Hispania, ut jus civile servetur, ubi leges regni desunt. Ita tenet Burgos de Paz in l. 1 Tauri, num. 520, ubi etiam Antonius Gomezius num. 10 sentit leges civiles habere vim legis in Hispania, deficiente lege regni ; non tamen affert jus in quo id fundetur, nec consuetudinis mentionem facit, sed tantum ait esse communem opinionem. Re tamen vera non habet sufficiens fundamentum ; nam constat ex dictis illa leges ex vi suae originis non habere vim in Hispania.'

[128] Suárez, *Tractatus de legibus et legislatore Deo*, lib. 3, cap. 8, num. 3, p. 200 : 'Sic etiam in hoc regno Lusitaniae, quod eisdem titulis supremum est, quibus regnum Hispaniae, jus civile per se non obligat, eique per leges regni derogari potest, ac saepe derogatur : ubi autem deest lex regni, servatur civile, non vi sua, sed ex ordinatione propria ejusdem regni.'

[129] Suárez, *Tractatus de legibus et legislatore Deo*, lib. 3, cap. 8, num. 4, p. 200-201: 'Idemque in Hispania expresse cautum est legibus regni (…) et refert Palacium Rub. dicentem Hispanos olim constituisse, ut qui leges imperatorum allegaret capite plecteretur. (…) Item in l. 1 Tauri refertur antiqua lex regis Alphonsi, quae ibi confirmatur et renovatur, in qua declaratur quo ordine et modo judicandum sit per proprias leges Hispaniae, nullaque ratio habetur juris civilis in ratione legis ac juris. Additur vero ibidem permitti nihilominus in Hispania

'imperial laws' or 'civil laws' are not in force in Spain. Still, it is permitted for academics to study the civilian tradition for the sake of the erudition and wisdom it contains. Moreover, to the extent that the 'civil laws' express natural law, they are binding by virtue of natural law, according to Suárez[130]. Even if they are not expressive of a natural obligation, they can serve as a model of prudence and equity (*per modum exemplarium ad imitandam prudentiam et aequitatem*).

The *ius commune*, then, clearly was not merely present as an attenuated force. Instead, theologians consciously used it as a precious source of wisdom and argument. In a style reminiscent of the so-called *mos italicus*, the theologians fiercely debated the right interpretation of provisions contained in the texts of the civilian tradition. Using the dialectical and scholastic method also typical of the late medieval jurists, they entered into vigorous debates with authorities past and present to weigh the opinions on the correct meaning of legal texts from the Code, the Digest, the Institutes and the Novels. References to jurists of Orléans, such as Pierre de Belleperche (ca. 1247-1308) are not insignificant[131]. The theologians were much more heavily indebted, though, to the work of post-glossators such as Bartolus de Saxoferrato (1313-1357)[132]. The theologians' predilection for Bartolus might have had to do with the fact that Bartolus had not been afraid of assimilating the principles of Aristotelian-Thomistic philosophy in the first place. It has been shown, indeed, that Bartolus deliberately integrated argumentations from theology and canon law into the field of civil law[133].

By the same token, their involvement with the canon law tradition was profound. Their discussions on contract law are replete with references to Gratian's *Decretum* and Pope Gregory IX's *Liber Extra*. The opinions of great canonists such as Nicolaus de Tudeschis

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leges civiles in publicis Academiis doceri, et interpretari propter earum eruditionem et sapientiam, non quia per illas judicandum sit. | Et in l. 2 Tauri adduntur illa verba, per leges regni, et non per alias judicandum esse, et omnia haec novissime confirmantur in nova recopilatione l. 1, ante librum 1, et lib. 2, l. 1 et 2. Ex quibus legibus manifestum est leges civiles in Hispania non habere vim legum quatenus leges positivae sunt.'

[130] Suárez, *Tractatus de legibus et legislatore Deo*, lib. 3, cap. 8, num. 4, p. 201 : 'Quatenus vero illae leges in multis continent et declarant ipsam naturalem legem, servandae erunt in vi legis naturalis, non in vi legis humanae. (…) Item quamvis non contineant naturalem obligationem, nec etiam per se obligent, deservire possunt per modum exemplarium ad imitandam prudentiam et aequitatem, quam frequentius continent, sive in taxandis poenis, sive in interpretandis testamentis, in conjecturanda mente defuncti, et similibus.'

[131] On Pierre de Belleperche (Petrus de Bellapertica), whose works are remembered mainly for their influence on Bartolus and Baldus thanks to the intermediation of Cino da Pistoia (c. 1270-1336/7), see F. Soetermeer, s.v. *Belleperche*, in: P. Arabeyre - J.-L. Halpérin - J. Krynen (eds.), Dictionnaire historique des juristes français, XIIe-XXe siècle, Paris 2007, p. 61-62; and K. Bezemer, *Pierre de Belleperche, Portrait of a legal puritan*, [Studien zur europäischen Rechtsgeschichte, 194], Frankfurt am Main 2005.

[132] On Bartolus, see the recent studies by S. Lepsius, *Der Richter und die Zeugen, Eine Untersuchung anhand des Tractatus testimoniorum des Bartolus von Sassoferrato, Mit Edition*, [Studien zur europäischen Rechtsgeschichte, 158], Frankfurt am Main 2003 ; and *Von Zweifeln zur Überzeugung, Der Zeugenbeweis im gelehrten Recht ausgehend von der Abhandlung des Bartolus von Sassoferrato*, [Studien zur europäischen Rechtsgeschichte, 160], Frankfurt am Main 2003.

[133] S. Lepsius, *Juristische Theoriebildung und Philosophische Kategorien, Bemerkungen zur Arbeitsweise des Bartolus von Sassoferrato*, in: M. Kaufhold (ed.), Politische Reflexion in der Welt des späten Mittelalters / Political thought in the ages of scholasticism, essays in honour of Jürgen Miethke, [Studies in Medieval and Reformation traditions, 103], Leiden-Boston 2004, p. 287-304; S. Lepsius, *Taking the institutional context seriously, A comment on James Gordley*, The American Journal of Comparative Law, 56 (2008), p. 661-662.

(1386-1455), better known as Abbas Panormitanus or Abbas Siculus, are a constant point of reference[134].

In the sixteenth century Spanish experience, the boundaries between legal and theological scholarship turn out to be rather porous. This is even more true of the Spanish legal tradition as it evolved in the Indies. The tremendous variety of sources quoted by a famous Spanish jurist from the first half of the seventeenth century such as Juan de Solórzano Pereira (1575-1655) evidences the syncretic nature of the Spanish legal culture in the early modern period. In his standard work on the law of the Indies (*De indiarum iure*), Solórzano Pereira quoted extensively from patristic sources, the *ius commune*, the humanist jurists and the moral theologians[135].

Eminent scholars used to teach that the culture of the *ius commune* lost the battle against the rising power of *iura propria* in the course of sixteenth century, since the *ius commune* came under the twin attack from legal humanism and the 'second scholastic'[136]. It is beyond doubt that the *ius commune* lost much of its significance in Europe at least from the middle of the sixteenth century onwards, as the nation state became the 'basic legal unit'[137]. There is also a certain amount of truth in the proposition that the 'second scholastic' and, even more so, legal humanism contributed to the demise of the the *ius commune*. Both the humanist jurists and the moral theologians regarded the *ius commune* as a historical source of useful juridical tools rather than a set of immutable truths. Yet it is difficult to make sweeping generalizations on this topic, certainly when it comes to the transformation of the *ius commune* in the works of the 'late scholastics'. At any rate, the *ius commune* was continuously praised by theologians as a unique source of knowledge for confessional practice. A brief look at Melchor Cano will illustrate this.

In his posthumously published masterpiece on the hierarchy of theological sources, *De locis theologicis*, the Dominican friar Melchor Cano (c. 1509-1560) concluded that both canon law and civil law were an extremely useful and authoritative source of norms for the

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[134] Nicolaus de Tudeschis was known under these synonyms, since he obtained the abbacy of Santa Maria di Maniace near Mount Etna in Sicily, even though he does not seem to have been present there very often; see K. Pennington, *Nicolaus de Tudeschis (Panormitanus)*, in: O. Condorelli (ed.), Niccolò Tedeschi (Abbas Panormitanus) e i suoi Commentaria in Decretales, [I libri di Erice, 25], Roma 2000, p. 9-36. M. Ascheri, *Nicola 'el monaco', consulente, con edizione di due suoi pareri olografi per la Toscana*, in: O. Condorelli (ed.), Niccolò Tedeschi (Abbas Panormitanus) e i suoi Commentaria in Decretales, [I libri di Erice, 25], Roma 2000, p. 9-36. Panormitanus was busy attending councils and giving legal advice, as is illustrated in the same volume by M. Ascheri, *Nicola 'el monaco', consulente, con edizione di due suoi pareri olografi per la Toscana*, p. 37-68.

[135] See the impressive number of authorities cited in his work, listed in Juan de Solórzano y Pereira, *De indiarum iure sive de iusta Indiarum Occidentalium inquisitione, acquisitione et retentione*, lib. 1: *De inquisitione Indiarum*, ed. C. Baciero e.a., [Corpus Hispanorum de Pace, Serie 2, 8], Madrid 2001, p. 615-640.

[136] Bellomo, *L'Europa del diritto comune*, p. 107. The author has acknowledged that this view on the alleged crisis of the *ius commune* in the sixteenth century is subject to revision; see M. Bellomo, *Condividendo, rispondendo, aggiungendo, Riflessioni intorno al 'ius commune'*, Rivista internazionale di diritto comune, 11 (2000), p. 295, n. 19. Since we cannot go into the subject of legal humanism in France and its attitude toward Roman law, we refer to Birocchi, *Alla ricerca dell'ordine*, p. 1-49 for a critical analysis of the authoritative status of Roman law among the legal humanists.

[137] This point is made with particular vehemence in D. Osler, *The myth of European legal history*, Rechtshistorisches Journal, 16 (1997), p. 393-410.

theologian[138]. The civilian tradition was praised as a unique source of elegant, technical legal vocabulary[139]. The fifty books of Justinian's Digest were called 'sacred' and 'a temple of wisdom'[140]. Also, Cano expressly criticized Juan Luis Vives' (1492/3-1540) typically humanist undermining of the authority of Roman law. Still, he did share Vives' lament about the corruption of the civilian tradition. Concretely, he dissuaded theologians from relying on the modern commentators of Roman law, since, in contrast to the Roman jurists, contemporary jurists frequently had no training in philosophy[141].

Cano's praise of civil law and canon law as invaluable tools for the sound practice of moral theology was certainly not an exception. An anonymous dissertation preceding Alfonso de' Liguori's *Theologia moralis* expressly confirmed Cano's statement that the knowledge of civil and canon law was not only useful for a moral theologian, but necessary. A theologian claiming to be able to solve a case of conscience without the support of the civilian and canon law tradition was considered to be arrogant[142].

2.1.3 A syncretic legal culture

The works of the canonists Martin de Azpilcueta (1492-1586), alias Dr. Navarrus, and of Diego de Covarruvias y Leyva (1512-1577), his student, have been of particular relevance for stimulating the cross-fertilization between the *ius commune*, the canon law tradition and the moral theological literature. Both stood at the crossroads of canon and civil legal thought, humanism, and scholasticism. Their works are exemplary of the syncretic nature of Spanish legal culture of the early modern period, both on the peninsula and in the Spanish Netherlands.

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[138] Melchor Cano, *De locis theologicis*, edición preparada por Juan Belda Plans, [Biblioteca de Autores Cristianos Maior, 85] Madrid 2006, lib. 10, cap. 8 [Utilidad del Derecho Civil para el teólogo], p. 545-546: 'La verdad es que, contra lo dicho en capítulo anterior, los recursos del Derecho humano pueden ser aprovechados por el teólogo en muchas ocasiones. En efecto, si la ciencia canónica es necesaria al teólogo, y está tan próxima y ligada al conocimiento de las leyes que apenas pueden separarse una y otra cosa, entonces el teólogo debe considerar cosa suya tanto el Derecho Canónico como el Civil, relacionado con el anterior.'

[139] Cano, *De locis theologicis*, lib. 10, cap. 8, p. 547: 'En los anteriores ejemplos nos parece bien el vocabulario técnico de los jurisperitos, pues tampoco es oportuno que hablemos siempre con un lenguaje elegante; (…).'

[140] Cano, *De locis theologicis*, lib. 10, cap. 8, p. 548: 'Afirmo que aquella compilación [Digesto] es cosa santa; con razón lo llamó Justiniano *Templo de la sabiduría* [C. 1,17,1].'

[141] Cano, *De locis theologicis*, lib. 10, cap. 9 [Fuerza y valor del argumento tomado del derecho civil], p. 549: 'Y no podemos aprobar que Luis Vives se empeñe en minar toda la fuerza de las leyes romanas y desvirtuar su autoridad. Con frecuencia es demasiado indulgente consigo mismo cuando fustiga la corrupción de la disciplinas. (…) Por otra parte, una cosa es criticar las leyes civiles, sobre todo las sancionadas por la costumbre en una República bien constituida, y otra denunciar los errors de los comentaristas; aunque Luis, en lo que atañe a los jurisperitos, piensa lo mismo que nosotros.'

[142] Alfonso de' Liguori, Bassani 1773, *Theologia moralis*, tom. 1, prol. (*Dissertatio prolegomena de casuisticae theologiae originibus, locis atque praestantia*), part. 2 (*Pars didactica*), app. 1 (*De jure utroque canonico et civili deque ejus usu in morali theologia*), par. 1 (*Juris utriusque canonici et civilis notitiam theologo morali necessarium esse*), p. lxiii: 'At pene innumera sunt in morali theologia, quae sine canonum scientia definiri non possint. (…) In his aliisque sexcentis hujus generis, theologus insolentissimus erit, si absque canonibus atque jurisperitis inconsultis sententiam ferre ausus fuerit. Plura vide apud Canum de locis theologicis (…). Atque hinc constare puto, juris quoque civilis notitiam non utilem modo theologo morali esse, sed et necessariam. Nam multa sunt in theologia morali quae ex juris civilis institutis pendent, neque aliter definiri possunt quam legibus.'

Dr. Navarrus was born in Barásoain in Navarra to the noble family Azpilcueta[143]. He studied the arts at Alcalá de Henares with doctor Miranda, himself a pupil of the Scottish, nominalist philosopher John Mair (1467-1550). Undoubtedly for political reasons, he left Spain in 1516 to study law in Toulouse, where he also taught for a couple years. In France he was exposed to both the revival of Thomism and the rise of legal humanism. To obtain his doctoral degree, Martin de Azpilcueta went to Salamanca in 1524, where he became a professor of canon law until Emperor Charles V called upon him in 1537 to teach at Coïmbra. For approximately the last two decades of his life, he worked as a counselor to the *Penitenzieria Apostolica*, the tribunal of conscience of the Holy See[144]. Covarruvias, one of Dr. Navarrus' students at Salamanca, was as difficult to put into a category as his master[145]. While drawing much inspiration from the scholastic tradition, they shared a love for the typically humanist ideal of writing perfect, limpid Latin[146]. Not without reason, Dr. Navarrus has been called a 'humanist jurist'[147].

The 'Spanish Bartolus', as Covarruvias was nicknamed, quoted as easily from the classical authors, the theologians, and the humanists, as he did from the civilians. Perhaps the

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[143] The following biographical details on Dr. Navarrus are borrowed from the detailed account in V. Lavenia, *Martín de Azpilcueta (1492-1586), Un profilo*, Archivio Italiano per la storia della pietà, 16 (2003), p. 15-148. See also E. Tejero, *El Doctor Navarro en la historia de la doctrina canónica y moral*, in: Estudios sobre el Doctor Navarro en el IV centenario de la muerte de Martín de Azpilcueta, Pamplona 1988, p. 125-180. Dr. Navarrus is not only famous for his legacy as a moralist and a canonist, he also formulated groundbreaking economic ideas, cf. B. Schefold (ed.), *Vademecum zu zwei Klassikern des spanishen Wirtschaftsdenkens, Martín de Azpilcuetas 'Comentario resolutorio de Cambios' und Luis Ortiz' 'Memorial del Contador Luis Ortiz a Felipe II'*, Düsseldorf 1998.

[144] For an introduction to the jurisdiction of the *Penitenzieria Apostolica*, which cries out for further study, see P. Chouët, *La sacrée Pénitencerie Apostolique, Étude de droit et d'histoire*, Lyon 1908; L. Schmugge, *Verwaltung des Gewissens, Beobachtungen zu den Registern der päpstlichen Pönitentiarie*, Rivista internazionale di diritto comune, 7 (1996), p. 47-76; M. Maillard-Luypaert, *Les suppliques de la pénitencerie apostolique pour les diocèses de Cambrai, Liège, Thérouanne et Tournai (1410-1411)*, [Analecta Vaticano-Belgica, Série 1, 34], Bruxelles 2003, p. 27-53 ; and J. Ickx, *Ipsa vero officii maioris Penitentiarii institutio non reperitur? La nascità di un Tribunale della coscienza*, in: M. Sodi - J. Ickx (eds.), La penitenzieria apostolica e il sacramento della penitenza, Percorsi storici, giuridici, teologici e prospettive pastorali, Città del Vaticano 2009, p. 19-50.

[145] Tomas y Valiente, *Manual de Historia del derecho Español*, p. 309-310. Valiente acknowledges that Covarruvias escapes any attempt to classify him, but he treats Covarruvias in the same chapter that discusses the humanist jurists Antonio de Nebrija (1441-1522) and Antonio Agustín (1516-1568). Further biographical details on Covarruvias can be found in F. Merzbacher, *Azpilcueta und Covarruvias, Zur Gewaltendoktrin der spanischen Kanonistik im Goldenen Zeitalter*, in: G. Köbler – H. Drüppel – D. Willoweit (ed.), Friedrich Merzbacher, Recht-Staat-Kirche, Ausgewählte Aufsätze, [Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht, 18], Wien-Köln-Graz 1989, p. 275-280; J. Finestres, *El humanismo jurídico en las universidades españolas, Siglos XVI-XVIII*, in : Rodríguez, L.-Bezares S. (eds.), Las Universidades Hispánicas de la Monarquía de los Austrias al Centralismo liberal, Salamanca 2000, vol. 1, p. 317-320; and N. Brieskorn, *Diego de Covarrubias y Leyva, Zum Friedens- und Kriegsdenken eines Kanonisten des 16. Jahrhunderts*, in: N. Brieskorn – M. Riedenauer (ed.), Suche nach Frieden, Politische Ethik in der Frühen Neuzeit II, Stuttgart 2002, p. 323-352.

[146] E.g. Martín de Azpilcueta, *In tres de poenitentia distinctiones posteriores commentarii*, Conimbricae 1542, [Ad auditores]: 'Cum enim illum erigere paulum potuerimus, ut multis potius quam paucis placeremus ac prodessemus usque ad plenam perspicuitatem illum deiecisse nos credimus a barbara boce ac phrasi quatenus per stilum scholasticum licuit abstinentes.'

[147] C. Zendri, *L'usura nella dottrina dei giuristi umanisti, Martin de Azpilcueta (1492-1586)*, in : D. Quaglioni – G. Todeschini – M. Varanini (eds.), Credito e usura fra teologia, diritto e amministrazione (sec. XII-XVI), [Collection de l'École française de Rome, 346], Rome 2005, p. 265-290.

only category which would do justice to the hybrid thought of both Dr. Navarrus and Covarruvias is 'humanist scholastic canon law' – a neologism which shows the inadequacy of the traditional categories when applied to sixteenth century Spanish juridical thought. Then again, Covarruvias was not only a great academic, but also actively engaged in forensic practice. Besides teaching canon law at Salamanca from 1543 onwards, he started his legal career as a judge in the *Chancillería* of Granada, participated in the Council of Trent, served as the bishop of Ciudad Rodrigo in 1560 and of Segovia in 1565, and eventually became the president of the *Consejo Real de Castilla* in 1573.

Dr. Navarrus and Covarruvias are among the most important and direct sources of juridical thought for theologians. However, the fusion of the traditions of civil law, canon law, and moral philosophy was not the exclusive domain of Dr. Navarrus and Covarruvias. They were tapping into a wider trend, which mixed legal and moral traditions. It found fertile ground in many different regions in the early modern Spanish empire, such as the Spanish Netherlands. The work of the sixteenth century jurists at the University of Leuven, too, drew on a mix of several traditions, such as Bartolism, legal humanism, and scholastic thought[148]. The general acceptance in the sixteenth-century Netherlands that naked pacts are binding (*pacta nuda sunt servanda*) might be due in no small measure to this singular fusion of civil and canon law traditions at the University of Leuven[149].

A seminal synthesis between civil law, canon law, and moral thought was already being forged at the beginning of the sixteenth century in the works of an exceptional jurist such as Nicolaes Everaerts (1463/4-1516), a professor at the University of Leuven who went on to become the president of the Council of Malines[150]. Everaerts heralded in a tradition of practice-oriented legal thought which combined a profound expertise in Romano-canon law and a great sensitivity for moral thought[151]. He was a friend of Erasmus and is considered to be a protagonist of the legal humanist movement at the University of Leuven[152]. The synthesis created by Everaerts not only inspired generations of jurists in the Low Countries, but also the

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[148] L. Waelkens, *Was er in de zestiende eeuw een Leuvense invloed op het Europese contractenrecht?*, in: B. Tilleman – A. Verbeke (eds.), Actualia vermogensrecht, Brugge 2005, p. 3-16. It is worthwhile noting with the author on p. 8-9 that despite King Philip II's attempt to separate the study of civil law and canon law by founding three royal chairs in law (1557), the influence of canon law persisted at the Faculty of Law of the University of Leuven. For example, the calvinist jurist Elbertus Leoninus (1519/20-1598) taught canon law for a certain period. Also, professor of Roman law Johannes Wamesius (1524-1590) went on to occupy the chair of canon law.

[149] Waelkens, *Was er in de zestiende eeuw een Leuvense invloed op het Europese contractenrecht ?*, p. 15-16.

[150] On the life and times of Everaerts, see the biograpy by D. van den Auweele in G. Van Dievoet e.a. (eds.), *Lovanium docet, Geschiedenis van de Leuvense Rechtsfaculteit (1425-1914)*, Cataloog bij de tentoonstelling in de Centrale Bibliotheek (25.5-2.7.1988), Leuven 1988, p. 60-63, and O.M.D.F. Vervaart, *Studies over Nicolaas Everaerts (1462-1532) en zijn Topica*, Arnhem 1994 [=doct. diss.], p. 3-25.

[151] On Everaerts' familiarity with the theologian Conrad Summenhart, in particular, see Vervaart, *Studies over Nicolaas Everaerts*, p. 110-111. Compare L. Waelkens, *Nicolaas Everaerts, Un célèbre méconnu du droit commun (1463/4-1532)*, Rivista internazionale di diritto comune, 15 (2004), p. 182 : 'Everaerts raisonne toujours *utroque iure*. En outre il ne cite pas seulement les légistes et les canonistes, mais également des moralistes et des pénitenciers comme Angelus de Clavasio, Astesanus de Asti ou Conrad Summenhart.'

[152] E.g. V. Brants, *La faculté de droit de l'Université de Louvain à travers cinq siècles, Étude historique*, Paris-Bruxelles 1917, p. 8-9; and R. Dekkers, *Het humanisme en de rechtswetenschap in de Nederlanden*, Antwerpen 1938, p. 1-36.

Spanish theologian Francisco de Vitoria[153]. Whether a direct connection between Everaerts and Vitoria existed is unknown. But it is beyond doubt that they participated in the same tendency of fusing canon law, civil law, moral thought, and humanist mentality. This trend can be witnessed from the early sixteenth century onward, in the Southern Netherlands as well as on the Spanish mainland.

The theologians did not content themselves with absorbing the legal traditions. They also claimed to be superior to the civilians and canonists. They vindicated the power to evaluate positive law – contemporary statutory law, the law of the Church, and the *ius commune* – from the perspective of natural law. For example, Domingo de Soto argued that it was the task of theologians to evaluate the moral foundations of civil law[154]. Boasting of the superiority of their discipline, the theologians claimed to be able to speak with authority in all matters related to man's existence. As the opening sentence of Francisco de Vitoria's *Relectio de potestate civili* reads[155], 'the office and calling of a theologian are so wide, that no argument or controversy on any subject can be considered foreign to his profession.'

2.2 From manuals for confessors to systematic legal treatises

2.2.1 Symbiosis *versus* separation of law and morality

The intense relationship between law and theology naturally reaches much farther back than the moral theologians of the sixteenth and seventeenth centuries[156]. During the Middle Ages, all monastic orders, even the most ascetic ones, became deeply involved with law[157]. It is unwise for an historian to divide the flux of historical events into neatly distinguished epochs, or worse still, to revise the existing *caesurae*. Were it not unwise, then it would be tempting to reconsider the Middle Ages as a thousand-year period beginning with Benedict of Nursia's famous maxim 'Ora et labora' as expressed during his Rule around 550, and ending with

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[153] Waelkens, *Civium causa*, p. 114. It is beyond doubt that jurists from Leuven did influence the Spanish moral theologians. This is very clear in Tomás Sánchez's work. References to Nicolaes Everaerts, in particular, are scarce but not absent, e.g. Sánchez, *Disputationes de sancto matrimonii sacramento*, Antverpiae 1620, tom. 1, lib. 1, disp. 65, num. 1, p. 111.

[154] Soto, *De iustitia et iure libri decem / De la justicia y del derecho en diez libros*, edición facsimilar de la hecha por D. de Soto en 1556 [Salamanca], con su versión castellana corrrespondiente, Introducción historica y teologico-juridica por Venancio Diego Carro, Versión española de Marcelino González Ordóñez, [Instituto de estudios políticos, Sección de teólogos juristas, 1], Madrid 1967 (hereafter : Soto, *De iustitia et iure*, ed. fac. V. Diego Carro – M. González Ordóñez), vol. 1, Prooemium, p. 5.

[155] Francisco de Vitoria, *On Civil Power*, prologue, cited from the translation in A. Pagden – J. Lawrance (eds.), *Francisco de Vitoria, Political writings*, Cambridge 2001 [=1991], p. 3. We are grateful to Professor Charles Donahue Jr. for bringing this text to our attention.

[156] The following paragraphs borrow in part from material previously published in Decock, *From law to paradise*, p. 14-33.

[157] Hence, the fundamental contribution of Franciscans such as Pier Giovanni Olivi (1248-1298) to contract law and economic thought; cf. S. Piron, *Marchands et confesseurs, Le Traité des contrats d'Olivi dans son contexte (Narbonne, fin XIIIe-début XIVe siècle)*, in : L'Argent au Moyen Age, XXVIIIe Congrès de la SHMESP (Clermont-Ferrand, 1997), Paris 1998, p. 289-308. Olivi is also the subject of detailed study in several, fundamental contributions by G. Todeschini, e.g. *Il prezzo della salvezza, Lessici medievali del pensiero económico*, Roma 1994, and *I mercanti e il tempio, La società cristiana e il circolo virtuoso della ricchezza fra Medioevo ed Età Moderna*, Bologna 2002.

Luther's symbolic burning of Angelo Carletti de Chivasso's (ca. 1414-1495) famous manual for confessors, the *Summa Angelica* (1486) on December 10th, 1520 at Wittenberg. Let us explain this a little further.

Benedict's Rule had been an authentic exhortation to reconcile the active and the contemplative life. The medieval tradition of manuals for confessors – which enjoyed a boom from at least the fourth Lateran Council (1215) onwards[158] – had eventually tried to determine the practical consequences of that ideal. The technical devices they used for bridging the gap between the lofty principles of Christian spirituality and the realities of the active life were Roman and canon law. These legal sources were brought to bear on the qualms of conscience arising in all areas of life[159]. However, Luther no longer wanted legal argument to dominate the internal forum, as it did in the *Summa Angelica* and other manuals for confessors[160]. It is certainly no coincidence that Silvester Mazzolini da Prierio (1456-1523), the Dominican theologian who was the author of the other famous manual for confessors, the *Summa Silvestrina*, was one of the first who became involved in a direct polemic with Luther, notably on the subject of papal power[161].

Significantly, two thirds of the references contained in Angelo Carletti's *Summa Angelica* were taken from Roman law, canon law and medieval jurists. This deeply juridical character of the *Summa Angelica* is not surprising. For one thing, Angelo Carletti de Chivasso himself was a former professor of theology and law at the university of Bologna and a magistrate who eventually became a Franciscan friar[162]. For another thing, the juridical and the theological spheres already overlapped in earlier manuals as well, for instance in the

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[158] The secondary literature on the manuals for confessors is abundant. See, for example, F.W.H. Wasserschleben, *Die Bussordnungen der abendländischen Kirche*, Halle 1851; H.J. Schmitz, *Die Bussbücher und Bussdisziplin der Kirche*, Mainz 1883; P. Michaud-Quantin, *Sommes de casuistique et manuels de confession au moyen âge (XIIe-XVIe siècles)*, Leuven-Lille-Montréal 1962; Ch. Bergfeld, *Katholische Moraltheologie und Naturrechtslehre*, in: H. Coing (ed.), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, Band II. Neuere Zeit (1500-1800), Das Zeitalter des gemeinen Rechts, Teilband I.1. Wissenschaft, München 1977, p. 999-1033; and O.I. Langholm, *The merchants in the confessional, Trade and price in the pre-Reformation penitential handbooks*, [Studies in Medieval and Reformation Thought, 93], Leiden 2003, p. 233-271; J. Goering, *The scholastic turn (1100-1500), Penitential theology and law in the schools*, in: A. Firey (ed.), A new history of penance, [Brill's Companions to the Christian Tradition, 14], Leiden-Boston 2008, p. 219-238; J. Goering, *The internal forum and the literature of penance and confession*, in: W. Hartmann – K. Pennington (eds.), The history of medieval canon law in the classical period, 1140-1234, From Gratian to the decretals of Pope Gregory IX, Washington D.C. 2008, p. 379-428. Importantly, under the supervision of Prof. Dr. Thomas Duve, PD Dr. Christiane Birr is currently conducting research on the manuals for confessors in the late medieval and early modern period at the Max-Planck-Insitute for European Legal History (Frankfurt/Main).

[159] The result is that those manuals offer us a unique insight into late medieval Christian societies, as has recently been noted in regard to the early fourteenth-century *Libro de las confesiones*A. García y García – B. Alonso Rodríguez – F. Cantelar Rodríguez (eds.), *Martín Pérez, Libro de las confesiones, Una radiografía de la sociedad medieval española*, [Biblioteca de autores cristianos maior, 69], Madrid 2002. It is worthwhile noting that the *Libro de las confesiones* (c. 1312-1317) counts no less than 757 pages in its modern edition.

[160] Pihlajamäki, *Executor divinarum et suarum legum, Criminal law and the Lutheran Reformation*, p. 183.

[161] M. Scattola, *Eine interkonfessionelle Debatte, Wie die Spanische Spätscholastik die politische Theologie des Mittelalters mit der Hilfe des Aristoteles revidierte*, in: A. Fidora – J. Fried – M. Lutz-Bachmann – L. Schorn-Schütte (eds.), Politischer Aristotelismus und Religion in Mittelalter und Früher Neuzeit, [Wissenskultur und gesellschaftlicher Wandel, 23], Berlin 2007, p. 141, n. 9.

[162] For more biographical details, see S. Pezzella, in: *Dizionario Biografico degli Italiani*, 20 (1977), p. 136-138.

Speculum curatorum drafted by Ranulph Higden (c. 1285-1364) from the Benedictine monastery in Chester, and in the *Gnotosolitos parvus* written by Arnold Gheyloven of Rotterdam (c. 1375-1442), a regular canon at the Windesheim monastery at Groenendaal near Brussels[163]. The eminent legal historian Winfried Trusen has cogently argued that the manuals for confessors provided one of the highways through which the *ius commune* took root at the grassroots level of society[164]. This is even more true of the subsequent moral theological tradition. The literature of theologians such as Soto, Molina and Lessius contributed to no small extent to the ongoing diffusion of the texts of the *ius commune* and to their preservation as a repository of legal vocabulary and legal argument until the modern era.

Martin Luther almost succeeded in his *damnatio memoriae* of 1520. Until recently, little attention has been paid to the fact that the Catholic Church's antagonistic reaction to the Protestant movement actually strengthened the combination of law and theology that formed the nub of Luther's criticism[165]. The sixteenth-century Dominicans and Jesuits challenged Luther's heterodox view of morality by reinforcing precisely what he had condemned[166]. They gave spiritual advice to the flock by relying on pagan philosophy and the *ius commune*. Luther thought that personal faith, divine grace and the Bible were the principal agents in the process of justification. Moreover, he rejected the intermediary role of the Church as the guide of the individual's conscience. The Dominicans and the Jesuits, on the other hand, remained faithful to the adage of Thomas Aquinas, that grace perfects nature, provided that the potential of nature has been developed in the first place (*gratia naturam praesupponit et perficit*). They also believed that the dictates of conscience could only be spelled out correctly by clerical experts. For Protestants, the individual's conscience was judge; for Catholics, the confessor was considered judge[167].

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[163] E. Crook – M. Jennings (ed. and transl.), *Ranulph Higden, Speculum Curatorum, A mirror for curates, Book 1, The commandments*, [Dallas Medieval Texts and Translations, 13], Leuven 2011; A.G. Weiler, *Het morele veld van de Moderne Devotie, weerspiegeld in de* Gnotosolitos parvus *van Arnold Gheyloven van Rotterdam, 1423, Een Summa van moraaltheologie, kerkelijk recht en spiritualiteit voor studenten in Leuven en Deventer*, [Middeleeuwse studies en bronnen, 96], Hilversum 2006, p. 41-72.

[164] W. Trusen, *Forum internum und gelehrtes Recht im Spätmittelalter, Summae confessorum und Traktate als Wegbereiter der Rezeption*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kan. Abt., 57 (1971), p. 83-126; W. Trusen, *Zur Bedeutung des geistlichen Forum internum und externum für die spätmittelalterliche Gesellschaft*', Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kan. Abt., 76 (1990), p. 254-285.

[165] There are excellent studies, however, by M. Turrini, *La coscienza e le leggi, Morale e diritto nei testi per la confessione delle prima età moderna*, Bologna 1991; A. Prosperi, *Tribunali della coscienza, Inquisitori, confessori, missionari*, [Bibliotheca di cultura storica, 214], Torino 1996; E. Brambilla, *Giuristi, teologi e giustizia ecclesiastica dal '500 alla fine del '700*, in: M.L. Betri – A. Pastore (eds.), Avvocati, medici, ingegneri, Alle origini delle professioni moderne (secoli XVI-XIX), Bologna 1997, p. 169-206; W. de Boer, *The conquest of the soul, Confession, discipline and public order in counter reformation Milan*, Leiden 2001; R. Rusconi, *L'ordine dei peccati, La confessione tra Medioevo ed età moderna*, Bologna 2002; V. Lavenia, *L'infamia e il perdono, Tributi, pene e confessione nella teologia morale della prima età moderna*, Bologna 2004.

[166] For a description of early modern Catholic legal culture as opposed to the Lutheran Reformation, see M. Schmoeckel, *Fragen zur Konfession des Rechts im 16. Jahrhundert am Beispiel des Strafrechts*, in: I. Dingel – W.-F. Schäufele (eds.), Kommunikation und Transfer im Christentum der Frühen Neuzeit, [Veröffentlichungen des Instituts für Europäische Geschichte Mainz, Beihefte, 74], Mainz 2008, p. 185-187.

[167] See J.F. Keenan, *William Perkins (1558-1602) and the birth of British casuistry*, in: J.F. Keenan – Th.A. Shannon (eds.), The context of casuistry, Washington DC 1995, p. 112. The author goes on to remark, not

It should not come as a surprise, then, that in comparison with their Catholic counterpart, the Protestant traditions in moral theology were characterized by relatively scarce references to sources other than the Gospel and the Old Testament. They emerged from the very condemnation by Luther of that symbiosis of law and morality as it had grown in the Catholic Church. This can clearly be seen in the work *On Conscience* by the Puritan theologian William Ames (1576-1633)[168]. His work is devoid of almost any reference to Roman or canon law, in great contrast to that of the Catholic moral theologians. This is reflective of the wider protestant tradition. To quote Friedrich Balduin's (1575-1627) critique of Catholic 'casuists' such as Cajetan, Dr. Navarrus, and Azor: 'they derive the solutions to far too difficult cases not from the most limpid fountains of Israel (*ex limpidissimis Israelis fontibus*), but from their own scholastic pool and that of others, such as Thomas Aquinas, Tomás Sánchez, and Suárez, and they yield them up to the ignorant mob.'[169].

Scathing critiques of canon law and 'papalizing jurisprudence' were typical of the Protestant reformation. This phenomenon persisted, for instance in Heinrich Ernst Kestner's (1671-1723)' *Discourse on papalizing jurisprudence* (*Discursus de jurisprudentia papizante*)[170]. However, the anti-papal rhetoric employed by Protestant theologians and jurists should not make us blind to their ongoing familiarity with the Catholic moral theological tradition. This is obvious from Balduinus' quoting their names in his *Treatise on cases of conscience*. But it is also obvious from juridical dissertations supervised by an eminent theologian and jurist such as Samuel Stryk (1640-1710). He would become very close to typically anti-Catholic protestant natural lawyers, such as Christian Thomasius (1655-1728). Stryk was even a mentor to Justus Henning Boehmer (1674-1749), the famous author of the *Ius ecclesiasticum protestantium*. A couple of dissertations that were submitted to the faculty of law at the University of Frankfurt/Oder under Stryk's supervision abound with references to Catholic moral theologians such as Leonardus Lessius[171].

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without a certain sense of irony, that the near-conflicting roles of judge and consoler that perplexed Catholic confessors were absolutely irreconcilable in the personal conscience of the Reformed believer.

[168] This is illustrated in regard to the solution of a concrete case of conscience, namely the Merchant of Rhodes, in Decock, *Lessius and the breakdown of the scholastic paradigm*, p. 68.

[169] Friedrich Balduin, *Tractatus de casibus conscientiae*, Wittebergae 1628, Epistola dedicatoria, [s.p.] : '(…) qui non ex limpidissimis Israelis fontibus, sed propriis traditionum scholasticorum et aliorum, ut Thomae Aquinatis, Thomae Sanchez, Suarezii lacunis, decisiones diffiliorum casuum hauserunt et rudi populo propinarunt. 'On Balduin, see Wilhelm Gaß, *Balduin, Friedrich*, in: Allgemeine Deutsche Biographie, 2 (1875), p. 16-17 (URL: http://www.deutsche-biographie.de/pnd116883391.html?anchor=adb; last visited on 20.09.2011).

[170] Heinrich Ernst Kestner, *Discursus de jurisprudentia papizante*, Rintelii 1711, p. 14 : 'Est autem nobis jurisprudentia papizans doctrina corrupta, sive ex papismo, sive ex superstitione fluens, quando circa genuina jurisprudentiae principia aliud statuimus, aliudque inferimus, quam quod recta ratio et vera legum natura exigunt.' For biographical information on Kestner, who became a professor of law at Rintel after his studies at the universities of Frankfurt/Oder and Halle(1671-1723), see F. von Schulte, *Kestner, Heinrich Ernst*, in: Allgemeine Deutsche Biographie, 15 (1882), p. 664 (URL: http://www.deutsche-biographie.de/pnd122950054.html?anchor=adb'; last visited on 20.09.2011).

[171] References to Lessius, to name but one Catholic moral theologian, are contained in: *Disputatio juridica de conscientia partium in judicio*, quam (…) praeside Samuele Strykio (…) placido eruditorum examini submittit Johannes Christianus John (Francofurti ad Viadrum, 1677) [=Diss. jur., Frankfurt/Oder, 1677], e.g. p. 10, 12, 17, 26, 39, 47, 48, 51, 52, 53, 60, 63, 64, 67, 71, 72, 78. Similar observations apply to *Dissertatio de conscientia advocati*, quam (…) praeside Samuele Strykio (…) placido eruditorum examini sistit Ephraim Nazius

To the protestant reformers, *ius commune* and canon law are no longer valid sources for the solution of moral problems. To return to the citation from Friedrich Balduin, only sacred texts of the New and Old Testament (*limpidissimi Israelis fontes*) are justified in arbitrating the solution of moral cases. A starker contrast with Melchor Cano's abovementioned insistence on the necessity of the study of Romano-canon law for confessors and moral theologians could hardly be imagined. Balduin's statement thus heralds in the neat separation, not only of law and morality, but also of the disciplines of jurisprudence and moral theology. A brilliant account of this separation of distinct duties and disciplines was eventually formulated by the Lutheran professor of natural law Samuel von Pufendorf (1632-1694). In the wonderful introduction to his work *On Duties*, which is a true rhetorical masterpiece, Pufendorf distinguished three sources of duties, namely: reason, civil laws, and divine revelation. Contrary to the Catholic moral theologians, he held that it pertained to separate disciplines to analyze the obligations that followed from each of those sources, namely: natural law, civil law, and moral theology, respectively[172]:

> It is therefore manifest that mankind draws the knowledge of his duty, and of what he has to do because it is honest, and of what he has to omit because it it is turpid, from three fountains, so to speak, namely from the light of reason, from the civil laws, and from a peculiar revelation by God. (…). From this, three separate disciplines come forth, of which the first is natural law, which is common to all nations, the other is the civil law of each individual political community, of which there are as many as, or could be as many, as there are political communities in which mankind split up. The third discipline is considered to be moral theology, which is distinct from that part of theology in which the principles of faith are explained.

2.2.2 The Dominicans at Salamanca and the renewal of the Catholic tradition

While the protestant reformation was asserting itself with increasing force, the Catholics revived Thomistic moral philosophy. This is sufficiently well-known[173]. This revival coincided with the reinforcement of the Aristotelian moral tradition, which can generally be

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(Francofurti ad Oderam, 1677) [=Diss. jur., Frankfurt/Oder, 1677], e.g. p. 31, 41, 42, 43, 50, 51, 66, 68, 69, 70. See also *Dissertatio juridica de credentiae revelatione,* quam (…) praeside Samuele Strykio (…) publicae eruditorum disquisitioni exponit Henricus Andreas Breiger (Francofurti ad Viadrum, 1675) [=Diss. jur., Frankfurt/Oder, 1675], e.g. p. 10, 72.

[172] Samuel von Pufendorf, *De officio, Ad lectorem*, in: G. Hartung (ed.), *Samuel Pufendorf, De officio*, in: W. Schmidt-Biggeman (ed.), *Samuel Pufendorf, Gesammelte Werke*, Band 2, Berlin 1997, p. 5: 'Manifestum igitur est, ex tribus velut fontibus homines cognitionem officii sui, et quid in hac vita sibi tanquam honestum sit agendum, tanquam turpe omittendum, haurire; ex lumine rationis, ex legibus civilibus, et ex peculiari revelatione divini numinis. […] Inde et tres separatae disciplinae proveniunt, quarum prima est juris naturalis, omnibus gentibus communis: altera juris civilis singularum civitatum, quae tam multiplex est, aut esse potest, quot numero sunt civitates, in quas genus humanum discessit. Tertia theologia moralis habetur, illi parti theologiae contradistincta, quibus credenda exponuntur.'

[173] See M. Grabmann, *Geschichte der katholischen Theologie seit dem Ausgang der Väterzeit*, Freiburg im Breisgau 1933, p. 151-154, for an overview of the most important commentators of Thomas at the outset of the sixteenth century.

observed during the sixteenth century and seventeenth centuries[174]. The victory of Thomas' *Summa* at the expense of Lombard's *Sentences* has been ascribed, amongst other reasons, to the more expressly juridical and technical character of the *Summa Theologiae*. This characteristic made it more fit for the solution of new and complex problems related to the discovery of the Americas and the expansion of commercial capitalism[175]. It may be recalled that the theologians were frequently consulted by merchants and bankers[176].

A good example of the revival of Thomas at the threshold of the sixteenth century can be seen in the work of the Dominican theologian Pieter Crockaert (c. 1450-1514) from Brussels. In 1509, he replaced Peter Lombard's (1095-1160) *Sententiae* with Thomas Aquinas' *Summa Theologiae* as the main textbook in theology at the University of Paris. Crockaert also wrote a commentary on the *Summa*. However, it was the Italian Dominican Tommaso de Vio (1469-1534), also named Cardinal Cajetanus (Gaetano) after his birthplace Gaeta, who started publishing in 1508 what was to become the standard commentary on Thomas' *Summa Theologiae*[177]. This commentary, particularly its expositions on the binding force of promises, became a point of reference in the Spanish theologians' treatises *On justice and right* and *On contracts*.

As the traditional story goes, it is to the credit of Francisco de Vitoria (1483/1492-1546), a pupil of Crockaert, to have imported Thomism from Paris into Salamanca, laying the foundations of the so-called of 'School of Salamanca', famous for its fundamental contributions to theological, juridical and economic thought[178]. This traditional picture is now subject to qualification, in part because the very concept of the 'School of Salamanca' is

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[174] On the renewed interest for Aristotle which is apparent in the jurists of the early modern period, both in Catholic and Protestant circles, see Birocchi, *Alla ricerca dell'ordine*, p. 159-164, and M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Band I : Reichspublizistik und Policeywissenschaft 1600-1800*, München 1988, p. 80-90. The lines of development of Aristotelianism from the fifteenth to the seventeenth century are expounded in great detail by Forlivesi, *A man, an age, a book*, p. 48-114, and by L. Bianchi, *Continuity and change in the Aristotelian tradition*, in: J. Hankins (ed.). The Cambridge companion to Renaissance philosophy, Cambridge 2007, p. 49-71. For a profound case-study of the reception of Aristotle's *Nicomachean Ethics* in Italy, see D.A. Lines, *Aristotle's Ethics in the Italian Renaissance (ca. 1300-1650), The universities and the problem of moral education*, [Education and society in the Middle Ages and Renaissance, 13], Leiden-Boston 2002.

[175] B. Löber, *Das spanische Gesellschaftsrecht im 16. Jahrhundert*, Freiburg im Breisgau 1965, p. 8-9. The juridical nature of Thomas's thought is analyzed in J.-M. Aubert, *Le droit romain dans l'œuvre de Saint Thomas*, [Bibliothèque Thomiste, 30], Paris 1955 ; T. Mayer-Maly, *Die Rechtslehre des heiligen Thomas von Aquin und die römische Jurisprudenz*, in: J.A. Ankum e.a. (ed.), Mélanges Felix Wubbe offerts par ses collègues et ses amis à l'occasion de son soixante-dixième anniversaire, Fribourg 1993, p. 345-353; K. Seelmann, *Thomas von Aquin am Schnittpunkt von Recht und Theologie, Die Bedeutung der Thomas-Renaissance für die Moderne*, [Luzerner Hochschulreden, 11], Luzern 2000.

[176] For example, in 1530 the Antwerp bankers consulted the doctors of Paris on the licitness of new types of bills of exchange; cf. M. Grice-Hutchinson, *The School of Salamanca, Readings in Spanish monetary theory, 1544-1605*, Oxford 1952, p. 120-126. See also L. Vereecke, *Théologie morale et magistère, avant et après le Concile de Trente*, Le Supplément, Revue d'éthique et théologie morale, 177 (1991), p. 13.

[177] For biographical references, see E. Stöve, s.v. *De Vio, Tommaso*, in: Dizionario biografico degli Italiani; cf. http://www.treccani.it/enciclopedia/tommaso-de-vio_(Dizionario-Biografico)/ (website last visited on 12/09/2011).

[178] Among recent biographical introductions to Vitoria, see D. Deckers, s.v. *Vitoria, Francisco de*, in: Theologische Realenzyklopädie, vol. 35, Berlin – New York 2003, p. 169-173.

under dispute[179]. Also, there is growing evidence that Thomism spread at Spanish universities long before Vitoria's appointment at a college in Valladolid in 1523 and, successively, at the University of Salamanca in 1526. Recent literature points out that Salamanca came under the spell of Thomism from the second half of the fifteenth century onwards through the pioneering work of Pedro Martínez de Osma (c. 1420-1480) and his student Diego de Deza (1443-1523)[180]. Probably, the decisive moments in the move toward Thomism were the reformation of the Dominican monastery in Vallodolid in 1502 and the foundation of an establishment for higher learning called *Santo Tomás* in Seville in 1517.

Vitoria's commentary on Thomas Aquinas' *Summa Theologiae* turned out to be idiosyncratic enough to become very influential. He earned himself a reputation as the 'Spanish Socrates'[181]. His commentaries on Thomas were considered to be more adapted to the concrete demands of the time than Cajetan's rather abstract and convoluted commentary of Thomas[182]. Since the revival of Thomas Aquinas' *Summa theologiae* was inspired by pragmatic motives as much as by dogmatic choices, it is not surprising that the moral theologians were not reluctant to deviate from the conclusions reached by the Doctor Angelicus. They frequently exposed themselves to other currents of thought, for instance to Scotist nominalism[183]. Vitoria's Thomism was intrinsically hybrid in nature. As was true of other theologians of the sixteenth century, Vitoria did not feel constrained by Thomas'

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[179] For an analysis of the problematical history of the conception of 'School of Salamanca' in the twentienth century, see M. Anxo Pena González, *La Escuela de Salamanca, de la Monarquía hispánica al Orbe católico*, [Biblioteca de Autores Cristianos Maior, 90], Madrid 2009, p. 415-484. The term was promoted by Marjorie Grice-Hutchinson to designate a group of scholars who were either directly or indirectly influenced by Francisco de Vitoria in the context of her ground-breaking investigation of early Spanish economic thought; cf. *The School of Salamanca, Readings in Spanish monetary theory, 1544-1605*, Oxford 1952, and *The concept of the School of Salamanca, Its origins and development*, in: L.S. Moss – C.K. Ryan (eds.), Economic thought in Spain, Selected essays of Marjorie Grice-Hutchinson, Cambridge 1993, p. 23-29. Of late, Juan Belda Plans has written a monumental history of the school arguing that it was chiefly a movement for the renewal of scholastic theology; cf. J. Belda Plans, *La escuela de Salamanca y la renovación de la teología en el siglo XVI*, [Biblioteca de Autores Cristianos Maior, 63], Madrid 2000.

[180] Belda Plans, *La escuela de Salamanca*, p. 64-73.

[181] He was named as such by Domingo de Bañez (1528-1604); cf. J. Barrientos García, *Un siglo de moral económica (1526-1629), Tom. 1: Francisco de Vitoria y Domingo de Soto*, [Acta Salmanticensia iussu Senatus Universitatis edita, Filosofía y letras, 164], Salamanca 1985, p. 27.

[182] Belda Plans, *La escuela de Salamanca*, p. 237-241, and A. Brett, *Liberty, right and nature, Individual rights in later scholastic thought*, [Ideas in Context, 44], Cambridge 1997, p. 123.

[183] It has been argued that the opposition became the *via antiqua* and the *via moderna* grew obsolete in the course of the sixteenth century; cf. M.J.F.M. Hoenen, *Via antiqua and via moderna in the fifteenth century, Doctrinal, institutional, and Church political factors in the Wegestreit*, in: R.L. Friedman – L.O. Nielsen (eds.), the medieval heritage in early modern metaphysics and modal theory, 1400-1700, [The new synthese historical library, Texts and studies in the history of philosophy, 53], p. 31. The influence of nominalistic philosophers such as John Mair and Jacques Almain is apparent in the works of the sixteenth century moral theologians and easily explicable in view of the training they received. For further discussion, see L. Vereecke, *Préface à l'histoire de la théologie morale moderne*, in : L. Vereecke, De Guillaume D'Ockham à Saint Alphonse de Liguori, Études d'histoire de la théologie morale moderne 1300-1787, [Bibliotheca Historica Congregationis Sanctissimi Redemptoris, 12], Romae 1986, p. 27-55 ; F. Gómez Camacho, *Later scholastics, Spanish economic thought in the 16th and 17th centuries*, in: S. Todd Lowry – B. Gordon (eds.), Ancient and medieval economic ideas and concepts of social justice, Leiden-New York-Köln 1998, p. 503-562.

viewpoints[184]. In time, the commentaries on Thomas grew into a new literary genre of treatises 'On justice and right' (*De iustitia et iure*). They dealt more specifically with ethical issues and attest to the birth of an autonomous discipline of moral theology[185].

A student of Vitoria, the Dominican Domingo de Soto (c. 1494-1560), was the first to publish such a treatise *De iustitia et iure* in 1553[186]. Soto studied arts at Alcalá de Henares and went on to study theology in Paris, for instance at the Collège Sainte-Barbe where for a short time he studied under the nominalist logician Juan de Celaya (c. 1490-1558) among his teachers[187]. From 1532 onward, he taught at the University of Salamanca, after a short period of teaching metaphysics at the *Complutense*. Soto is noted for his advocating the rights of the poor during the grain crises and the famine in 1540 and 1545. He was appointed as the representative of Emperor Charles V at the Council of Trent, even becoming the emperor's confessor for a couple of years. In 1553 his *De iustitia et iure* was published for the first time, soon followed by an extended edition in 1556. It presented itself as a mirror-for-princes, dedicated to prince Carlos (1545-1568), the first and only child born out of Philip II's marriage to Maria Emanuala of Portugal. Hence, Soto called his work the *Carolopaedia*, by analogy with Xenophon's *Cyropaedia*, the Greek mirror-for-princes written in the early fourth century BC. He compared his mission to that of Aristotle teaching Alexander the Great, Seneca the future emperor Nero, and Plutarch the emperor Trajan[188].

Many view Soto's work as even more juridical than that of his pedecessors[189]. Some suggest that Soto played a major role in the development of a systematic law of contract[190]. There is certainly a good amount of truth in those propositions, although they should not be exaggerated. As a matter of fact, Soto remained quite dependent on the structure of Thomas Aquinas' argument[191]. It is important not to overlook that other theologians, mainly coming

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[184] Similar observations on the 'liberal' use of Thomas by the scholastics of the early modern period can be found in M. Villey, *Bible et philosophie gréco-romaine, De saint Thomas au droit moderne*, in : Dimensions religieuses du droit et notamment sur l'apport de Saint Thomas D'Aquin, [Archives de Philosophie du Droit, 18], Paris 1973, p. 45-48; and F. Motta, *Bellarmino, Una teologia politica della Controriforma*, [Storia, 12], Brescia 2005, p. 553-554.

[185] See Van Houdt, *Leonardus Lessius over lening, intrest en woeker*, p. xxviii.

[186] Belda Plans, *La escuela de Salamanca*, p. 487-498. For a chronological overview of the treatises *De iustitia et iure* in the early modern period, see A. Folgado, *Los tratados De legibus y De iustitia et iure en los autores españoles del siglo XVI y primera mitad del XVII*, La Ciudad de Dios, 172.3 (1959), p. 284-291.

[187] For a detailed biographical account, see V. Beltrán de Heredia, *Domingo de Soto, O.P., Estudio biográfico documentado*, [Biblioteca de teologos españoles, 20], Salamanca 1960, p. 9-588.

[188] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 1), epistola dedicatoria, [p. 3]: 'Scripsit Xenophon Cyropediam, instituit Aristoteles Alexandrum, Neronem Seneca, et Traianum Plutarchus, atque alios alii. Ego vero, quamvis ea utaris sapientum paedagogia, ut a mea pusillitate nullius egeas obsequii, hanc interim tamen Carolopaediam claritudini tuae non sum offere veritus: ubi, uti dicere coeperam, decorem iustitiae, ac perinde foelicissimi principis vultum contempleris.'

[189] E.g. R. Feenstra, *Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen*, in: O. Behrends (ed.), Festschrift für Franz Wieacker zum 70. Geburtstag, Göttingen 1978, p. 219-226.

[190] Gordley, *The philosophical origins of modern contract doctrine*, p. 69-111.

[191] These treatises fall outside the scope of this dissertation. For an overview, see M. Nuding, *Geschäft und Moral, Schriften ‚De contractibus' an mitteleuropäischen Universitäten im späten 14. und frühen 15. Jahrhundert*, in: F.P. Knapp – J. Miethke – M. Niesner (eds.), Schriften im Umkreis mitteleuropäischer Universitäten um 1400, Lateinische und volkssprachige Texte aus Prag, Wien und Heidelberg, Unterschiede,

from the German areas, contributed to the systematic treatment of contract law already back in the fourteenth and fifteenth centuries, that is much earlier than Soto. From the point of view of the growth of autonomous works on contract law, they probably played an even bigger role than the Spanish Dominicans Vitoria and Soto. A good example is Matthäus von Krakau's (1330/1335-1410) *De contractibus*[192]. Another instance is the *Opus septipertitum de contractibus* by the magnificent Tübingen professor Conrad Summenhart von Calw (c. 1455-1502)[193]. Summenhart's *De contractibus* was frequently cited by the Spanish scholastics, in particular by Juan de Medina (1490-1546), a star professor of nominalist theology at the University of Alcalá de Henares – from which he derived his nickname 'el Complutense'[194]. Medina authored a very successful treatise on penance, restitution and contracts (*De poenitentia, restitutione, et contractibus*). He expressly addressed it to both theologians and jurists[195].

2.2.3 The Jesuits and the reinforcement of the symbiosis

As time went by, the connection between law and theology grew ever stronger, at least in the Catholic tradition. The Council of Trent (1545-1563), which was attended by great Salamancan theologians such as Domingo de Soto, affirmed and reinforced the tendency within the late medieval manuals for confessors to use legal argument as an essential tool in solving cases of conscience. What is more, the role of the confessor was increasingly conceived of in juristic terms[196]. The confessors were expressly considered to be judges in an

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Gemeinsamkeiten, Wechselbeziehungen, [Education and Society in the Middle Ages and Renaissance, 20], Leiden – Boston 2004, p. 40-62.

[192] See M. Nuding (ed.), *Matthäus von Krakau, De contractibus*, [Editiones Heidelbergenses, 28], Heidelberg 2000; M. Nuding, *Matthäus von Krakau, Theologe, Politiker, Kirchenreformer in Krakau, Prag und Heidelberg zur Zeit des Großen Abendländischen Schismas*, [Spätmittelalter und Reformation, Neue Reihe, 38], Tübingen 2007.

[193] See J. Varkemaa, *Conrad Summenhart's theory of individual rights and its medieval background*, Helsinki 2009, doct. diss., p. 3-4. Summenhart joined Gabriel Biel (1420/1425-1495) to teach at the faculty of theology of the freshly founded University of Tübingen in 1491. He occupied a chair of the *via antiqua*, which in Tübingen was dedicated to Scotist philosophy. Before that time, he had been teaching at the faculty of arts – which explains his thorough familiarity with natural philosophy and physics. See also the discussion of Conrad Summenhart and of that other important German theologian, Johann Eck (1486-1543), in I. Birocchi, *Tra elaborazioni nuove e dottrine tradizionali, Il contratto trino e la natura contractus*, Quaderni fiorentini per la storia del pensiero giuridico moderno, 19 (1990), p. 243-322. This article also offers a good illustration of the nominalistic influences in late medieval scholasticism in general, and in Summenhart, in particular.

[194] Scant biographical notes on Medina, who has been the subject of very little scholarly interest, are contained in V. Heynck, *Johannes de Medina über vollkommene und unvollkommene Reue*, Franziskanische Studien, 29 (1942), p. 120-150.

[195] As is obvious from the complete title of his work; cf. Juan de Medina, *De poenitentia, restitutione et contractibus praeclarum et absolutum opus, in duos divisum tomos, non modo theologiae, sed et iurisprudentiae professoribus ac studiosis omnibus quam utilissimum*, Farnborough 1967 [=Ingolstadii 1581].

[196] Cf. D. Borobio, *The Tridentine model of confession in its historical context*, Concilium 23 (1967), p. 21-37 and A. Prosperi, *La confessione e il foro della coscienza*, in: P. Prodi – W. Reinhard (eds.), Il concilio di Trento e il moderno, Atti della XXXVIII settimana di studio, 11-15 settembre 1995, [Annali dell'Istituto storico italo-germanico, 45], Bologna 1996, p. 225-254; M. Turrini, *Il giudice della coscienza e la coscienza del giudice*, Prodi, P. – Penuti, C. (eds.), Disciplina dell'anima, disciplina del corpo e disciplina della società tra medioevo ed età moderna, [Annali dell'Istituto storico italo-germanico, 40], Bologna 1994, p. 279-294. For the preceding model of the confessor, see A.T. Thayer, *Judge and doctor, Images of the confessor in printed model sermon*

autonomous tribunal, namely the court of conscience (*forum internum*). Accordingly, they were required to have the knowledge of a judge (*scientia judicis*)[197]. Their acts were considered to be tantamount to judicial acts[198]. There was a tendency to consider the decisions rendered by the supreme court of conscience in Rome (*praxis Sacrae Poenitentiariae*) as judicial precedent[199]. This intensification of a form of 'moral jurisprudence', so to speak, is all the more salient as it happened both in concomitance with and in reaction to the separation of the moral and the legal spheres in the Reformed traditions of the sixteenth century. It has been sharply noted that post-Tridentine confession became judicialized at a moment when the analogy between the resolution of cases of conscience and adjudication in the external court lost its power in the Reformed traditions[200].

After Trent, the Catholic conviction that spirituality and morality cannot be made operational unless they are articulated along legal lines was strengthened. This gave rise to a reinforcement of the synthesis of patristic-scholastic philosophy and Romano-canon law, which had characterised the medieval manuals for confessors. This is particularly evident in the works of the Jesuits[201]. From relatively thin manuals of confessors which mixed theological and juridical argument, the Jesuit confessional literature increasingly became all-comprehensive, systematic and doctrinal in nature. The Jesuits were adamant that sound moral theology could not function without putting the juridical tradition to use. Vincenzo Figliucci (1566-1622), member of the Penitentiary at Saint Peter's Basilica and the chair of moral theology at the Collegio Romano (1600-1604/1607-1613), pointed out that he did not content himself just to give the solution for moral cases[202]. As a methodological principle he would always make sure to elucidate the foundation of his solution. These grounds were to be found either in civil law, canon law, theological principles or natural reason[203].

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collections, 1450-1520, in K.J. Lualdi – A.T. Thayer (eds.), Penitance in the age of reformations, Aldershot 2000, p. 10-29.

[197] E.g. Vincenzo Figliucci, *Brevis instructio pro confessionibus excipiendis*, Ravenspurgi 1626, cap. 2 (*De scientia necessaria ad confessiones*), par. 1 (*De scientia quantenus est iudex*), p. 28-109.

[198] See the conclusions reached during session 14 on the doctrine of penance which was held at the Council of Trent on 25 November 1551, cited in M. Schmoeckel, *Der Entwurf eines Strafrechts der Gegenreformation*, in: M. Cavina, Tiberio Deciani (1509-1582), Alle origini del pensiero giuridico moderno, Udine 2004, p. 226, n. 138-142.

[199] E.g. Vincenzo Figliucci, *Morales quaestiones de Christianis officiis et casibus conscientiae ad formam cursus qui praelegi solet in Collegio Romano Societatis Iesu*, Lugduni 1622, tom. 1, Ad lectorem, [s.p.]: 'Ubi vero probabilium opinionum varietas est, adieci praxim Sacrae Poenitentiariae, sicuti etiam suis locis formam absolutionum et dispensationum, quae impendendae poenitentibus sunt iuxta praxim eiusdem Sacrae Poenitentiariae.'

[200] Schmoeckel, *Fragen zur Konfession des Rechts im 16. Jahrhundert am Beispiel des Strafrechts*, p. 187.

[201] E.g. N. Brieskorn, *Skizze des römisch-katholischen Rechtsdenkens im 16. Jahrhundert und seine Spuren im Denken der Societas Jesu und des Petrus Canisius*, in: R. Berndt (ed.), Petrus Canisius SJ (1521-1597), Humanist und Europäer, [Erudiri Sapientia, Studien zum Mittelalter und zu seiner Rezeptionsgeschichte, 1], Berlin 2000, p. 39-75.

[202] On Figliucci, see M. Zanfredini, *Vincenzo Figliucci*, in : C. O'Neill – J. Domínguez (eds.), Diccionario Histórico de la Compañía de Jesús, Biográfico-Temático, Roma-Madrid 2001, vol. 2, p. 1416.

[203] Figliucci, *Morales quaestiones*, tom. 1, Ad lectorem, [s.p.]: 'Quoad modum, non solae conclusiones et resolutiones quaestionum afferentur, sed etiam earum fundamenta, vel ex civili aut canonico iure, iuxta materiae exigentiam, vel ex theologicis principiis, vel naturalibus rationibus desumpta.'

The following paragraphs will briefly go into relevant writings of some of the most important Jesuits, whose work will be touched upon in this dissertation. Not surprisingly, the canonist Martin de Azpilcueta (1492-1586), better known under the name Dr. Navarrus, left an indelible mark on Jesuit casuistry and moral theology[204]. The Jesuit Francisco de Toledo (1532-1596), a former student of Domingo de Soto at the University of Salamanca, who was to become a professor at the *Collegio Romano*, drew inspiration from Dr. Navarrus' famous manual (*Enchiridion sive manuale confessariorum et poenitentium*) as he prepared his own *Instruction for Priests and Penitants* (*Instructio sacerdotum ac poenitentium*). From its publication in 1596 it was to become an alternative within the Jesuit order to Juan Alfonso de Polanco's (1517-1576) high-minded *Short Directory for Confessors and Confessants* (*Breve directorium ad confessarii ac confitentis munus recte obeundum*), along with Valère Regnault's (1549-1623) *Praxis fori poenitentialis*. Incidentally, Regnault modelled his manual for confessors on the structure of Emperor Justinian's *Institutions*, as will be shown later in this chapter.

Rather than adding names to the impressive list of Jesuit manuals for confessors and casuistic treatises of moral theology, what matters here is to point out the increasing systematization of the Jesuits' involvement with law[205]. Of course, Francisco Suárez (1548-1617) from Granada is a famous case in point[206]. Although he had almost been refused as a novice when he entered the Jesuit order in Salamanca, Suárez was to become its most renowned metaphysician. He served as a professor of theology at the *Collegio Romano* (1580-1585), at Alcalá de Henares (1585-1592), at Salamanca (1592-1597), and at Coïmbra (1597-1616). In Rome he taught Leonardus Lessius among many other young and bright Jesuits. The most juridical of his works is the treatise on *The Laws and God the Legislator* (1612). It contains some of the most thorough and systematic discussions of the concept of 'law' that have ever been written[207]. Suárez elaborates on pairs of concepts that in a similar, albeit not entirely identical form, continue to play a role in legal thinking today. One is the distinction between the promulgation (*promulgatio*) of a law and its divulgation (*divulgatio*) among the people. In Suárez's view, the promulgation is the moment when a law theoretically starts to have binding force. The divulgation is the moment when the citizens can really be considered

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[204] On the good relations between Dr. Navarrus and the Society of Jesus, see Lavenia, *Martín de Azpilcueta (1492-1586), Un profilo*, p. 103-112.

[205] For a comprehensive account of early Jesuit manuals for confessors, see the priceless list in R.A. Maryks, *Saint Cicero and the Jesuits, The influence of the liberal arts on the adoption of moral probabilism*, Aldershot – Rome 2008, p. 32-47, which is but a selection of the more extensive overview in R.A. Maryks, *Census of the books written by Jesuits on sacramental confession (1554-1650)*, Annali di Storia moderna e contemporanea, 10 (2004), p. 415-519. The role of the Jesuits as confessors to princes is discussed in H. Höpfl, *Jesuit political thought, The Society of Jesus and the State c. 1540-1630*, [Ideas in context, 70], Cambridge 2004, p. 15-19.

[206] An introduction to the study of the transformation of the Roman legal tradition in Suárez's work can be found in C. Bruschi, *Le 'Corpus iuris civilis' dans le premier livre du 'De legibus' de François Suárez*, in: Les représentations du droit romain en Europe aux temps modernes, Collection d'histoire des idées politiques, Aix-Marseille 2007, p. 9-41.

[207] For an introduction, see N. Brieskorn, *Lex Aeterna, Zu Francisco Suárez' Tractatus de legibus ac Deo legislatore'*, in: F. Grunert – K. Seelmann (eds.), Die Ordnung der Praxis, Neue Studien zur Spanischen Spätscholastik, [Frühe Neuzeit, 68], Tübingen 2001, p. 49-74.

to be bound by it because they have effectively been able to take notice of the newly promulgated law[208]. A short overview of the titles of the ten books of *The Laws and God the Legislator* will make the rich variety of legal theoretical subjects treated by Suárez abundantly clear[209]:

> Book 1: On the nature of laws in general, their causes, and their effects
> Book 2: On eternal law, natural law, and the law of nations
> Book 3: On human positive law in itself (as it can be seen in the pure nature of man), also called civil law
> Book 4: On canon positive law
> Book 5: On the variety of human laws, particularly on criminal laws and laws that are being detested
> Book 6: On the interpretation of human laws, their changeability and ending
> Book 7: On the non-written laws, called custom
> Book 8: On favorable human law, viz. on privileges
> Book 9: On the old divine positive law
> Book 10: On the new divine law

Although Suárez is undoubtedly the Jesuit most widely known for the fundamental contribution he made to legal thinking, he is by no means the only Jesuit who excelled in legal studies[210]. Perhaps he even borrowed many ideas from his colleagues, which is hardly surprising. Back from a mission to China, François Noël (1651-1729) composed a companion to Suárez's theology in which he pointed out that Suárez's mind may have been far too speculative to be able to dwell on rather vulgar and practical day-to-day affairs[211]. Consequently, he decided to add a summary of Tomas Sánchez's *On Marriage* and of Leonardus Lessius' *On Justice and Right* to the companion[212]. These additions were praised

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[208] Suárez, *Tractatus de legibus et legislatore Deo*, lib. 3, cap. 16, num. 3 , p. 238 : '*Distinctio inter promulgationem et divulgationem legis*. – Ut autem explicem clarius qualis promulgatio sufficiat ac necessaria sit, distinguo inter promulgationem et divulgationem legis. Promulgationem appello illam publicam propositionem seu denuntiationem legis, quae fit aut voce praeconis, aut affigendo legem scriptam in publico loco, aut alio simili modo. Divulgationem autem appello applicationem illius primae promulgationis ad notitiam vel aures subditorum absentium, qui aut legere aut audire primam illam promulgationem non potuerunt : utrumque ergo explicandum est : nam re vera utrumque potest esse aliquo modo necessarium, et in utroque oportet aliquos dicendi modos extreme contrarios cavere.'

[209] Suárez, *Tractatus de legibus et legislatore Deo*, Index librorum et capitum.

[210] Recent introductions to Suárez include J.-F. Schaub, *Suárez, Les lois*, in: O. Cayla – J.-L. Halpérin (eds.), Dictionnaire des grandes oeuvres juridiques, Paris 2008, p. 565-570, and V.M. Salas (ed.), *J.P. Doyle, Collected studies on Francisco Suárez (1548-1617)*, [Ancient and Medieval philosophy, De Wulf-Mansion Centre, Series 1, 37], Leuven 2010, p. 1-20.

[211] Noël is known for his *Sinensis imperii libri classici sex*, Pragae 1711, a Latin translation of classical Chinese philosophy which formed the basis for Christian Wolff's observations on Chinese culture. For biographical details on Noël, see P. Rule, *François Noël, SJ and the Chinese rites controversy*, in: W.F. Vande Walle – N. Golvers (eds.), The history of the relations between the Low Countries and China in the Qing Era (1644-1911), [Leuven Chinese Studies, 14], Leuven 2003, p. 137-165. I am grateful to Dr. Noël Golvers for bringing this contribution to my attention.

as being the most frequently studied works in Jesuit colleges on these practical matters worldwide.

The Jesuit Tomás Sánchez (1550-1610), from Cordoba, wrote an influential treatise *On the holy sacrament of Marriage* (*Disputationes de sancto matrimonii sacramento)* amongst several other important moral-juridical treatises[213]. Its first volume appeared in 1602, the remaining two volumes were published in 1605[214]. Because of its vastness and detail, Sánchez's *On marriage* surpasses the earlier and rather modest attempt by Jesuit Enrique Henríquez (1536-1608) to treat the canon law of marriage. Henríquez studied in Alcalá de Henares and became a professor of theology in Salamanca, Córdoba, Granada and Sevilla[215]. He dedicated an entire book of his *Summa Theologiae Moralis* to marriage law, which was simply cited as his *On Marriage* by subsequent authors such as Sánchez[216]. Sánchez's *On Marriage* would remain one of the works referenced in post-Tridentine matrimonial law. The eminent French natural lawyer Robert-Joseph Pothier (1699-1772) appears to have been familiar with Sánchez's *On Marriage,* in spite of his Jansenist sympathies. At the beginning of the twentieth century, Pietro Gasparri (1852-1934), the Secretary for the Commission for the Codification of Canon Law, drew heavily on Sánchez for the canons on marriage law as he prepared the new Code of Canon Law of 1917[217].

Studying Sánchez requires a certain amount of courage and perseverance, not in the least because his argument is often floating and self-contradictory, even if the general structure of his treatise is systematic and clear. Yet no one runs the risk of being disappointed by Sánchez's stimulating reasoning and prudent counsels in very concrete matters. The expressive terms in which he describes the casuistry surrounding certain impediments to a valid marriage have struck eminent historians of canon law as being almost tantamount to

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[212] F. Noël, *Theologiae Francisci Suarez e Societate Jesu summa seu compendium in duas partes divisum, duobusque tractatibus adauctum ; primo de justitia et jure, secundo de matrimonio,* Coloniae, 1732, *Appendix ad Suarez,* p. 1-2. Curiously, the economic historian Raymond De Roover attributes the short discussion on bills of exchange, which is included in this anthology, to Suárez, while it is actually part of the supplement *On Justice and Right*, which is a summary of Lessius' legal and economic thought; cf. R. De Roover, *L'Évolution de la lettre de change (14e-18e siècles),* [Affaires et gens d'affaires, 4], Paris 1953, p. 202.

[213] On Sánchez, see E. Olivares, *Más datos para una biografía de Tomás Sánchez,* Archivo Teológico Granadino, 60 (1997), p. 25-50; J.M. Viejo-Himénez, s.v. *Sánchez*, in: M.J. Peláez (ed.), Diccionario crítico de juristas españoles, portugueses y latinoamericanos (hispánicos, brasileños, quebequenses y restantes francófonos), 2.1, Zaragoza-Barcelona 2006, p. 480-481; and F. Alfieri, *Nella camera degli sposi, Tomás Sánchez, il matrimonio, la sessualità (secoli XVI-XVII),* [Annali dell'Istituto storico italo-germanico in Trento, 55], Bologna 2010, p. 21-48.

[214] E. Olivares, *En el cuarto centenario de la publicación del tratado de Tomás Sánchez, De sancto matrimonii sacramento (1602),* Archivo Teológico Granadino, 65 (2002), p. 5-38. Parts of the ninth book (*De debito conjugali*) were censured; cf. E. Olivares, *Ediciones de las obras de Tomás Sánchez,* Archivo Teológico Granadino, 45 (1982), p. 160-178.

[215] E. Moore, *Enrique Henríquez*, in : C. O'Neill – J. Domínguez (eds.), Diccionario Histórico de la Compañía de Jesús, Biográfico-Temático, Roma-Madrid 2001, vol. 2, p. 1900-1901.

[216] In the Venice edition of 1600, the canon law of marriage is dealt with autonomously by Enrique Henríquez in book 11 of his *Summa theologiae moralis tomus primus.*

[217] Cf. C. Fantappiè, *Chiesa Romana e modernità giuridica*, Tom. 1: *L'edificazione del sistema canonistico (1563-1903),* [Per la storia del pensiero giuridico moderno, 76], Milano 2008, p. 447-458.

mild forms of pornographic literature[218]. The editor of an early seventeenth century compendium of Sánchez's *On marriage* honestly expressed his wonder at how well Sánchez had scrutinized the most intimate secrets of wedlock – an amazing performance, for somebody to teach all the details of the bride-bed without sleeping in it (*Quam bene scrutatur thalami penetralia Sánchez! Mirum! Qui docuit, nesciit ipse torum*)[219]! Charles Louis de Secondat, alias Montesquieu (1689-1755), took Sánchez as a prime example of those casuists who revealed all the secrets of the night, and were capable of rounding up all the monsters which the demon of love produced[220].

When it comes to the development of contract law, we will see that Sánchez's elaborations on duress have been seminal. This is due to the fact that much of Sánchez's detailed analyses in regard to the validity of marital consent were then applied by other Jesuits, such as Lessius, to other contracts. The table of contents from Sánchez's work *On Marriage* gives a rough idea of his systematic approach to marriage law and its relevance to other domains of contract law[221]:

Book 1: On engagement
Book 2: On the essence of marriage and marital consent
Book 3: On clandestine consent
Book 4: On coerced consent
Book 5: On conditional consent
Book 6: On donations between spouses, premarital gifts, and jointures
Book 7: On marital impediments
Book 8: On dispensations
Book 9: On marital obligations
Book 10: On divorce

For historians of moral theology, as well as historians of law, it is useful also to consider Sánchez's commentary on the precepts contained in the Decalogue (*Opus morale in praecepta Decalogi*) and his collection of counsels (*Opuscula sive consilia moralia*). The latter contains a vast number of cases dealing with what is now known as the law of persons and family law, inheritance, sale contracts, and the morality of judging. However, at this point these works will not be further investigated due to limited space and the need to consider the other Jesuit whose work was thought to be of such importance that it must be added to the anthology of Suárezian thought: Leonardus Lessius[222]. Ever since the Renaissance of

[218] See J. Brundage, *Law, sex and Christian society in medieval Europe*, Chicago-London 1990, p. 564-567; M. Madero, *Peritaje e impotencia sexual en el De Sancto Matrimonio de Tomás Sánchez*, Eadem utraque Europa (2008), p. 105-136.

[219] Cited in Alfieri, *Nella camera degli sposi, Tomás Sánchez, il matrimonio, la sessualità*, p. 11.

[220] Alfieri, *Nella camera degli sposi, Tomás Sánchez, il matrimonio, la sessualità*, p. 13.

[221] Sánchez, *Disputationes de sancto matrimonii sacramento*, index.

[222] For details on Lessius' life and times as well as references to secondary literature, see Decock, *Breaking the limits*, p. 35-53; T. Van Houdt – W. Decock, *Leonardus Lessius, Traditie en vernieuwing*, Antwerpen 2005, p. 11-54. Especially worthy of mentioning in this context is T. Van Houdt, *De economische ethiek van de Zuid-*

Thomism, driven by Pope Leo XIII in the late nineteenth century, this renowned Jesuit from Antwerp has drawn much attention for his masterpiece *On Justice and Right and the other Cardinal Virtues* (*De iustitia et iure ceterisque virtutibus cardinalibus*), by historians of moral, economic, and legal thought[223]. Impressed with Roberto Bellarmino's (1542-1621) fiery sermons during his studies at the Arts faculty in Louvain, Lessius entered the Society of Jesus in 1572 and soon became a teacher of Aristotelian philosophy at the Collège d'Anchin in Douai – a job which left him enough spare time to teach himself Roman and canon law.

Upon finishing his theological studies at the *Collegio Romano*, Lessius became a professor of moral theology at the Jesuit College of Louvain in 1585. For the exercises in practical ethics and casuistry, which he considered to be the hallmark of the Jesuit order, he made use of Dr. Navarrus' *Manual for Confessors*. Even if Lessius is best known among theologians for his tenacious defence of molinism in the debate on grace and free will, his moral theological and juridical masterpiece is the treatise *On Justice and Right*, which enjoyed numerous re-editions across Europe until the nineteenth century[224].

Lessius' *On Justice and Right* played a vital role in the history of the law of obligations. In his *On the Right of War and Peace* (*De iure belli ac pacis*) the alleged father of modern natural law, Hugo Grotius (1583-1645), frequently gives an elegant summary of the extensive arguments that were first developed by Lessius and other moral theologians. Embarrassingly, this often leads Grotius to copy the same incorrect references as Lessius did[225]. Also in regard to the history of commercial law, Lessius' work is not insignificant. For instance, in order to get the best analysis of financial techniques used by merchants and bankers at the Antwerp Bourse, the jurist Zypaeus (1580-1650), from the Southern Netherlands, recommends that lawyers read Lessius' *De iustitia et iure*[226]. Given his reputation for sharp economic analyses, it should not come as a surprise that Lessius became a source of inspiration for Kaspar Klock from Soest (1583-1655) in the more technical parts of his *De aerario*, a comparative study of state financing[227].

Nederlandse jezuïet Leonardus Lessius (1554-1623), Een geval van jezuïtisme?, De zeventiende eeuw, 14 (1998), p. 27-37.

[223] Throughout the ages, interest in Lessius never entirely faded. He was singled out as an original thinker, for instance, by Carl von Kaltenborn-Stachau (1817-1866), the famous jurist from Halle, in *Die Vorläufer des Hugo Grotius auf dem Gebiete des Ius Naturae et Gentium sowie der Politik im Reformationszeitalter*, vol. 1 : *Literarhistorische Forschungen*, Leipzig 1848, p. 151-157. Emblematic for the renewed interest in Lessius at the beginning of the twentieth century are the studies by the Leuven historian, philosopher and economist Victor Brants; e.g. V. Brants, *Les théories politiques dans les écrits de L. Lessius (1554-1623)*, Revue Néo-Scolastique de Philosophie, 19 (1912), p. 42-85; V. Brants, *L'économie politique et sociale dans les écrits de L. Lessius (1554-1623)*, Revue d'Histoire ecclésiastique, 13 (1912), p. 73-89. The last years have seen a revival of the interest in Lessius' economic thought ; cf. B. Schefold (ed.), *Leonardus Lessius' De iustitia et iure. Vademecum zu einem Klassiker der Spätscholastischen Wirtschaftsanalyse*, Düsseldorf 1999, which contains contributions by Louis Baeck, Barry Gordon, Toon Van Houdt, and Bertram Schefold.

[224] T. Van Houdt, *Leonardus Lessius over lening, intrest en woeker*, p. xviii-xxv.

[225] Feenstra, *L'influence de la Scolastique espagnole sur Grotius en droit privé, Quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause*, p. 377-402.

[226] F. Zypaeus, *Notitia iuris belgici*, Antverpiae 1675, lib. 4, p. 61.

[227] Cf. K. Klock, *Tractatus juridico-politico-polemico-historicus de aerario, sive censu per honesta media absque divexatione populi licite conficiendo, libri duo*, mit einer Einleitung herausgegeben von Bertram

In any event, in Lessius' *On Justice and Right*, the casuistry of the legal and moral tradition is ordered within a systematic whole[228]. Since Lessius' elaborate concept of law has already been mentioned, it should suffice here to point out an element in the construction of Lessius' book which is symptomatic of the shift towards systematic legal thinking. Before discussing the particulars of property law, Lessius gives an account of justice in general (*de iustitia in genere*) and right in general (*de iure in genere*). By the same token, his comprehensive analysis of illicit acts or torts is preceded by a chapter on injustice and restitution in general (*de iniuria et restitutione in genere*). Last but not least, his treatment of particular contracts follows his treatment of general contract law (*de contractibus in genere*). A quick look at the contents of the second book of Lessius' treatise shows us how thoroughly and systematically the law of property, torts and contracts were discussed by Lessius, next to selected topics in procedural law, tax law and canon law[229]:

Section I. On justice, right, and the specific types of right
1. On justice in general
2. On right in general
3. On dominion, usufruct, use and possession, which are specific types of rights
4. On who is capable of having dominion and over what
5. On the mode of acquiring dominion over goods that belong to nobody or over goods which are common to all, particularly on servitudes, hunting, fishing, fowling and treasures
6. On the mode of acquiring dominion over someone else's good, particularly on prescription

Section II. On injustice and damage in all kinds of human goods and their necessary restitution
7. On injustice and restitution (which is an act of justice) in general
8. On injustice against spiritual goods
9. On injustice against the body through homicide or mutilation
10. On injustice against the body through adultery and fornication
11. On injustice against reputation and honour through detraction and defamation
12. On injustice against property through theft, robbery or damage.
13. On cooperating to theft or injury
14. On restitution by virtue of the good received and the receiver of restitution
15. On the respective order and the way in which restitution has to be made, where restitution must be made and what to do with the expenses
16. On the factors which excuse from restitution

Section III. On contracts
17. On contracts in general

Schefold, Hildesheim - Zürich - New York 2009, *passim* ; reviewed in : Tijdschrift voor Rechtsgeschiedenis, 78 (2010), p. 463-466.

[228] This is the scope of the argument developed in W. Decock, *La transformation de la culture juridique occidentale dans le premier 'tribunal mondial'*, in : B. Coppein – F. Stevens – L. Waelkens (eds.), Modernisme, tradition et acculturation juridique, Actes des Journées internationales de la Société d'histoire du droit tenues à Louvain, 28 mai - 1 juin 2008, [Iuris scripta historica, 27], Brussel 2011, p. 125-135.

[229] Lessius, *De iustitia et iure*, lib. 2, p. 13-14.

18. On promise and donation
19. On testaments and legacies
20. On loan for consumption and usury
21. On sale-purchase
22. On rents
23. On money-exchange
24. On lease-hire, emphyteusis and feudal contracts
25. On companies
26. On games and gambling
27. On deposit and loan
28. On suretyship, pawn, mortgage

Section IV. On injustice in judgments and courts

29. On judges
30. On plaintiffs and witnesses
31. On lawyers and defendants

Section V. On distributive justice

32. On favoritism in general
33. On levies and taxes
34. On benefices
35. On simony

Section VI. On religion, which is the first part of justice

36. On religion in general
37. On praying and praising God
38. On sacrifices and adoration
39. On tithes
40. On vows
41. On the religious state
42. On swearing and oaths
43. On superstition and its forms
44. On magic
45. On irreligiosity

Section VII. On virtues connected to justice

46. On the other virtues connected to justice in which there is legal debt
47. On virtues connected to justice in which there is moral debt

Lessius' work is a relatively concise treatise on legal and moral problems written in a crystal-clear style. The six-volume treatise, *On Justice and Right*, by his friend and colleague Luís de Molina, which was published over the period 1593-1609, was more detailed and voluminous[230]. It is obvious from a quick glance at the sheer titles of the six volumes

[230] On Molina, see, F.B. Costello, *The Political Philosophy of Luis de Molina*, Rome 1974 ; F. Gómez Camacho, *Luís de Molina. La teoría del justo precio*, Madrid 1981; and D. Alonso-Lasheras, *Luis de Molina's De iustitia et iure, Justice as virtue in an economic context*, [Studies in the history of Christian traditions, 152], Leiden-Boston 2011.

constituting Molina's impressive *On Justice and Right* that this is an extremely rich treatise, which deals not only with vast areas of private law, but also with those of public law [231]:

> Volume 1: On justice, rights, property law, family law, successions
> Volume 2: On contracts
> Volume 3/1: On primogeniture and taxes
> Volume 3/2: On delicts and quasi-delicts
> Volume 4: On commutative justice in corporeal goods and goods belonging to people connected to us
> Volume 5: On commutative justice in the goods of honour and reputation, and also in spiritual goods
> Volume 6: On judgment and the execution of justice by the public authorities

Molina had been the first Jesuit to adopt the type of moral theological literature known as *On Justice and Right*. As mentioned before, the first work of its kind was written by the Salamancan Dominican Domingo de Soto in 1553. These treatises actually grew out of commentaries on Thomas Aquinas' *Secunda Secundae* as can still be seen in the *Commentarii theologici* of Gregorio de Valentia (1550-1603), a Spanish Jesuit who taught at the University of Ingolstadt. Yet these commentaries soon became increasingly independent from their source. This eventually led to the creation of an autonomous genre of moral theological literature at the university of Salamanca, where an important renewal of theological thought took place in the course of the sixteenth century. Due to this increased autonomy, at the very outset of his treatise, *On Justice and Right*, Molina both acknowledges and minimizes Thomas Aquinas' contribution to his discussion on justice[232]:

> Granted, the things that the divine Thomas hands down to us through those twenty-three questions on justice have been expressed as wisely as the rest, but we are of the opinion that it will be useful for the Church and pleasant for the theologians, if not necessary, to treat this subject much more extensively, and to elaborate on many of the things concerning contracts and other things which the divine Thomas omitted. In this manner, the theologians will no longer find themselves stuck when untangling the consciences of men. Consequently, they will feel more confident and will be more adapted for the task of helping their neighbors and keeping them away from sin. They will grow more useful for exercizing the ecclesiastical offices and the government of the Church.

In contrast to Soto's work, the Jesuits' treatises, *On Justice and Right*, were far more systematic, voluminous and technical. The Jesuits were much more acquainted with the *ius*

[231] Luís de Molina, *De iustitia et iure tomi sex*, Moguntiae 1659.

[232] Molina, *De iustitia et iure*, tom. 1, col. 1: 'Licet autem, quae per has 23. quaestiones Divus Thomas de iustitia tradit, sapientissime ut et caetera alia, dicta sint, Ecclesiae tamen utile theologisque pergratum, immo et necessarium fore iudicamus, si rem hanc multo copiosius tractaremus, multa, quae D. Thomas de contractibus et plerisque aliis rebus praetermisit, disputantes. Ita enim fiet, ut theologi in enodandis hominum conscientiis, passim non haereant, audacioresque proinde, aptioresque multo sint ad proximos suos iuvandos, et a peccatis eruendos, atque ut praelaturis, regiminique toti Ecclesiae longe evadant utiliores.'

commune and the juridical thinking of their time. Molina's references to contemporary Portuguese and Spanish law or commercial practices are even more copious than Lessius' useful observations on contemporary law and commercial customs in the Low Countries[233]. Molina's citations of scholastic authorities also outnumber those in Lessius. In this respect, Lessius appears to have integrated the humanist critique on scholastic methodology to a greater extent. He also cared more about the reader-friendliness of his book. Yet, the general scope of both treatises is the same, namely to give a systematic outline of law for the purpose of spiritual guidance. As a result, the Romano-canon legal tradition and Aristotelian-Thomistic moral philosophy were united in Lessius' and Molina's, *On justice and right*.

The third Jesuit who wrote a successful treatise, *On Justice and Right*, was Juan de Lugo (1583-1660), a canon lawyer by training, who went on to become a professor of theology at the Collegio Romano before being named a Cardinal by Pope Urban VIII in 1643, the year after the publication of his *Disputations on Justice and Right* (*Disputationes de iustitia et iure*)[234]. He shared a thorough understanding with Molina and Lessius of different kinds of law and their application to qualms of conscience, but he also had a tremendous insight into the actual functioning of life, particularly in regard to business and economic affairs[235]. In regard both to form and content, Lugo seems to be heavily indebted to Lessius, although he is certainly not a servile imitator. Lugo further developed the Jesuits' systematic approach to law and morality, but sometimes could not avoid the pitfalls of casuistry. It is worthwhile noting to the modern reader that Lugo also treated a number of subjects that are considered to be 'juridical', such as marriage law, in his collection of practical moral responses (*Responsa moralia*)[236].

By the mid-seventeenth century we witness the birth of vast, systematic and influential books on various branches of law. An exciting example of this turn towards a Jesuit legal science, notably in regard to contract law, is the Spanish Jesuit Pedro de Oñate's (1568-1646) four-volume treatise, *On Contracts*, published posthumously in 1646 (*De contractibus*)[237]. Pedro de Oñate, who had been a student of Suárez at Alcalá de Henares, became provincial of the Jesuit order in Paraguay in 1615. By the end of his term, he had co-founded the University of Córdoba (Argentina) and eleven colleges. In 1624 he was designated professor of moral theology at the Colegio San Pablo in Lima (Peru). His treatise, *On Contracts*, is one of the most extensive treatises on both general and particular contract law that has ever been written.

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[233] I am grateful to Prof. Dr. Wolfgang Forster (Universität Gieβen) for sending me along his unpublished paper *Das kastilische Privatrecht in der Spanischen Spätscholastik, Luis de Molina S.J. (1535-1600)*, delivered at the symposium *Spanische Spätscholastik- noch Mittelalter oder schon Moderne?* (Hamburg 14-17.09.2008).

[234] For further details, see E. Olivares, *Juan de Lugo (1583-1660), Datos biográficos, sus escritos, estudios sobre su doctrina y bibliografía*, Archivo Teológico Granadino, 47 (1984), p. 5-129.

[235] F. Monsalve Serrano – O. De Juán Asenjo, *Juan de Lugo y la libertad en economía, El análisis económico escolástico en transición*, Procesos de mercado, Revista europea de economía política, 2 (2006), p. 217-243.

[236] E.g. Juan de Lugo, *Responsa moralia*, Lugduni 1651, lib. 1, dub. 35-46, p. 55-80.

[237] See E. Holthöfer, *Die Literatur zum gemeinen und partikularen Recht in Italien, Frankreich, Spanien und Portugal*, in: H. Coing (ed.), Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, 2.1, München 1977, p. 368 and p. 491; Birocchi, *Causa e categoria generale del contratto*, p. 271-289; E. Fernández, s.v. *Oñate*, in: C. O'Neill – J. Domínguez (eds.), Diccionario histórico de la Compañía de Jesús biográfico-temático, vol. 3, Roma-Madrid 2001, p. 2870-2871.

In it, Oñate discusses all contracts from the point of view of Aristotelian-Thomistic philosophy. He borrows extensively from the Romano-canon legal tradition, as well as from Molina, Sánchez and Lessius, but has the merit of giving an ultimate synthesis of all the problems pertaining to contract law. It is a three-volume testament to a five hundred year-old tradition in scholastic contract doctrine, which is unparalleled in its comprehensiveness.

The first volume of Pedro de Oñate's *On Contracts* is a systematic account of general contract doctrine (*de contractibus in genere*). The second volume deals with gratuitous contracts (*de contractibus lucrativis*), e.g. donations, agency, dowry, etc., and the third offers a meticulous analysis of all onerous contracts (*de contractibus onerosis*), e.g. sale-purchase, rents, bills of exchange, etc. At the outset of his treatise, Oñate warns his reader that contract law is both an extremely vast (*vastissimum*) and difficult (*difficillimum*) field of study. Distinguishing between more than thirty particular contracts, he admits that contract law is an immense ocean or, rather, an infinite chaos. Contract law is founded upon unstable ground, which prevented any scholar before him to treat it as thoroughly. Moreover, contract law is very difficult. According to Oñate, this has to do with the avarice of man, which mainly expresses itself through the use of contracts, since contracts are the juridical means by which money and property are exchanged. On top of this, various legislators have tried to rule on the same matter in different ways and have issued a plethora of different laws.

Pedro de Oñate points out that understanding contract law is extremely useful (*utilissimum*). Contract law is essential not only to businessmen, lawyers, judges and public officials, but to theologians as well. A sound knowledge of contract law is absolutely necessary for theologians, certainly for those who are involved in the sacrament of confession (*est materia haec theologis, iis maxime qui sacris aures confessionibus praebent, pernecessaria*)[238]. The reason is simple: on the earthly pilgrimage towards God, it is impossible not to enter into contracts. In the course of the twentieth century, certainly after the Second Vatican Council, mainstream theology seems to have lost touch with this tradition of moral jurisprudence[239]. Influential theologians, such as the Henri de Lubac (1896-1991), have called for a return to the allegedly more authentic Christian spirit found in the writings of the Fathers of the Church. The Church's age-long involvement with Roman law and Aristotelian moral philosophy – the pillars of the scholastic – bore the brunt of Lubac's criticism. It is actually easy to forget that Lubac belonged to the same Jesuit order that had previously went to such great lengths to promote the synthesis of law and theology.

2.3 Moral jurisprudence and the court of conscience

2.3.1 A court for the soul and the truth

A lawyer by training, Saint Alfonso de' Liguori, founder of the Redemptorist order, patron saint of moral theologians, and doctor of the Church, agreed to define moral theology

[238] Oñate, *De contractibus*, tom. 1, tract. 1, pr., num. 3, p. 1.

[239] See J.F. Keenan, *A history of Catholic moral theology in the twentieth century, From confessing sins to liberating consciences*, London – New York 2010, and the remarks in the chapter 8.

properly as 'a kind of moral jurisprudence and civil science' (*quasi moralis iurisprudentia ac scientia civilis*), not so much consisting in the memorization of written laws, at least not exclusively, but a jurisprudential science capable of finding out what is right if the existing laws remain silent'[240]. Clearly, in the eighteenth century, the Catholic fusion of law and theology was still very much alive. The prerequisite for being called a good theologian was showing a certain prowess to study law. As Lessius noted, the knowledge (*scientia*) a good confessor must possess pertains not only to theology but also to canon law[241]. As a matter of fact, Liguori's treatise on moral theology (*Theologia moralis*) abounded with references to the Jesuit confessional literature of the preceding centuries, especially to Hermann Busembaum's (1600-1668) *Medulla theologiae moralis*[242]. Although definitely not as elaborated as the expositions on contract law contained in the treatises, *De iustitia et iure*, by Jesuits such as Molina and Lessius, Liguori's masterpiece still contained chapters on contract law in general and on the particular contracts. Even in the details, for instance, in the solution of practical cases of conscience, Liguori showed himself a fine expert of Jesuit casuistry[243].

Those jurisprudential qualities required of confessors and moral theologians served the settlement of cases of conscience in the so-called court of conscience (*forum conscientiae*) or internal forum (*forum internum*). The reality of this tribunal of conscience may well come across as counterfeit to a modern ear. Yet it was part and parcel of legal cultures in the early modern period. This is an essential insight not only if one wants to come to grips with the moral theological literature of the time, but also with the first systematic treatises on commercial law, such as the *Tractactus de commerciis et cambio* by Sigismondo Scaccia (c. 1564-1634)[244]. Its existence was still obvious to eighteenth century luminaries such as the

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[240] This definition figures in the apologetic part of an anonymous dissertation preceding Liguori's books on moral theology. Since Liguori supervised the publication of the 1773 edition, which is used here, he at least approved of this dissertation, if he was not its author. The passage is directly attributed to Liguori by Alfieri, *Nella camera degli sposi, Tomás Sánchez, il matrimonio, la sessualità*, p. 75. For the Latin text, see Liguori, *Theologia moralis*, tom. 1, prol. (*Dissertatio prolegomena de casuisticae theologiae originibus, locis atque praestantia*), part. 3 (*pars apologetica*), cap. 1, p. lxv: 'Est enim theologia illa moralis quasi jurisprudential, ac scientia civilis, quae si bene definiatur, non in eo sita est, quod quispiam memoria leges omnes scriptas teneat, quamvis et id non sit extra ipsam, sed quod ubi leges nihil dicunt, norit id, quod rectum est invenire.'

[241] Lessius, *In III Partem D. Thomae de Sacramentis et Censuris*, quaest. 8, art. 5, dubium 8 (*quanta requiratur scientia in confessario ?*), num. 50, in: *De beatitudine, de actibus humanis, de incarnatione Verbi, de sacramentis et censuris praelectiones theologicae posthumae. Acceserunt variorum casuum conscientiae resolutiones*, ed. I. Wijns, Lovanii 1645, p. 240.

[242] Busembaum, a famous Jesuit moral theologian, taught humanities, philosophy and theology at Münster and Köln. He became rector of the Jesuit colleges of Hildesheim and Münster, and was a confessor to the prince-bishop of Münster; cf. P. Schmitz, *Hermann Busembaum*, in : C. O'Neill – J. Domínguez (eds.), Diccionario Histórico de la Compañía de Jesús, Biográfico-Temático, Roma-Madrid 2001, vol. 1, p. 578.

[243] For an illustration in regard to speculation in the market and insider trading, see Decock, *Lessius and the breakdown of the scholastic paradigm*, p. 67.

[244] See the caveat in W. Endemann, *Studien in der romanisch-kanonistischen Wirthschafts- und Rechtslehre bis gegen Ende des siebenzehnten Jahrhunderts*, Berlin 1874, tom. 1, p. 59: 'Dabei muss bemerkt werden, dass er [sc. Scaccia] und viele andere Juristen stets zweierlei Gerichte (*fora*) im Auge haben. Nicht blos das weltliche Gericht, sondern auch der Beichtstuhl wird als Gericht, Beichte und Absolution als eine Art von gerichtlicher Prozedur betrachtet. Es gibt also ein Gewissens- oder inneres Forum (*forum conscientiae, interius, animae, poli*), in dem Gott richtet durch den Mund des Priesters, und ein irdisches Gericht (*forum terrestre, fori, exterius*), in dem Menschen urtheilen. In jenem wird nach dem göttlichem und natürlichem Recht, nach der Wahrheit, namentlich nach der wahren Absicht geurtheilt, um Gott genug zu thun; in diesem nach dem weltlichen Gesetz,

Italian historian Ludovico Antonio Muratori (1672-1750) and the French jurist Robert-Joseph Pothier. Muratori spoke of the jurisdiction over the soul of man which the moral theologians had (*i teologi morali che hanno giurisdizione sull'anima dell'uomo*)[245]. Pothier, for his part, proposed to investigate the law of obligations from the perspective of both the *forum externum* and the *forum internum* in his famous *Treatise on obligations according to the rules of the court of conscience as well as the external court*[246].

The court of conscience was not just a metaphor. The procedural character of the notion of conscience in the medieval tradition was real. The introduction to the manual for confessors by the Jesuit Valère Regnault, who expressly modelled his book after the structure of Justinian's *Institutions*, is quite telling[247]:

> This manual subdivides into three parts according to the three basic elements of adjudication in the external courts: persons (*personae*), actions (*actiones*), and things (*res*). The first part concerns the persons in the court of conscience, namely those who participate in the sacrament of penance: the confessor, who is the legitimate judge in this court, and the penitent sinner, who is at the same time the guilty party and the witness, his own defendant and plaintiff, as if he were pleading the cause of God, who is offended by his acts against himself. The second part concerns the actions that are used in the process of confession. For the penitent, those actions involve inner contrition, oral confession, and satisfaction through works; for the confessor, performing the sacrament of absolution. The former constitute the material of the sacrament of penitence, the latter its form. Lastly, the third part concerns the things which the practice of confession is about, namely the sins committed by the penitent after his baptism.

One of the clearest descriptions of the court of conscience was offered by the Carthusian Juan de Valero (1550-1625), author of a splendid work on *The Differences between both courts, that is between the judicial court and the court of conscience*[248]. He

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nach Präsumtionen, die der Wahrheit, welche hier oft verborgen bleibt, vorgehen, um dem Gemeinwesen und den Betheiligten genug zu thun.'

[245] Cited in Prodi, *Una storia della giustizia*, p. 430, n. 89.

[246] R.-J. Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, nouvelle édition, Paris – Orléans 1777. The fact that the original, also moral context of Pothier's law of obligations has been obscured may be part of what has been called the 'Enlightenment myth' surrounding the study of the French natural lawyers Domat and Pothier – a myth which emphasizes the legacy of both luminaries for the *Code civil*, without sufficiently taking into account the profound roots their thought had in the pluralist legal culture of the *ancien régime* ; cf. Birocchi, *Alla ricerca dell'ordine*, p. 153-157.

[247] Valère Regnault, *Praxis fori poenitentialis ad directionem confessarii in usu sacri sui muneris. Opus tam poenitentibus quam confessariis utile*, Lugduni 1616, pr.: '[…] Institutiones […] digessi tripartitas, pro triplice genere attinentium ad iudiciale forum: personarum, inquam, actionum, et rerum, ita ut prima pars complectatur spectantia ad personas fori poenitentialis, tanquam eas ex quibus dependet sacramenti poenitentiae usus. Sunt autem confessarius, tanquam iudex legitimus in illo foro; et peccator poenitens, tanquam reus simul et testis, adeoque advocatus accusator sui, tanquam is qui a se offensi Dei causam agat contra semetipsum. Secunda vero pars contineat spectantia ad actiones, in quibus idem usus consistit; quae sunt, quoad poenitentem quidem, contritio cordis, confessio oris et satisfactio operis. Quoad confessarium vero, absolutio sacramentalis. Illaeque sacramenti poenitentiae materiam constituunt et haec formam. Tertia demum pars […] sit de rebus, circa quas idem usus versatur. Eae autem sunt peccata poenitentis post Baptismum commissa […].'

[248] A graduate from the universities of Valencia and Salamanca, Juan de Valero was the head of the Carthusian monastery of Palma de Mallorca from 1613 till 1621. He was closely connected to the Jesuits as can be seen

opposed the exterior court (*forus exterior*) as a human court presided by judges to the interior court (*forus interior*) as the court of God pertaining to confessors and to every Christian[249]. The rigor of justice and the laws attended in the exterior court yielded to equity in the court of conscience – conscience being the dictate of right reason in a good and virtuous man. Valero distinguished between the interior tribunal as it related to the sacrament of penance (*alter ad sacramentum poenitentiae*), and the interior tribunal as an instrument to appease the soul's scruples about obligations regardless of the sacrament of confession (*alter ad sedandam animam ab scrupulis et eius obligationibus extra sacrementum*)[250]. By the same token, Valero differentiated in regard to the external court between the judicial forum (*alter judicialis*) and the customary practice of men (*alter usus et practica inter homines*)[251].

The interior court had two objectives, according to Valero, the first being the preservation of the soul (*conservatio animae*), and the second being the restitution of what belonged to the estate of another (*restitutio alieni patrimonii*). Indeed, restitution of goods taken from another person without justification was considered an essential prerequisite for the salvation of the soul. Every form of unjust enrichment was considered to be an offence against the seventh commandment not to steal[252]. Hence, commutative justice was as important a rule in contracts as mutual consent. In light of the overriding importance of saving souls, it should not come as a surprise that canon law, which the Church laid down precisely for the sake of spiritual salvation, was thought to be immediately binding in the court of conscience. Yet there was an important qualification to this principle. If a rule of canon law was based on a presumption (*praesumptio*) which was manifestly in contradiction with the truth, then the truth had to prevail in the internal court[253]. Presumptions applied in the external courts did not bind the confessor[254]. In other words, the court of conscience was considered to be simultaneously the court of the soul (*forus animae*), the court of equity (*forus aequitatis*) and the court of truth (*forus veritatis*).

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from a letter written by Michael Julian (1557-1621), the rector of the Jesuit college at Mallorca, to Valero. This letter was included as a dedication to the *Differentiae*. Valero heavily draws on Leonardus Lessius throughout his treatise. More biographical details can be found in A. Gruys, *Cartusiana, vol. 1 : Biblioghraphie générale et auteurs cartusiens*, Paris 1976, p. 169.

For a couple of other works dealing with the differences between the court of conscience and the external courts, see J.F. von Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts von Gratian bis auf die Gegenwart*, Graz 1956 [=Stuttgart 1877], vol. 2 (*Gregor IX. Bis auf das Concil von Trient*), p. 508.

[249] Juan de Valero, *Differentiae inter utrumque forum, iudiciale videlicet et conscientiae*, Cartusiae Maioricarum 1616, praeludia, num. 1.

[250] Valero, *Differentiae*, praeludia, num. 2. On the post-Tridentine origins of the distinction between a sacramental and an extra-sacramental side to the court of conscience, see A. Mostaza, *Forum internum – forum externum, En torno a la naturaleza jurídica del fuero interno*, Revista Española de derecho canonico, 23 (1967), p. 274-284.

[251] Valero, *Differentiae*, praeludia, num. 28.

[252] See chapter 8.

[253] Valero, *Differentiae*, praeludia, num. 7; and s.v. *lex*, diff. 11, num. 1, p. 181.

[254] Compare Lessius, *De iustitia et iure*, lib. 2, cap. 7, dub. 6, num. 30, p. 79 : '(…) nos loquimur in foro interiori, ubi praesumptio non habet locum (…).'

On the development of the doctrine of presumptions in the *ius commune*, see M. Schmoeckel, *Humanität und Staatsraison, Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozeß- und Beweisrechts seit dem hohen Mittelalter*, Köln e.a. 2000, p. 228-232.

2.3.2 A minimalistic concept of morality

Even though the ultimate standard of judgment in the *forum internum* was truth and not presumption, its objective was expressly not to enforce the highest ideals of Christian virtue. Up until the beginning of the twentieth century, moral theologians would assert, just as Valero did, that one of its two main objectives was to offer relief to overburdened consciences[255]. Since the very idea of overburdened consciences may sound improbable to a modern ear, it is worthwhile remembering that the famous theologian Jean Gerson (1363-1429), at one point the Chancellor of the University of Paris, already raised alarm about the pestiferous effects of scrupulosity in his *Doctrine against too strict and scrupulous conscience*. Gerson expressed the need to dam up the spread of scruples of conscience, since those unduly burdensome feelings of guilt risked to turn into a counter-productive sense of moral defeatism[256]. Throughout the centuries, theologians would not cease to repeat this fundamental truth. In the introduction to his treatise on the sacrament of penance, Juan de Lugo asked confessors to proceed tactfully in applying the abstract rules of consciences in confessional practice. He admonished them not to turn this soft and sweet remedy against evil into an impossible, dysfunctional, scary machine that would unsettle man, certainly the scrupulous one, in his fragility[257]. Transposed in the economic language of today – which, in many respects, has replaced the religious grammar and vocabulary of times past – unduly burdensome tax rates risk to unsettle the State rather than fill its treasury.

The minimalistic approach to morality is closely related to the notoriously complex debates on decision-making in a context of uncertainty, which flourished in early modern scholasticism. The historiography on this subject, which touches on thorny issues such as tutiorism and probabilism, has often been distorted by internecine strife between rival theological schools. Many of these distortions have now been rectified through Rudolf Schüßler's *magnum opus* on the subject[258]. It would be inappropriate to open the Pandora box on probabilism in the context of this dissertation. A couple of notes may contribute, though, to understanding the juridical bent of early modern theology and the minimalistic character of

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[255] Keenan, *A history of Catholic moral theology in the twentieth century*, p. 9-34.

[256] Braun – Vallance, *Contexts of conscience in early modern Europe*, p. 4.

[257] Juan de Lugo, *Disputationes scholasticae et morales de virtute et sacramento poenitentiae*, Lugduni 1638, *Ad lectorem*, [s.p.]: 'Ut suo loco iterum monebimus, ad praxim huius sacramenti considerandum non solum est, quid utcumque verum quasi in abstracto sit, sed quid etiam moraliter et humano modo fieri possit ac deceat, ita ut remedium hoc suavitate ac dulcedine plenum non fiat sua difficultate impossibile vel horrorem nimium ingerat humanae fragilitati. Quod multo magis circa conscientias scrupulosas prae oculis habendum est (…).'

[258] On the vicissitudes of probabilism as a moral problem solving method from Antiquity till modern times, see G. Otte, *Der Probabilismus: eine Theorie auf der Grenze zwischen Theologie und Jurisprudenz*, in: Grossi, P. (ed.), La seconda scolastica nella formazione del diritto privato moderno, [Per la storia del pensiero giuridico moderno, 1] Milano 1973, p. 283-302; L. Vereecke, *Le probabilisme*, Le Supplément. Revue d'Ethique et Théologie Morale, 177 (1991), p. 23-31, and Rudolf Schüßler's magnum opus *Moral im Zweifel*, [Perspektiven der analytischen Philosophie, Neue Folge], Paderborn, Band I: *Die scholastische Theorie des Entscheidens unter moralischer Unsicherheit*, 2003, and Band II: *Die Herausforderung des Probabilismus*, 2006. See also R. Schüßler, *Moral self-ownership and ius possessionis in late scholastics*, in: V. Mäkinen – P. Korkman (eds.), Transformations in medieval and early modern rights discourse, [The new synthese historical library, Texts and studies in the history of philosophy, 59], Dordrecht 2006, p. 149-172.

Catholic moral theology until before the Second Vatican Council. Probabilism holds that in a situation of uncertainty one may follow an expert opinion, at least if that opinion is simply 'probable' (*opinio probabilis*), meaning that it is endorsed by an authoritative expert or by sound argument), despite the fact that a 'more probable' opinion (*opinio probabilior*) exists.

Although the Jesuits would become the fiercest advocates of moral probabilism, it was defended for the first time in 1577 by the Dominican Bartolomé de Medina (1527-1581), a student of Francisco de Vitoria[259]. Medina held that even if the arguments for the other position were very good, an opinion could be followed as long as it was probable, even if the opposite opinion was more probable[260]. Medina defended his position on four grounds. Firstly, he reasoned that if an opinion was deemed probable from a theoretical point of view, i.e. it could be followed without running the risk of being intellectually mistaken, then it was also to be deemed probable from a practical point of view, i.e. it could be followed without the risk of sin[261]. Secondly, an opinion is called probable precisely because it can be followed without reprehension or vituperation. Consequently, it is a contradiction in terms to maintain that the an opinion is probable, but that it is nevertheless illicit to followed it[262]. Thirdly, a probable opinion is in conformity with right reason and the assessment of prudent and wise men. Hence, to follow it does not amount to sin[263]. Lastly, the advocates of the contrary opinion admit that it is licit to teach and propose a probable opinion in academia. It is also licit, then, to advise it[264].

Probabilism is related to a theory of moral action centered around the quite liberal assumption that the human will is the owner of its actions (*voluntas domina suorum actuum*)[265]. Put differently, human will is basically free to choose any course of action it

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[259] I Kantola, *Probability and moral uncertainty in late medieval and early modern times*, [Schriften der Luther-Agricola-Gesellschaft, 32], Helsinki 1994, p. 124-130. Whether Medina really espoused probabilism is cast in doubt, though, by F. O'Reilly, *Duda y opinion, La conciencia moral en Soto y Medina*, [Cuadernos de pensamiento español, 32], Pamplona 2006, p. 81-90.

[260] Bartolomé de Medina, *In primam secundae divi Thomae*, Bergomi 1586, ad quaest. 19, art. 7, p. 179: 'Certe argumenta videntur optima, sed mihi videtur, quod si est opinio probabilis, licitum est eam sequi, licet opposita probabilior sit.'

[261] Medina, *In primam secundae divi Thomae*, ad quaest. 19, art. 7, p. 179: 'Nam opinio probabilis in speculativis ea est, quam possumus sequi sine periculo erroris et deceptionis. Ergo opinio probabilis in practicis ea est, quam possumus sequi sine periculo peccandi.'

[262] Medina, *In primam secundae divi Thomae*, ad quaest. 19, art. 7, p. 179: 'Secundo, opinio probabilis ex eo dicitur probabilis, quod possumus eam sequi sine reprehensione et vituperatione. Ergo implicat contradictionem, quod sit probabilis et quod non possimus eam licite sequi.'

[263] Medina, *In primam secundae divi Thomae*, ad quaest. 19, art. 7, p. 179: 'Tertio, opinio probabilis est confirmis rectae rationi et existimationi virorum prudentum et sapentium. Ergo eam sequi non est peccatum.'

[264] Medina, *In primam secundae divi Thomae*, ad quaest. 19, art. 7, p. 179: 'Quarto, licitum est opinionem probabilem in scholis docere et proponere, ut etiam adversarii nobis concedunt. Ergo licitum est eam consulere.'

[265] Lessius, *De gratia efficaci, decretis divinis, libertate arbitrii et praescientia Dei conditionata disputatio apologetica*, Antverpiae 1610, cap. 5, num. 11, p. 53. There is some controversy on whether possession of the self as defended in the scholastic tradition prefigures modern conceptions of liberalism or not. See the critical remarks by Janet Coleman on the contributions by Rudolf Schüβler and Brian Tierney in the same volume; cf. J. Coleman, *Are there any individual rights or only duties?, On the limits of obedience in the avoidance of sin according to late medieval and early modern scholars*, in: V. Mäkinen – P. Korkman (eds.), Transformations in medieval and early modern rights discourse, [The new synthese historical library, Texts and studies in the history of philosophy, 59], Dordrecht 2006, p. 27-32.

wants, as long as that course of action has not been forbidden by a superior law. For example, Lessius argued that making extra profits on the basis of insider trading was not forbidden for individual businessmen, since there was no law forbidding them to avail themselves of the knowledge of a future statute (*nulla lex vetat ne utar notitia illius decreti in meum commodum*)[266]. Freedom is the principle, restriction the exception. As a matter of fact, the human will is its own legislator in the context of a hierarchy of laws. Superior laws can break the obligation which the individual will imposes upon itself. Therefore, the political authorities can impose formality requirements by virtue of which the citizens' freedom to contract is limited[267]. Superior laws can also create an obligation for the individual will. Yet, if superior laws want to impose an obligation on an individual, then they must be clearly promulgated and convincing.

One of the basic requirements which a law must meet to be able to bind the individual is sufficient promulgation. According to a fundamental rule of scholastic legal philosophy, a doubtful law is not binding (*lex dubia non obligat*)[268]. A doubtful law is not binding for the following reasons. First, the individual possesses its freedom before a law comes to claim that it has the right to restrict that fundamental freedom. Second, the position of the possessor is the stronger[269]. In other words, the moral theologians applied a fundamental rule of property law to the field of human action. They used it as an argument both in disputes regarding property and in questions concerning the obligation or not which rested on an individual's conscience. As an example of the former, Lessius argued in the footsteps of Covarruvias that he who starts to doubt the good faith with which he acquired a good continues to be the rightful possessor of that good. Hence, he continues to benefit from acquisitive prescription. To buttress his view, Lessius expressly cited the maxim that, in equal doubt, the position of he who possesses is stronger than that of he who does not possess (*in pari dubio melior est conditio possidentis quam non possidentis*)[270].

The Spanish Jesuit Antonio Perez (1599-1649) claimed with reason that this maxim was the cornerstone of moral theology[271]. Juan de Salas (1553-1612) likened man's

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[266] Lessius, *De iustitia et iure*, lib. 2, cap. 21, dub. 5, num. 47, p. 279.

[267] See Chapter 5 (Formal limitations on 'freedom of contract').

[268] See L. Vereecke, *Le Concile de Trente et l'enseignement de la théologie morale*, in : id., De Guillaume D'Ockham à Saint Alphonse de Liguori. Études d'histoire de la théologie morale moderne 1300-1787, [Bibliotheca Historica Congregationis Redemptoris, 12], Romae 1986, p. 495-508 ; L. Vereecke, *Théologie morale et magistère, avant et après le Concile de Trente*, Le Supplément, Revue d'Ethique et Théologie Morale, 177 (1991), p. 7-22; J. Mahoney, *The making of moral theology*, Oxford 1987, p. 227.

[269] Compare S. Pinckaers, *Les sources de la morale chrétienne, Sa méthode, son contenu, son histoire*, [Etudes d'éthique chrétienne, 14], Fribourg 1985, p. 279: 'La liberté 'possède' la place, tant qu'une loi certaine ne vient pas l'en déloger.' Similarly, L. Vereecke, *Le probabilisme*, Le Supplément, Revue d'Ethique et Théologie Morale, 177 (1991), p. 29.

[270] Lessius, *De iustitia et iure*, lib. 2, cap. 6, dub. 3, num. 11, p. 56.

[271] Antonio Perez, *De iustitia et iure et de poenitentia opus posthumum*, Romae 1668, tract. 2, disp. 2, cap. 4, num. 78, p. 174. Perez, who studied arts and theology in Medina del Campo and Salamanca, succeeded Juan De Lugo in 1642 as a theology professor at the Collegio Romano. He made an important contribution to the conceptualization of intellectual property and copyright; cf. J. Escalera, s.v. *Perez*, in C. O'Neill – J. Domínguez (eds.), Diccionario histórico de la Compañía de Jesús biográfico-temático, vol. 3, Roma-Madrid 2001, p. 3089-3090.

possession of liberty and his right to do what is most useful to him to the position of the possessor of an external good[272]. Put differently, the building blocks of a strikingly liberal strand of moral theology were provided by the *ius commune*. The theologians reasoned from Romano-canon property law to ethics. The rule that the position of the possessor is the stronger can be traced back through to the Digest[273]. It also figured in the titles on the general principles of law of both Justinian and Pope Boniface VIII (*in pari delicto vel causa potior est conditio possidentis*)[274]. This is another example of the profound interconnectedness of law and theology in premodern times. Although the exact scope of application of the rule remained a matter of debate, the moral theologians would continue to endorse this view of freedom of action as an undisputed right possessed by the will and protected by the '*melior est conditio possidentis*-rule'. The Jesuit Ignaz Schwarz (1690-1763), for instance, maintained that this maxim held true not only as a matter of justice not only in the external courts, but also in conscience, since man's right to possess his freedom was certain, while the right of the law which intended to limit that freedom was doubtful[275].'

The relationship between man's basic freedom, on the one hand, and laws trying to impose obligations on the individual, on the other, was essentially conceived of in antagonistic terms. It was analyzed as a conflict which opposed a plaintiff against a defendant in the tribunal known as the court of conscience. As Antonio Perez explained, the side favoring the imposition of an obligation was like a plaintiff (*actor*), since it claimed a debt, while the other side acted as a defendant (*reus*) who fought for his freedom. Moreover, the

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[272] Juan de Salas, *Disputationes in primam secundae*, Barcinonae 1607, tom. 1, tract. 8, disp. 1, sect. 6, num. 67, p. 1205 : 'ut in dubiis melior est conditio possidentis rem aliquam externam aut ius percipiendi aliquem fructum (…), ita etiam melior est conditio possidentis libertatem suam et ius efficiendi quod sibi utile fuerit'. A graduate from Salamanca and a theology professor at the Collegio Romano, he and his colleague Suárez were accused by Miguel Marcos of deviating too much from Thomas Aquinas's standard teaching; cf. V. Ordóñez, s.v. *Salas*, in C. O'Neill – J. Domínguez (eds.), Diccionario histórico de la Compañía de Jesús biográfico-temático, vol. 4, Roma-Madrid 2001, p. 3467.

[273] E.g. D. 43, 33, 1, 1 in *Corporis Iustinianaei Digestum novum*, Commentariis Accursii, scholiis Contii, paratitlis Cujacii, et quorundam aliorum doctorum virorum observationibus novae accesserunt ad ipsum Accursium Dionysii Gothofredi notae, Lugduni 1604 [=1588] (hereafter: ed. Gothofredi), tom. 3, col. 782: 'Si colonus res in fundum duorum pignoris nomine intulerit, ita ut utrique in solidum obligatae essent; singuli adversus extraneum Salviano interdicto recte experientur, inter ipsos vero si reddatur hoc interdictum, possidentis conditio melior erit.' See also D. 43, 33, 2 cum glossa *Ad Servianum*, l.c.: 'In Salviano interdicto, si in fundum communem duorum pignera sint ab aliquot invecta, possessor vincet, et erit eis descendendum ad Servianum iudicium [Gl.: in quo id veniet, ut sit possidentis conditio melior].'

[274] VI, Reg. iur., 65, *Corpus juris canonici* (ed. Gregoriana), part. 3, col. 844, l. 9-10. The gloss *In pari* rightly draws the attention to the procedural consequence of this rule: that the defendant has the benefit of the doubt (*et nota quia hic exhibetur favor reo, quia absolvitur in pari causa vel delicto*). Boniface VIII's formulation of the rule combines D. 50,17,128*pr*. (*in pari causa possessor potior haberi debet*) and D. 50,17,154 (*cum par delictum est duorum, semper oneratur petitor et melior habetur possessoris causa*); cf. *Corporis Iustinianaei Digestum novum* (ed. Gothofredi), tom. 3, col. 1915 and col. 1921.

[275] Ignaz Schwarz, *Institutiones iuris universalis naturae et gentium*, Venetiis 1760, part. 1, tit. 1, instruct. 5, par. 4, resp. 2, p. 126: 'Ista regula, *quod melior sit conditio possidentis* non tantum valet in materia iustitiae, sed etiam conscientiae. Ratio est, quia in hac homo habet *ius certum* possessionis *quoad suam libertatem*; lex vero *jus dubium* obligationis. Ergo homo non debet deturbari a sua possessione, nisi oppositum efficaciter probetur. Porro tunc libertas hominis censetur *esse in possessione*, quando dubium est *de obligatione contracta*, secus, quando dubium est *de obligationis contractae satisfactione* seu *exemptione*. '

Ignaz Schwarz was a professor of history at the University of Ingolstadt; cf. H. Dickerhof, *Land, Reich, Kirche im historischen Lehrbetrieb an der Universität Ingolstadt, Ignaz Schwarz (1690-1763)*, Berlin 1967.

burden of proof lay with the law trying to impose an obligation on the individual, since it is up to the plaintiff to prove his claim (*actoris est probatio*) that the individual owes it something. It lay in the nature of things that the defendant was unable to prove that he was not under an obligation[276]. More interesting still, is that Perez defended the view that he who doubts the existence of a certain precept remains free (*dubitans est possessor suae libertatis*). He reasoned that this kind of principles promoted freedom of action and relieved men of innumerable obligations (*favent libertati operandi, et ab innumeris obligationibus homines liberant*)[277].

Perez's argumentation brings us back to the interior forum's role as the place where Christians are healed from unduly burdensome obligations, as the Carthusian monk Valero pointed out. Consequently – and this point needs emphasis – the court of conscience was not the place for the enforcement of lofty moral principles or 'thick morality'. It was the place for determining the rights and obligations a person had in the light of truth and justice. For example, following Lessius, Perez maintained that one is not bound as a matter of justice to rescue people from drowning. It is important to understand what he means by that. Perez explained that you could not be bound as a matter of justice, that is, legally speaking, to prevent someone from incurring damage by omitting certain actions. This means that you are only bound to prevent damage if you are under a duty to do so by your office or by contract *(ex officio aut contractu)*[278]. If you do not care for the good of your neighbor and you are not under a (quasi-)contractual or official obligation to do so, then you cannot be bound to make restitution if your neighbor suffers damages that you could have prevented. You are certainly under obligation as a matter of charity, but you are not under an obligation as a matter of justice. You are not infringing upon your neighbor's natural rights by failing to take action. Consequently, your confessor cannot oblige you to make restitution.

The focus on restitution and the rights and obligations existing between people as a matter of justice explains the minimalistic character of the penitential literature, or, according to the modern understanding of the role of 'law', its 'legalistic' nature[279]. They were

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[276] Perez, *De iustitia et iure*, tract. 2, disp. 2, cap. 4, num. 100, p. 182: 'Ultimo idem probari potest, quia pars obligationi favens est, quasi actor, petit enim debitum ; altera est quasi reus, defendit enim suam libertatem. At semper actoris est probatio, non vero rei : actor enim dicit sibi deberi ; reus solum negat : negatio autem per rerum naturam probari non potest, ut passim iuris periti dicunt.'

[277] Perez, *De iustitia et iure*, tract. 2, disp. 2, cap. 4, num. 78, p. 174.

[278] Perez, *De iustitia et iure*, tract. 2, disp. 3, cap. 7, num. 122, p. 236: 'Quaritur primo, utrum qui non impedit damnum alterius, cum posset facile impedire, teneatur semper ad restitutionem ? Caietanus verbo restitutio, et alii affirmant. Contraria sententia est communis, et vera, teste Lessio lib. 2, cap. 13, dub. 10. Et ratio est, quia quando meam operam in alterius commodum non impendo, si ad id ex officio, aut contractu non tenear, nihil proprium illius, nihil ipsi ex iustitia debitum aufero : alioquin, si quando alius mea opera indiget, tenerer ex iustitia eam non omittere, non possem pro opera petita pretium exigere, quod est absurdum. Secundo, quia durissimum esset, omnes homines esse obligatos ex iustitia, et cum obligatione restitutionis ad praestandam mutuam operam, quando damnum timetur, cum ad finem societatis humanae sufficiat obligatio misericordiae et charitatis.'

[279] I am thinking, in particular, of the positivistic definition of law as the ethical minimum in Georg Jellinek's (1851-1911) *Die sozialethische Bedeutung von Recht, Unrecht und Strafe*, Berlin 1908, p. 45: ‚Das Recht ist nichts anderes, als das ethische Minimum. Objektiv sind es die Erhaltungsbedingungen der Gesellschaft, soweit sei vom menschlichen Willen abhängig sind, also das Existenzminimum ethischer Normen, subjektiv ist es das Minimum sittlicher Lebenstätigung und Gesinnung, welches von den Gesellschaftsgliedern gefordert wird.' Also

concerned, primarily, with what jurists such as Pothier would call 'perfect obligations' (*obligations parfaites*). Unlike imperfect obligations (*obligations imparfaites*), perfect obligations created legal debt, whether those obligations were enforceable in the exterior fore or in the interior fore. Like Pothier, the theologians recognized that moral debt (*debitum morale seu debitum ex honestate*) brought about a natural obligation, but not the kind of natural obligation which was enforceable in the court of conscience. The only enforceable natural obligation was the natural obligation rooted in the body of law called natural law (*debitum ex iure naturali*)[280]. Imperfect natural obligations, for instance natural obligations stemming from moral debt but not based on natural law (e.g. the duty to be grateful to somebody who makes you a gift) did not grant a right to another person, not even in the court of conscience[281]. Natural obligations based on natural law, on the contrary, were considered to be enforceable in the court of conscience both by the moral theologians and by Pothier[282].

The moral theologians made a sharp distinction between precepts (*praeceptum*) and counsels (*consilium*). It drew on medieval antecedents and persisted unaltered in the work of Hugo Grotius[283]. Precepts were binding for all Christians, while counsels became enforceable only on condition that one assented to making them binding for oneself through a vow (*votum*)[284]. Counsels show the way to the plenitude of Christian life, but they are not

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cited in O. Behrends, *Die rechtsethischen Grundlagen des Privatrechts*, in: F. Bydlinski – T. Mayer-Maly (eds.), Die ethischen Grundlagen des Privatrechts, Wien-New York 1994, p. 28.

[280] Valero, *Differentiae*, praeludia, num. 24-25, p. 3 : 'Naturalis tantum obligatio est duplex, ut constat ex D. Thoma 2.2., quaest. 106, art. 4, 5, 6. Una, quae est vera et propria, ex iure et lege naturae producta, quae in re gravi obligat in conscientia sub poena peccati mortalis. […] Altera est naturalis obligatio, quae ab honestate morali deducitur, insurgitque ex honestate et debito morali. Ut est illa recipientis beneficium qua quis tenetur ad antidora et ad gratam remunerationem loco et tempore convenienti.'

[281] Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, tom. 1, article préliminaire, p. 1.

[282] Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, tom. 1, part. 2, chap. 2, p. 174-175 : 'Au contraire, les obligations naturelles, dont nous avons traité dans ce chapitre, donnent à la personne, envers qui nous les avons contractées, un droit contre nous, non pas, à la vérité, dans le for extérieur, mais dans le for de la conscience. C'est pourquoi si j'ai fait une dépense de cent livres dans un cabaret du lieu de mon domicile, ce cabaretier est vraiment mon créancier de cette somme, non dans le for extérieur, mais dans le for de la conscience; et si j'avois de mon côté une créance de pareille somme contre lui qui fût prescrite | il pourroit dans le for de la conscience se dispenser de me la payer, en la compensant avec celle qu'il a contre moi.' As will be explained below, one of the favorite enforcement mechanisms in the court of conscience was compensation.

[283] E.g. Hugo Grotius, *De jure belli ac pacis libri tres in quibus ius naturae et gentium item iuris publici praecipua explicantur*, Curavit B.J.A. De Kanter – Van Hettinga Tromp, Editionis anni 1939 exemplar photomechanice iteratum, Annotationes novas addiderunt R. Feenstra et C.E. Persenaire, adiuvante E. Arps-De Wilde, Aalen 1993 [hereafter cited as Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire], lib. 1, cap. 2, par. 9, num. 4, p. 81. On the thirteenth century roots of this distinction, see Pinckaers, *Les sources de la morale chrétienne*, p. 292-293, and D. Witschen, *Zur Bestimmung supererogatorischer Handlungen, Der Beitrag des Thomas von Aquin*, Freiburger Zeitschrift für Philosophie und Theologie, 51 (2004), p. 30-38. The *praeceptum – consilium* pair already played a vital role in the Franciscan Pierre Jean d'Olivi's (1248-1298) treatise on contracts, see S. Piron, *Le devoir de gratitude, Émergence et vogue de la notion d'antidora au XIIIe siècle*, in : D. Quaglioni – G. Todeschini – M. Varanini (eds.), Credito e usura fra teologia, diritto e amministrazione (sec. XII-XVI), [Collection de l'École française de Rome, 346], Rome 2005, p. 73-101.

[284] This is the theme of Coccia, *Regula et vita*, p. 97-147.

binding[285]. They are the object of works of supererogation (*supererogatio*), not of justice. They go beyond what is demanded from ordinary Christians. For example, Lessius conceded that following the counsels of Christ was the safest way to paradise, but he refused to acknowledge that they were binding as a matter of necessity. Otherwise, he quipped, all people would be bound to abstain from doing business[286]. The *forum internum*, then, merely pretended to be a place where rights and obligations deriving from precepts could be reinforced. The confessors did not mean to transform character[287]. It was their task to make sure that ordinary Christians passed the exam, so to speak, at the Day of Last Judgment. If people strived for honors, as they were encouraged to do through homilies and preaching, they would turn their attention to devotional and spiritual literature, not to manuals for confessors.

2.3.3 A plurality of legal sources

The sources of obligations that threatened to limit the will's possession of its freedom of action were manifold. Contrary to the Protestants, the Catholics did not think that the 'New Law', that is the Gospel[288], was sufficient to decide what obligations a man needed to fulfil in a particular circumstance in order to please God. Moral theologians such as Lessius had a comprehensive and systematic view of the various bodies of law that rule human behavior[289]. The main distinction Lessius made was between natural law and positive law. Natural law (*ius naturale*) was considered to derive from rational nature and the natural condition of things[290].

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[285] T. Van Houdt – N. Golvers – P. Soetaert, *Tussen woeker en weldadigheid, Leonardus Lessius over de Bergen van Barmhartigheid (1621), Vertaling, inleiding en aantekeningen*, Leuven-Amersfoort 1992, p. 129.

[286] Lessius, *De beatitudine (...) praelectiones theologicae posthumae. Accesserunt eiusdem variorum casuum conscientiae resolutions*, Lovanii 1645), quaest. 19, art. 6, dub. 7, num. 44: 'Fateor tamen tutius esse facere quam non facere in tali casu. Non tamen ideo necessarium est facere, alioqui omnes deberent sequi consilia Christi: hoc enim est tutius; omnes tenerentur exequi omnes bonas inspirationes, omnes tenerentur abstinere a negotiatione.'

[287] E. Leites, *Casuistry and character*, in: E. Leites (ed.), Conscience and casuistry in Early Modern Europe, Cambridge 2002 [=1988]), p. 120; M. Sampson, *Laxity and liberty in seventeenth-century English political thought*, in: E. Leites (ed.), Conscience and casuistry in early modern Europe, Cambridge 2002 [=1988], p. 82; J.F. Keenan, *The casuistry of John Mair, Nominalist professor of Paris*, in: J.F. Keenan – Th.A Shannon (eds.), The context of casuistry, Washington DC 1995, p. 96.

[288] Since, to a modern ear, which is influenced by the Protestant tradition, the Gospel is considered to be a source of morality instead of law, it might be worthwhile recalling that the the Gospel used to be considered a source of law by the Catholics. Indeed, the post-Tridentine moral theologians emphasized that seeing it otherwise was a form of heresy. Cf. Francisco Suárez, *Tractatus de legibus et legislatore Deo*, lib. 10, cap. 1 (*De lege nova et legislatore Christo*), num. 3, in: Opera omnia, editio nova a Carolo Berton, Parisiis 1856, tom. 6, p. 550: 'Catholica veritas Christum Dominum non solum fuisse Redemptorem, sed verum et proprium legislatorem. – Dicendum vero primo est Christum Dominum non solum fuisse redemptorem, sed etiam fuisse verum et proprium legislatorem. Haec assertio est de fide, definita in Concilio Tridentino, sessione 6, canon. 21.'

[289] See Lessius, *De iustitia et iure*, lib. 2, cap. 2, dub. 2, num. 9, p. 20: 'Si [ius] accipiatur secundo modo, pro lege, dividitur sicuti lex. Itaque *ius* aliud est naturale, aliud positivum; *ius positivum* alius est divinum, aliud humanum. *Ius divinum* aliud est vetus, aliud novum. *Ius humanum* aliud est ius gentium, aliud ius canonicum, aliud civile.'

[290] Lessius, *De iustitia et iure*, lib. 2, cap. 2, dub. 2, num. 9, p. 20: 'Ius naturale dicitur quod ex ipsis rerum naturis oritur, scilicet ex natura rationali et naturali conditione operum de quibus hoc ius disponit. Unde eius rectitudo, supposita existentia naturae humanae, non pendet ex aliqua libera ordinatione Dei vel hominis, sed ex ipsa rerum natura.'

Contrary to positive law, the rectitude of natural law was determined not by a human or divine voluntary disposition, but rather by the inherent nature of things themselves (*ex ipsa rerum natura*)[291]. Hence, natural law was also said to be immutable. Positive law (*ius positivum*), on the other hand, derived from a voluntary disposition. As Lessius explained, positive law depended on the free will of God or mankind. Hence, it was subject to change.

Positive law was subdivided into two main categories depending on whether a positive legal disposition stemmed from God (*ius divinum*) or from mankind (*ius humanum*). Divine law itself was divisible into old divine law and new divine law. Old divine law (*ius divinum vetus*) coincided with God's legislation in the Old Testament, for example concerning rituals and governance. New divine law (*ius divinum novum*) encompassed the Gospel and, as Lessius added in a truly anti-protestant vein, the sacraments. Human law subdivided into three categories. Apart from the laws that were common to all nations (*ius gentium*), there existed civil law (*ius civile*) as constituted by secular rulers, and canon law (*ius canonicum*) as issued by virtue of the authority of the Pope or the Council. It should suffice here to note that positive law was thought to be divine at least in an indirect sense, since God was the ultimate legislator. Therefore, it was commonly accepted by Catholic moral theologians that human laws were binding in conscience, as longs as they were just[292]. As Suárez explained, all secular laws derive from God as their first cause (*causa prima*), even if their direct cause (*causa proxima*) is the work of the secular legislator[293]. The indirectly divine nature of statutory law legitimized the theologians' involvement with positive secular law in the first place[294].

Not only did moral theologians such as Lessius draw up a cartography of laws, they also found an important connection between objective laws and subjective rights – rights being defined in terms of power based on law (*potestas legitima*)[295]. Therefore, depending on whether they correspond to natural law or positive law, men dispose of natural rights (*ius naturale*) or positive rights (*ius positivum*). Conversely, Lessius and his colleagues also developed the important conceptual notion that a debt or an obligation (*debitum*) is the other

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[291] The 'nature of things' remains an elusive and ubiquitous argument in the history of jurisprudence; cf. H. Holzhauer, *Natur als Argument in der Rechtswissenschaft*, in: G. Köbler – H. Nehlsen (ed.), Wirkungen europäischer Rechtskultur, Feschrift für Karl Kroeschell zum 70. Geburtstag, München 1997, p. 395-417.

[292] E.g. Francisco de Vitoria, *Commentarii in IamIIae De lege*, quaest. 96, art. 4 (*Utrum lex humana imponat homini obligationem in foro conscientiae*), num. 5, in: Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomás*, edición preparada por V. Beltrán de Heredia, tom. 6, appendice 1 (*De lege*), [Biblioteca de Teólogos Españoles, 17], Salamanca 1952, p. 433 : 'Communis tamen opinio theologorum est quod leges humanae possunt obligare virtute sua ad mortale [peccatum].'

[293] For discussion, see W. Decock, *Counter-reformation diplomacy behind Francisco Suárez's constitutionalist theory*, Ambiente Juridico, 11 (2009), p. 68-92.

[294] Suárez, *Tractatus de legibus et legislatore Deo*, tom. 5, Prooemium, p. ix-x; and Suárez, *Defensio fidei catholicae adversus Anglicanae sectae errores*, lib. 3, cap. 2, num. 1, in: Opera Omnia, editio nova a Carolo Berton, Parisiis 1859, tom. 24, p. 206. Compare C. Larrainzar, *Una introducción a Francisco Suárez*, Pamplona 1976, p. 135.

[295] Lessius, *De iustitia et iure*, lib. 2, cap. 2, dub. 2, num. 10, p. 20: 'Si ius accipiatur tertio modo, scilicet pro *potestate legitima*, dividi potest, primo ex parte principii, nempe secundum divisionem legum quibus oritur. Unde aliud est *naturale*, quod lege vel concessu naturae competit; aliud *positivum*, quod lege positiva vel concessione libera Dei vel hominum competit, et sic deinceps in aliis membris.'

side of a right[296]. The Jesuits arrived at a detailed and scientific analysis of the 'system' of law to which Hugo Grotius was highly indebted[297]. Developing these highly influential theoretical observations on laws and rights at the outset of their manuals for confessors, the moral theologians could then proceed to answer the question about which concrete rights and which laws were at play in a particular case of conscience. A moral theologian needed to have a sound knowledge of all sources of law to be able to determine the rights and obligations of the penitents with precision. In Suárez's words[298]:

> The road to salvation passes through free actions and moral rectitude. Since moral rectitude strongly depends on law's being, as it were, the rule of human actions, the study of law is a major part of theology. In treating of laws, the sacred doctrine of theology investigates nothing less than God himself in his function as a legislator. (…) It is the task of a theologian to care for the consciences of the pilgrims on earth. Yet the rectitude of consciences is dependent on observing the law just like moral depravity is dependent on breaking the law, since a law is every rule which leads to the acquisition of eternal salvation if observed – as it must be – and which leads to the loss of eternal salvation when it is broken. The study of law, then, pertains to theologians, to the extent that law binds conscience.

Jurisdiction over the souls required a profound knowledge of a plurality of legal sources. Learned experts in moral jurisprudence needed to assist confessors with the task of judging in the internal forum, just as knowledgeable doctors of laws had to assist judges in the external forum. Adjudication in the internal forum was perhaps even more demanding than it was in the external forum, at least from an intellectual point of view. The Jesuit Juan Azor (1536-1603) added to the title of his famous *Moral Institutes* (*Institutiones morales*) that the material of his treatise was based not only on the doctrine of theology, but also on canon law, civil law, and history, as well as on commentaries by the experts in each of those fields[299].

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[296] Lessius, *De iustitia et iure*, lib. 2, cap. 2, dub. 1, num. 7, p. 20: 'Ex iure enim ipsius in me vel mea, nascitur in me debitum praestandi id, quod illud ius impleat et exhauriat.'

[297] The same idea has been stressed in the context of demonstrating the profound indebtedness of Hugo Grotius (1583-1645) to Jesuit moral theological thought, by P. Haggenmacher, *Droits subjectifs et système juridique chez Grotius*, in: L. Foisneau (ed.), Politique, droit et théologie chez Bodin, Grotius et Hobbes, Paris 1997, p. 73-130; and in B. Tierney, *The idea of natural rights, Studies on natural rights, natural law, and Church law, 1150-1650*, [Emory studies in law and religion, 5], Grand Rapids – Cambridge 2001, p. 316-342.

[298] Suárez, *Tractatus de legibus et legislatore Deo*, Prooemium, p. ix-x : 'Quoniam igitur hujus salutis via in actionibus liberis morumque rectitudine posita est, quae morum rectitudo a lege tanquam ab humanarum actionum regula plurimum pendet ; idcirco legum consideratio in magnam theologiae partem cedit ; et dum sacra doctrina de legibus tractat, nihil profecto aliud quam Deum ipsum ut legislatorem intuetur. (…) Deinde theologicum est negotium conscientiis prospicere viatorum ; conscientiarum vero rectitudo stat legibus servandis, sicut et pravitas violandis, cum lex quaelibet sit regula, si ut oportet servatur, aeternae salutis assequendae ; si violetur, amittendae ; ergo et legis inspectio, quatenus est conscientiae vinculum, ad theologum pertinebit.'

[299] Juan Azor, *Institutiones morales, in quibus universae quaestiones ad conscientiam recte aut prave factorum pertinentes breviter tractantur. Omnia sunt vel ex theologica doctrina, vel ex iure canonico vel civili, vel ex probata rerum gestarum narratione desumpta, et confirmata testimoniis vel theologorum, vel iuris canonici aut civilis interpretum, vel summistarum, vel denique historicorum*, Lugduni 1612. For a biographical introduction to Juan Azor, see A.F. Dziuba, *Juan Azor S.J., Teólogo moralista del s. XVI-XVII*, Archivo Teológico Granadino, 59 (1996), p. 145-156.

Also, the field of application of moral jurisprudence was less limited than in the external forum, even in a territorial sense. Its territory and field of application was the soul. As a result, whereas a judge in either a secular or an ecclesiastical external court had no legitimate jurisdiction beyond his own territory, a parish priest could confess his flocks and absolve them wherever on earth he was[300]. The jurisdiction of the soul as well as its accompanying science, moral jurisprudence, were all-encompassing in scope.

2.4 Enforcement mechanisms

2.4.1 Norms and force

It is natural to take the law of one's own time and country as a norm, and, hence, to consider it as 'normal'. If carried to excess, however, this tendency easily leads to an impoverishment of our understanding of the historical development of legal doctrine and of human conflict management in the past. Awareness of the deeply religious consciousness that shaped the lives of more than a minority of the people until well into modern times is a fundamental prerequisite for gaining a better insight into the functioning of 'law' in the *ancien régime*[301]. This study will reveal some of the roots of modern contract doctrine in an area where they ought not have grown according to the tenets of legal positivism. The theological roots of Western legal cultures are hidden behind the view – which relies on the philosophies of legal thinkers such as John Austin and Max Weber – that rules of conduct can properly be called laws only when force stands behind them, and that the secular State is endowed with the monopoly over the legitimate use of such force. In Michael Barkun's description of this positivistic creed[302]: 'The coercive power of the state, exercised or brandished, makes the difference between the pious hopes of morality and the grim certitudes of law.'

One may wonder whether it is useful at all to approach the theologians' treatment of contract from the perspective of the current distinction between 'morality' and 'law'. We have just seen that the theologians themselves conceived of their job in terms of moral jurisprudence. They also made a distinction between 'moral' norms that were unenforceable and 'moral' norms that were enforceable in the court of conscience. To put it in their own vocabulary, they distinguished between 'moral debt' and 'legal debt'. In addition, the normative universe developed by the theologians was not entirely perceived, at least in their times, to be unenforceable. If we follow Hart's concept of law as rules of recognition, then, the theologians' norms should be considered, even according to certain strands in contemporary legal philosophy, not as 'morality' but as 'law'. Furthermore, it is a matter of debate whether norms need to be enforceable to qualify as 'legal' in the first place. As

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[300] Valero, *Differentiae*, s.v. *sententia*, num. 1, p. 323 : 'Iudex ferens sententiam extra locum consuetum et territorium proprium nulliter agit. […] At parochus ubicumque locorum et terrarum potest audire confessiones suorum parochianorum et eos absolvere. […]'.

[301] Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX, systematisch auf grund der handschriftlichen Quellen dargestellt*, [Studi e testi, 64], Città del Vaticano 1935, p. 1-3.

[302] Michael Barkun, *Law without sanctions, Order in primitive societies and the world community*, New Haven – London 1968, p. 8.

Donahue has argued with reference to Jewish and Islamic legal systems as well as the Roman legal system in many of its periods, the absence of the possible use of public force might not be a necessary element in a system of private law at all[303].

To return from contemporary legal philosophy to the facts of history, it is clear that the theologians were the self-promoted guardians of a realm of norms which ran parallel to State legislation and were coupled with jurisdiction. In the following paragraphs, a tentative hint is given of how the normative universe of the theologians rose to the surface in the material life of pre-modern societies. We will first draw attention to a well-known mechanism for the enforcement of moral norms through the ecclesiastical courts which is known as evangelical denunciation (*denunciatio evangelica*). Originally, evangelical denunciation was meant as a charitable act of fraternal correction (*correctio fraterna*) for the good of the soul of one's brother. Eventually, however, it evolved into a mechanism for enforcing one's patrimonial claims against a sinful defendant. Therefore, evangelical denunciation came close to the appeal to the judge's office (*officium judicis*), which allowed the vindication of one's material interests through urging the judge to have the defendant comply with his moral duties. The second enforcement mechanism that will offer us a glimpse into the material implications of the moral theologians' normative universe is secret compensation (*occulta compensatio*). This is a form of legal self-help promoted by the theologians (and Grotius), in the event that the external courts are defective in giving litigants their due.

2.4.2 Evangelical denunciation and the power of the keys

An in-depth study of the use of evangelical denunciation in classical canon law has been provided by Piero Bellini[304]. It may be recalled that the precept of fraternal correction (*correctio fraterna*) takes its roots from the Gospel of Matthew (Mt. 18:15-17). In short, it holds that every Christian is under a duty to talk to his brother about his misbehavior. If the brother in question refuses to listen to him, then he should try to persuade him by appealing to one or two witnesses. In the event that even this second warning fails, the wrongs should be reported to the Church. Canonists such as Dr. Navarrus insisted on the necessity of following each step in this procedural order (*ordo*). The secret, fraternal correction had to occur first (*primo fraterna et secreta correctio*), then the appeal to witnesses (*deinde testium adhibitio*),

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[303] Donahue, *Private law without the State and during its formation* p. 123. The author goes on to argue, however, that the possibility of using force makes the practical application of any system of private law more effective. Also, even if religious authorities (e.g. the rabbis of the Talmud), developed a private law system with little regard for whether the system ever got applied to actual disputes, they, or their students, were often involved in the resolution of real-world cases (p. 124-125).

[304] P. Bellini, *'Denunciatio evangelica' e 'denunciatio iudicialis privata', Un capitolo di storia disciplinare della Chiesa*, Milano 1986. Earlier studies of importance include Ch. Lefebvre, *Contribution à l'étude des origines et du développement de la 'denunciatio evangelica' en droit canonique*, in : Ephemerides iuris canonici, 6 (1950), p. 60-93 ; Ch. Lefebvre, *Gratien et les origines de la dénonciation évangélique, De l'accusatio à la denunciatio*, Studia Gratiana, 4 (1956), p. 231-250. Recent literature includes G. Jerouschek – D. Müller, *Die Ursprünge der Denunziation im Kanonischen Recht*, in : H. Lück-B. Schildt (ed.), Recht – Idee – Geschichte. Beiträge zur Rechts- und Ideengeschichte für Rolf Lieberwirth anlässlich seines 80. Geburtstages, Köln e.a. 2000, p. 3-24.

and, finally, the denunciation in court (*postremo denunciatio*)[305]. At any rate, a Christian who sees his brother committing a sin must try to dissuade him. The combat against sin and the promise of salvation are at the heart of Christianity, and of the Church as an institution, in particular. It is no coincidence, then, that the precept of fraternal correction precedes the verse that lays the foundation of the Church's power of the keys (Mt. 18:18).

The Church's power of the keys (*potestas clavium*), that is the power to bind and loose sins, was central to the Church's claim to spiritual jurisdiction[306]. The power of the keys is a judicial power, exercised through a tribunal of its own. According to Suárez, the orthodox Catholic faith subscribes on pain of heresy to the tenet that Christ established a kind of tribunal in the Church, crowding it with judges to whom cases of conscience and sinners are to be brought[307]. As Diego de Covarruvias y Leyva explains, the power of the keys falls directly to all priests by virtue of the sacrament of holy orders or ordination[308]. The power of the keys grants priests the power to absolve penitants from sin in the court of conscience (*potestas absolvendi a peccatis in foro animae*). However, Covarruvias is careful to point out that the actual exercise of the power of the keys presupposes that a priest has first been granted the power of jurisdiction (*potestas iurisdictionis*) from the Pope or from a bishop, as when the care over a particular group of souls is committed to him. In other words, the power of jurisdiction is as it were the force which sets in motion the power of the keys (*potestas iurisdictionis tamquam vis motiva clavium*). Generally speaking, from the moment a priest is punished with excommunication, he loses his jurisdictional power both in the ecclesiastical court and in the court of conscience[309].

Fraternal correction was thought to be a binding precept for every Christian. It was considered to pertain to justice as well as charity. Huguccio of Pisa and, later, Hostiensis forcefully asserted that every Christian was bound as a matter of charity to correct the sins of

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[305] Azpilcueta, *Relectio in cap. Novit de iudiciis*, not. 5, num. 1, in: Opera Omnia, Venetiis 1601, tom. 3: Commentarii et tractatus relectionesve, f. 76r.

[306] In a remarkable book, *The reformation of the keys, Confession, conscience, and authority in sixteenth-century Germany*, Cambridge Mass. 2004, Ronald K. Rittgers rightly finds it surprising that so little scholarly attention has been paid to the change in the conception of the power of the keys during the Reformation (p. 3).

[307] Francisco Suárez, *Commentaria in tertiam partem Divi Thomae, a quaestione 84 usque ad finem*, Disp. 16 (*De potestate clavium*), sect. 1, coroll. (*potestatem hanc esse per modum judicii*), num. 10, in: Opera omnia, editio nova a Carolo Berton, Parisiis 1861, tom. 22, p. 340: 'Ex quibus facile etiam colligitur, potestatem hanc esse judiciariam, seu per modum judicii exercendam; quod etiam est de fide, ut constat ex Conc. Trid., sess. 14, cap. 1, ubi propterea can. 9 definit absolutionem esse actum judicii et sententiae prolationem. Quod etiam maxime confirmatur ex traditione Ecclesiae, quae in illis verbis semper intellexit, constituisse Christum Dominum in Ecclesia sua quoddam tribunal, et reliquisse judices, apud quos peccatorum et conscientiarum causae tractarentur; quod verba illa Christi, *remittendi et retinendi peccata, ligandique et solvendi*, satis indicant, ut disp. seq. sect. 2 latius expendam.'

[308] Merzbacher, *Azpilcueta und Covarruvias*, p. 294-295.

[309] Francisco Suárez, *Disputationes de censuris in communi et in particulari de excommunicatione, suspensione et interdicto, ac praeterea de irregularitate*, disp. 14 (*De sexto effectu excommunicationis majoris, qui est privatio jurisdictionis ecclesiasticae*), in: Opera omnia, editio nova a Carolo Berton, Parisiis 1861, tom. 23, p. 366: 'Hic est ultimus effectus excommunicationis pertinens ad privationem spiritualem bonorum, in quo nihil addere oportebat de jurisdictione spirituali pertinente ad forum poenitentiae; nam in superioribus dum ostendimus excommunicatum privatum esse potestate administrandi sacramenta, satis est consequenter ostensum, esse privatum jurisdictione judicandi in illo foro. Solum ergo hic agimus de jurisdictione in foro exteriori.' For the details, see p. 367-385.

his brother[310]. As Thomas Aquinas explained in his elaborate question *De correctione fraterna*, fraternal correction is an act of charity in that it liberates the sinner from an evil, and an act of justice since it sets a good example for Christians other than the sinner in question[311]. If the sinner would not listen to the corrections of his brother, he could be taken to court by virtue of evangelical denunication. There were three ways of bringing a criminal to trial[312]. The first was the *accusatio*, in which the prosecution was initiated by an individual, mostly the person who had suffered from the crime ; the second was the *inquisitio*, in which the prosecution was initiated by the judge ; the third was the *denuntiatio*, which started through an individual's denunciation under oath and was then carried forward by the judge. Contrary to the *accusatio*, the proceedings initiated by evangelical denunciation were not primarily geared towards the punishment of the criminal act, but towards the emendation of the sinner (*ad emendationem delinquentis*), as Thomas Aquinas explained[313].

Of great importance, at least to the decretists of the twelfth century, was the intention with which sinful behavior was denounced. The admissibility of evangelical denunciations depended on the good zeal (*bonus zelus*) of the denouncer to correct and emend the behavior of his brother. If driven by bitterness, pride or dishonesty, Rufinus warned, the denouncer himself was guilty of sin and malice[314]. Thomas Aquinas admonished that the manner in which fraternal correction was practiced mattered as much as the observation of the precept itself. Most importantly, the goal of fraternal correction, namely virtue, had to be kept in mind[315]. Consequently, the benefits bestowed upon the denouncer through the emendation of the sinner were thought to be merely accidental, and they could certainly not be strived for as an end in themselves. For example, if a vendor had violated the just price, then he could not be absolved from his sin unless he made restitution to the buyer of the surplus – which is a clear external, material act benefitting the buyer. However, if the buyer principally intended this restitution, without cheerfully intending the moral emendation of the vendor in the first place, then he sinned by denouncing the vendor[316]. In the absence of good zeal, the denouncer

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[310] Bellini,'*Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 52-53.

[311] Thomas Aquinas, *Summa Theologiae*, IIaIIae, quaest. 33, art. 1 (*Utrum fraterna correctio sit actus caritatis*), in: *Opera omnia iussu impensaque Leonis XIII edita*, tom. 8: *Secunda secundae a quaestione I ad quaestionem LVI cum commentariis Cardinalis Cajetani*, Romae 1895 [hereafter: Ed. Leonina, tom. 8]), p. 262-263. This interpretation was followed by Guido de Baysio (Archidiaconus), cf. Bellini,'*Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 46, n. 76.

[312] For a brief introduction to these separate procedures, see Helmholz, *The spirit of classical canon law*, p. 293-296.

[313] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 8), IIaIIa, quaest. 33, art. 1, concl., p. 262. Als cited in Bellini,'*Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 47, n. 79.

[314] Bellini,'*Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 62, n. 100.

[315] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 8), IIaIIa, quaest. 33, art. 2, concl., p. 263: 'Sed actus virtutum non quolibet modo fierei debent, sed observatis debitis circumstantiis quae requiruntur ad hoc quod sit actus virtuosus: ut scilicet fiat ubi debet, et quando debet, et secundum quod debet. Et quia dispositio eorum quae sunt ad finem attenditur secundum rationem finis, in istis circumstantiis virtuosi actus praecipue attendenda est ratio finis, quia est bonum virtutis (…). Correctio autem fraterna ordinatur ad fratris emendationem. Et ideo hoc modo cadit sub praecepto, secundum quod est necessaria ad istum finem: non autem ita quod quolibet loco vel tempore frater delinquens corrigatur.'

[316] Bellini,'*Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 72-73.

could be excluded through the exception of malice (*malitia*)[317]. As Guillaume Durand cynically remarked, the lawyers of the defence found an easy ground for the reproval of denouncers in the criterion of the good zeal[318].

Although, initially, evangelical denunciation could grant the victim of a sinful act committed by his 'brother' only an indirect means of relief, such as the sinner not being absolved from sin except by making restitution, this was bound to change gradually. A major role in this evolution was played by Pope Innocent III. In one of his most important decretals, *Novit ille* (X 2,1,13), which actually deals with the larger problem of the relationship between the pope, the ecclesiastical courts and secular authority[319], he favored the use of evangelical denunciation as a way of obtaining relief for the infringement of one's patrimonial rights[320]. Canon *Novit ille* paved the way for a utilitaristic rather than a charitable recourse to fraternal correction. Furthermore, in a gloss on X 5,19,13, which was undoubtedly inspired by Tancred, it was expressly stated that the victim of a usurious loan could denounce the usurer for the sake of his private good (*ob privatum commodum*)[321]. The turn towards the 'interested' as opposed to the 'disinterested' use of evangelical denunciation was completed in the work of Sinibaldo de' Fieschi, the later Pope Innocent IV. In his commentary on canon *Novit ille* (X 2,1,13), this famous canonist held that if it was in this patrimonial interest, one could denounce a debtor and claim that he could not repent his sin unless he performed his obligation[322]. Thus, the use of evangelical denunciation for 'temporal', 'patrimonial' or 'secular' ends became common currency.

As will be demonstrated in the next chapter, Innocent IV proposed that naked pacts be enforceable through evangelical denunciation[323]. Having parted with the original, purely charitable function of fraternal correction, denunciation could now evolve into a remedy to enforce one of the most important principles in the history of contract law. Previously, canonists such as Huguccio had had to propose an alternative remedy for the enforcement of

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[317] Bellini,*'Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 60 and 73.

[318] Guillaume Durand, *Speculum iudiciale illustratum et repurgatum a Giovanni Andrea et Baldo degli Ubaldi*, Aalen 1975 [= anastatic reprint of the Basel 1574 edition], tom. 2, lib. 3, partic. 1, num. 1, p. 24 : 'Quis denunciare possit ? Et certe qui bonae famae, vitae et conversationis est, et non criminosus nec excommunicatus nec odii fomite denuncians (…) Et has exceptiones non ignorant procuratores praelatorum in Curia Romana degentes, quia, cum aliqua summo Pontifici de eorum dominis nunciantur, statim dicunt : Pater sancte, ille non est audiendus, quia ex odio movetur ; odit enim dominum meum ex tali causa. Item est criminosus, et sic frequenter litteras impediunt, ut videmus. (…) Item opponitur contra denunciantem quod non charitative proponit, quod facere debuit (…)'. Also cited in Bellini,*'Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 92, n. 25.

[319] Responding to an appeal of King John of England that King Philip August of France was wrongly waging war against him, Pope Innocent III explained that he could not interfere in a case of feudal law, cleverly submitting at the same time that the pope could only judge *ratione peccati*, thus leaving open the possibility of interference in matters of sin; cf. K. Pennington, *Panormitanus' Additiones to 'Novit ille' (X.2.1.13)*, Rivista internazionale di diritto comune, 13 (2002), p. 43.

[320] Bellini,*'Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 98-99.

[321] Bellini,*'Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 104, n. 39. See also p. 105, n. 41 for another testimony by Tancred that the denouncer cannot be reproved if he is primarily motivated by his private interests.

[322] Bellini,*'Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 106, n. 43.

[323] Cf. infra, p. 114-115.

naked pacts, namely the recourse to the office of the judge[324]. This is conclusive, since at the end of the eleventh and during the twelfth centuries, evangelical denunciation was still conceived of very strictly in terms of the emendation of one's neighbor. It was intimately connected to the requirement of *bonus zelus* and charity. Although the enforcement of temporal interests on moral grounds was thought to be a proper task of the ecclesiastical courts, it nonetheless had to occur through remedies other than evangelical denunciation. In fact, canon law developed a general rule according to which the office of the judge could be implored if an ordinary remedy did not exist for the enforcement of moral principles (*deficiente actione datur officium judicis*)[325]. Thus, in the ecclesiastical courts, the office of the judge became an instrument which granted the judge a certain flexibility to account for moral considerations in resolving a lawsuit[326].

Pope Innocent IV was able to advocate evangelical denunciation instead of the recourse to the office of the judge as the proper way of enforcing promises, since, by his time, fraternal correction was no longer dependent on exclusively charitable intentions. In his view, all material interests deriving from natural obligations could be vindicated through the remedy of evangelical denunciation[327]. Of paramount importance in this context is that the two chief principles of contract law, namely the prohibition of unjustified enrichment and the bindingness of naked pacts, were considered to be naturally binding. This was stated, for instance, by Bartolus de Saxoferrato[328]. Consequently, the re-balancing of one-sided contracts and the enforcement of a naked pact could be obtained through private evangelical denunciation. As has been pointed out by Kenneth Pennington in his study of a manuscript of Abbas Panormitanus' *Additiones* to *Novit ille*, the Sicilian jurist adopted and expanded upon Bartolus' observations in the recension of his commentary on X 2,1,13. It reads as follows[329]:

> And conclude that when the enforcement of the civil law would nurture a sin, as in a natural obligation that arises from consent or when someone is enriched at the expense of another, recourse can be made to the Church.

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[324] Cf. infra, p. 111-112.

[325] Ch. Lefebvre, *L'officium iudicis d'après les canonistes du Moyen Age*, L'Année canonique, 2 (1953), p. 120, n. 29.

[326] Lefebvre, *L'officium iudicis*, p. 116-117. The appeal to the office of the judge was dependent on the pre-existence of some kind of moral obligation. For example, illegitimate children could claim alimentation from their parents by virtue of the office of the judge since those parents were bound to supply alimentation as a matter of natural equity. Similarly, the duty to observe promises was grounded on the moral principle that a Christian's word should be as trustworthy as an oath. The appeal did not need to be based on a legitimate text from the civil law or the canon law. Indeed, the office of the judge was invoked as a subsidiary remedy, but it had to be motivated at least by natural equity (p. 123). For more details on the role of the office of the judge in Roman and canon law, see Horn, *Aequitas in den Lehren des Baldus*, p. 134-149.

[327] Bellini, '*Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 118.

[328] Bellini, '*Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 122, n. 64.

[329] Own translation from the Latin text in Appendix num. 18 (Vat. Lat. 2551) as transcribed in Pennington, *Panormitanus' Additiones to 'Novit ille' (X.2.1.13)*, p. 51: 'Et conclude quod ubi iuris civilis observatione nutriretur peccatum, ut in obligatione naturali, que oritur ex consensu vel cum quis locupletatur cum alterius iactura, potest ad ecclesiam recurri, ut in c.i. de pact. [X.1.35.1] et c. Cum haberet, de eo qui duxit in matrimon. [X.4.7.5].'

In this manner, Panormitan pushed Pope Innocent IV's treatment of evangelical denunciation to its logical conclusion. Evangelical denunciation became a universal remedy to guarantee the protection of material interests. Also, this quotation is indicative of the expansion of ecclesiastical jurisdiction by virtue of sin (*ratione peccati*). Indirectly, that is for reason of sin, all human affairs were claimed to be subject to the jurisdictional authority of the Church[330]. While the doctrine of the two swords, as developed by Pope Gelasius (d. 496), held that temporal and spiritual authorities were autonomous and equal powers, each with its own sphere of competence, Innocent IV's views exemplify the increased assertiveness of the Church during the first three centuries of the second millenium. In that period, of which the symbolic starting point is the pontificate of Gregory VII (d. 1085), the hierocratic claim gained ground that the spiritual was superior to the temporal[331]. It was canon *Novit ille*, precisely, through which one of Innocent IV's predecessors, Pope Innocent III, had laid down that the pope could always judge in a matter of sin.

The improper use of evangelical denunciation to defend the temporal interests of the denouncer rather than to promote the spiritual salvation of the sinner led to a reconceptualization of denunciation in the second half of the thirteenth century. To distinguish the original, charitable form of denunciation from its improper use, in his commentary on canon *Romana* (VI 3,20,1) Cardinal Hostiensis made an influential distinction between 'evangelical denunciation' (*denunciatio evangelica*), 'judicial denunciation' (*denunciatio judicialis*), and 'canonical denunciation' (*denunciatio canonica*)[332]. True to its authentic meaning, evangelical denunciation intended to bring a sinner to confession and penitence[333]. Judicial denunciation was either public or private. Private judicial denunciation was the instrument for the creditor to defend his interests (*ratione interesse*)[334]. Those interests had been wronged by the inappropriate behavior of the sinner, and the aim of private judicial denunciation was to have the sinner make restitution or compensate the wronged party. Public judicial denunciation also serves the enforcement of interests, but it is initiated by virtue of

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[330] Bellini, '*Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 108-117.

[331] Helmholz, *The spirit of classical canon law*, p. 339-343.

[332] Hostiensis' commentary on this canon was originally published as a commentary on Pope Innocent IV's Novels (*Lectura in Novellas Innocentii IV*). We have used the following edition: Hostiensis, *In sextum Decretalium librum commentaria*, Torino 1965 [= anastatic reprint of the Venice 1581 edition], ad VI 3,20,1, f. 26v-27r, num. 29-38.

[333] Hostiensis, *In sextum Decretalium librum commentaria*, ad VI 3,20,1, f. 26v, num. 29 : 'Evangelica est illa quae fit ad hoc tantum, ut peccator confiteatur peccatum et poenitentiam agat, et habet locum in peccato non omnino occulta.'

[334] Hostiensis, *In sextum Decretalium librum commentaria*, ad VI 3,20,1, f. 26v, num. 32 : 'Privata vero iudicialis potest dici illa quae ratione interesse competit, ut si aliquis mihi iniurietur vel rem meam auferat.'

public office, for instance by a bishop[335]. Canonical denunciation was used, among other things, to remove clerics from their benefices or to correct ecclesiastical judges[336].

Hostiensis was anxious to neatly distinguish between judicial denunciation and evangelicial denunciation, noting that despite the apparent similarities, they were entirely different in substance, scope, and procedure[337]. The distinction between 'interested' and 'disinterested' forms of denunciation, initiated by Innocent III and further developed by Innocent IV and Hostiensis, had a tremendous impact[338]. Giovanni d'Andrea (c. 1275-1348), one of the luminaries of later medieval canon law, remained faithful to Hostiensis' opinions on private judicial denunciation[339]. Less than three centuries after Hostiensis had developed the distinction between the three forms of denunciation, it shows up in an only slightly refined version in the work of the Spanish canonist Dr. Navarrus. Alongside mixed forms of denunciation, he distinguished between 'pure evangelical denunciation' (*denunciatio evangelica pura*), 'pure judicial denunciation' (*denunciatio judicialis pura*), and 'pure canonical denunciation' (*denunciatio canonica pura*)[340]. While pure evangelical denunciation was seen in direct relationship with penance (*ad poenitentiam*), the aim of pure judicial denunciation was said to be restitution (*ad restitutionem*), and the aim of pure canonical denunciation was geared toward the removal from office (*ad remotionem officii*).

As Hostiensis sharply noted, the existence of the remedy of evangelical denunciation implied that legal disputes could almost universally be brought before the ecclesiastical courts *ratione peccati*. Moreover, the prospect of evangelical denunciation being used on a general scale for the sake of enforcing private interests threatened to make secular jurisdiction almost redundant (*laicis iurisdictionem subtrahere*)[341]. To avoid just that, Hostiensis was careful to

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[335] Hostiensis, *In sextum Decretalium librum commentaria*, ad VI 3,20,1, f. 26v, num. 32 : 'Publica iudicialis potest dici illa quae competit ex officio suo in qua nec monitio requiritur (….), et ad hanc denuntiationem episcopus inquirere tenetur (…), et si episcopus nollet inquirere, archiepiscopus de hoc inquiret.'

[336] Hostiensis, *In sextum Decretalium librum commentaria*, ad VI 3,20,1, f. 27r, num. 35-36 : 'Canonicarum vero denuntiationem alia potest dici specialis, alia generalis. Specialis canonica denuntatio competit illi soli cuius interset habere bonum praelatum vel bonum subditum ecclesiasticum, et fit ad hoc ut quid de beneficio suo removeatur. (…) Canonica generalis et publica potest dici quando agitur de numero dissolvendo vel impediendo, vel quando agitur de peccato in iudicio ecclesiastico corrigendo, in quo principaliter aliquod non includitur interesse (…)'.

[337] Hostiensis, *In secundum Decretalium librum commentaria*, Torino 1965 [= anastatic reprint of the Venice 1581 edition], ad X 2,1,13, f. 6r, num. 13: 'Nihil enim est idipsum cui simile est (…). Licet autem sit ei similis quantum ad formam, est tamen dissimilis quod ad substantiam, in evangelica enim agitur ad hoc, ut peccator poenitentiam agat, nec scriptura proponitur, neque litigator. In ista vero ad hoc agitur, ut res restituatur, sive ut laesus indemnis servetur et denunciatio in scripturis porrigitur et examinatur et tandem in ea pronunciatur.'

[338] Its relevance is emphasized by Bellini,*'Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 166, n. 5.

[339] Giovanni d'Andrea, *In secundum Decretalium librum novella commentaria*, Torino 1963 [= anastatic reproduction of the Venice 1581 edition], f. 9v, num. 6.

[340] Azpilcueta, *Relectio in cap. Novit de iudiciis*, not. 5, num. 3, f. 76r.

[341] Hostiensis, *In sextum Decretalium librum commentaria*, ad VI 3,20,1, f. 26v-27r, num. 33 : 'Sic ratione peccati quasi omnis causa coram judice ecclesiastico agi potest (…) sed hoc intelligendum puto quando iuramentum intervenit, vel agitur de pacis foedere, vel in defectum iustitiae, vel ubi denunciantes pauperes sunt et oppressi, vel quando notorium est delictum (…) Alioquin si hoc generaliter intelligeres nihil aliud esset quam laicis totam iurisdictionem suam subtrahere, quod non est faciendum.'

stress that the use of private judicial denunciation must be restricted to a limited set of cases, for instance, if secular jurisdiction was deficient or if *miserabiles personae* were involved[342]. Hostiensis deemed it absurd that the jurisdiction of the temporal sword, to use Gelasius' metaphor, would vanquish due to the greediness of the ecclesiastical courts (*periret iurisdictio temporalis gladii*)[343]. The innate tendency of ecclesiastical jurisdiction to expand its scope *ratione peccati* and to intrude into the sphere of competence of the secular courts continued to stir controversy until well into the modern age. While Giovanni d'Andrea contented himself to repeat Hostiensis' conclusion almost word for word[344], Dr. Navarrus re-invigorated the Church's claims to indirect power in temporal affairs by reason of sin. His relectio on canon *Novit ille* contained a dauntless defence of the enforcement of the moral principle of justice in exchange – the second pillar of contract law besides the principle that all agreements are binding – by means of ecclesiastical remedies.

Interestingly, Dr. Navarrus advocated evangelical denunciation as the proper means to restore the equilibrium of unduly one-sided contracts in the framework of an exposition on the nature of power and the scope of the Church's jurisdictional competence[345]. In this theoretical preface, he espoused the doctrine of the indirectly divine nature of political power a

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Hostiensis, *In secundum Decretalium librum commentaria*, ad X 2,1,13, f. 5v, num. 6 : 'Tamen iudex ecclesiasticus hanc denunciationem non debet admittere indistincte, nisi in defectum iustitiae, vel ratione pacis, vel iuramenti, vel secundum dictum numerum quando alias non audiretur in foro civili, puta quoniam obligatio naturalis tantum est, super quod vide quod numero supra de pactis, c. 1, vel quando notorium est peccatum, ut probatur in inferioribus, vel quando hanc proponit persona miserabilis et depressa, secundum ea quae numero supra de officium et potestatem iudicis delegati significantibus. (…) Alioquin si hoc generaliter intelligeres haec absurditas exinde sequeretur, quia periret iurisdictio temporalis gladii, et omnis causa per hanc viam ad ecclesiam deferretur.'

[342] See the quotes from Hostiensis in the previous footnote. The legitimate intervention of ecclesiastical judges in temporal affairs in the event of the breakdown of secular jurisdiction or for the sake of disadvantaged persons is subject to elaborate discussion in Helmholz, *The spirit of classical canon law*, p. 116-144. On the subject of the Church's authority to interfere with temporal affairs to protect *miserabiles personae*, in particular, see now Th. Duve, *Sonderrecht in der Frühen Neuzeit, Studien zum ius singulare und den privilegia miserabilium personarum, senum und indorum in Alter und Neuer Welt*, [Studien zur europäischen Rechtsgeschichte, 231], Frankfurt am Main 2008.

[343] Hostiensis, *In secundum Decretalium librum commentaria*, ad X 2,1,13, f. 5v, num. 6 (cited above), discussed in Bellini,*'Denunciatio evangelica' e 'denunciatio iudicialis privata'*, p. 200.

[344] D'Andrea, *In secundum Decretalium librum novella commentaria*, f. 9v, num. 6: 'Tamen licet iudex ecclesiasticus praecedentem denunciationem [sc. evangelicam] admittat indistincte, istam [sc. iudicialem privatam] indistincte non debet admittere, quia non nisi in defectum iustitiae vel si crimen de sui natura est ecclesiasticum, vel ratione pacis, vel iuramenti, vel quando crimen est notorium, vel quando non auditur in foro seculari, ut quia obligatio est naturalis tantum, vel si hanc proponit miserabilis et depressa persona (…). Alias, si indistincte admitteretur, periret temporalis gladii iurisdictio, et omnis causa per hanc viam deferretur ad ecclesiam.'

[345] For Dr. Navarrus' treatment of the interconnected themes of commutative justice, unjustified enrichment and *laesio enormis*, see corollary 13 of notabile 6 of his *Relectio in cap. Novit de iudiciis*. For his political views, see *Relectio in cap. Novit de iudiciis*, notabile 3; for his treatment of evangelical denunciation, see *Relectio in cap. Novit de iudiciis*, notabile 4-6.

It has been noted with reason that the Relectio in canon *Novit* contains the kernel of Dr. Navarrus' political philosophy; cf. R. Martínez Tapia, *Filosofía política y derecho en el pensamiento español del s. XVI, El canonista Martín de Azpilcueta*, Granada 1997, p. 122.

generation before it was to gain such prominence among the Jesuits[346]. By the same token, he asserted the Holy See's indirect power in temporal affairs (*potestas indirecta*), besides affirming the Church's direct power in regard to the supernatural spheres of life[347]. As a matter of fact, these ideas were part and parcel of sixteenth-century Spanish political thought[348]. It should not come as a surprise, then, that Dr. Navarrus cited Cajetan and Vitoria to buttress his claim that the Pope could interfere with temporal affairs, if, and only if, spiritual interests were at stake[349]. A little later on in the sixteenth century, the Jesuit Roberto Bellarmino would become one of the most famous advocates of the theory of the indirect secular power of the Pope[350]. What is striking about Dr. Navarrus' exposition is the straightforward manner in which he applied relatively widespread political ideas to concrete contractual disputes. As will be explained in the penultimate chapter of this dissertation, Dr. Navarrus feared no pain in challenging both lay and ecclesiastical judges through his insistence on the enforcement of justice in exchange[351].

Despite his deploring the lack of concern for the salvation of the soul in secular jurisdictions, Dr. Navarrus went far in recognizing the autonomy of the temporal sphere. Significantly, he emphasized more than other canonists of his time, such as Fortunius Garcia, that the principal aim of civil law was fundamentally different from the scope of canon law[352]. Against Fortunius, Dr. Navarrus held that civil law could not be concerned with the supernatural aim of saving souls, at least not directly. The end of the civil laws must be in accordance with the nature of man as a human and as a citizen. Crucially, the natural end must correspond to the natural means, and no human being has the natural capacity to conceive of the end of human life in supernatural terms by natural reason alone (*ratio et cognitio naturalis non attingit supernaturalia*)[353]. The true, eternal, and Christian form of happiness is perceived

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[346] See Dr. Navarrus' definition of lay power (*potestas laica*) in *Relectio in cap. Novit de iudiciis*, not. 3, num. 85, f. 69r: '(…) esse potestas naturaliter a Deo immediate data mortalium communitati ad sese gubernandum in rebus naturalibus, ut bene beateque vivant secundum rationem naturalem.'

[347] See Dr. Navarrus' definition of ecclesiastical power (*potestas ecclesiastica*) in *Relectio in cap. Novit de iudiciis*, not. 3, num. 85, f. 69v: '(…) est potestas a Christo instituta immediate et supernaturaliter, ad gubernandos fideles secundum legem Evangelicam in supernaturalibus, et quatenus ad illa est opus etiam in naturalibus.'

[348] E.g. B. Hamilton, *Political thought in sixteenth-century Spain, A study of the political ideas of Vitoria, De Soto, Suárez, and Molina*, Oxford 1963. For further discussion, see. infra, chapter 8.

[349] Azpilcueta, *Relectio in cap. Novit de iudiciis*, not. 3, num. 41, f. 66v: 'Ita quod, ut dixit Franciscus a Victoria, de potestate Ecclesiastica, q. 5, versic. octava propositio, Papa in ordine ad supernaturalia habet amplissimam potestatem supra omnem temporalem qua uti potest, quando et quantum necesse est ad finem supernaturalem; et potest non solum omnia quae possunt principes saeculares, sed et facere novos principes et tollere alios et imperia dividere et pleraque alia, adeo quod verum dici possit illud illustrissimi Caietani, tom. 1, tract. 2 de auctoritate Papae et Concilii, cap. 13, ad 8, in haec verba: *Papa habet supremam potestatem in temporalibus et non habet supremam potestatem in temporalibus: affirmativa namque est vera in ordine ad spiritualia, negatio vero est vera directe, seu secundum seipsa temporalia.* Haec ille.'

[350] S. Tutino, *Empire of souls, Robert Bellarmine and the Christian Commonwealth*, Oxford 2010, p. 24-47 and p. 159-210.

[351] Cf. infra, chapter 7.

[352] For his critical assessment of Fortunius Garcia, see Martín de Azpilcueta, *Commentarius de finibus humanarum actuum, in cap. Cum minister (C. 23 q.5)*, num. 29, f. 210v-211r, in: Opera omnia, Venetiis 1601, tom. 1. On Fortunius Garcia's conception of the end of the civil laws, see infra, chapter 8.

[353] Azpilcueta, *Commentarius de finibus humanarum actuum*, num. 29, par. *Omissa tamen*, f. 211r.

through the supernatural light of faith, not through the light of natural reason (*beatitudo vera, quae Christiana est, supernaturali tantum lumine cognoscitur*)[354]. It is attained by following the laws issued through that supernatural power with which the Church alone has been endowed[355].

Dr. Navarrus made a separation, then, between the natural and the supernatural spheres of life, between secular power and ecclesiastical power, between the citizen and the Christian. Dr. Navarrus carefully articulated the distinction between mortals (*mortales*) in so far as they were Christians (*quatenus sunt Christiani*) and in so far as they were merely human beings or citizens (*quatenus homines tantum vel cives*)[356]. Dr. Navarrus thus tapped into a tradition, initiated by Cajetan, which rebuked the classical scholastic idea that man has a natural appetite for the supernatural. Cajetan paved the way for the conception of man as man, and of a purely human form of morality without reference to the realm of grace and eternal happiness. Cajetan would not deny, of course, that there is a supernatural dimension to life. Yet instead of seeing the relationship of man to God in terms of a natural rational desire, he described the connection between the supernatural and the natural in terms of voluntary obedience[357]. This would eventually lead to the doctrine of man 'in the state of pure nature'. Cajetan's and Dr. Navarrus' ideas herald in a more anthropocentric worldview, later reinforced by the Jesuits, which is at odds with the more theocentric conception of man's existence promoted by medieval theologians such as Thomas Aquinas[358].

A further testimony to the increasing respect for the autonomy of the secular sphere in Dr. Navarrus' thought is his subtle modification of some of the standpoints concerning the scope of ecclesiastical jurisdiction formulated by famous thirteenth century jurists such as Guillaume Durand and Hostiensis. Prefiguring, at least to a certain extent, the modern advocates of 'forum-shopping', Durand had allegedly stated that Christian citizens were granted an option to submit any cause either to the ecclesiastical or the lay courts[359]. Dr. Navarrus subscribed to Durand's proposition that a Christian citizen, inasmuch as he is a Christian, is subject to ecclesiastical jurisdiction. Yet he called the right of 'forum-shopping' into question, as well as the proposition that ecclesiastical courts could be approached in all

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[354] Azpilcueta, *Commentarius de finibus humanarum actuum*, num. 29, par. *Tertius*, f. 211r.

[355] Naturally, this general statement must be qualified. For example, Dr. Navarrus conceded that the civil laws laid down by Roman emperors such as Justinian also attained the supernatural end of human life, since these were Christian Emperors. Even though in theory their power was merely natural, therefore striving only at natural ends, they were 'infused by the knowledge of the Christian faith' (*habent cognitionem fidei infusam*). From this he infers, importantly, that Justinian's laws must be interpreted in conformity with the canon law; *Commentarius de finibus humanarum actuum*, num. 29, par. *Quartum* et par. *Ex quibus*, f. 211r.

[356] Azpilcueta, *Relectio in cap. Novit de iudiciis*, not. 3, num. 169, f. 75v.

[357] See F. Todescan, *Lex, natura, beatitudo, Il problema della legge nella scolastica Spagnola del sec. XVI*, [Pubblicazioni della Facoltà di Giurisprudenza dell'Università di Padova, 65], Padova 1973, p. 39-46. See now also F. Todescan, *Etiamsi daremus, Studi sinfonici sul diritto naturale*, Studio 3: *Amore, socialità et legge nella filosofia e teologia del diritto del sec. XVII*, [Biblioteca di Lex naturalis, 1], Padova 2003, esp. p. 54-58.

[358] Todescan, *Lex, natura, beatitudo*, p. 55-81.

[359] Azpilcueta, *Relectio in cap. Novit de iudiciis*, not. 6, num. 8 et num. 16-18, f. 76v-77v.

affairs[360]. His argumentation is sophisticated, but it is clear that it stemmed from the fear that the secular courts would be weakened. At the same time, Dr. Navarrus tried to temper those fears. Paradoxically, he did so by expressly rejecting Hostiensis' statement that the ecclesiastical courts can merely step in when the secular courts are deficient.

Against Hostiensis, Dr. Navarrus affirmed that, in principle, the ecclesiastical courts had the right to investigate any affair by reason of sin, even in the absence of negligent or impotent lay tribunals. However, he shared Hostiensis' commitment not to make the secular courts superfluous. Therefore, he suggested a new argument to limit the scope of ecclesiastical jurisdiction and to guarantee the survival of lay adjudication[361]. Even if, in principle, no objection could be made to the competence of the ecclesiastical judge to investigate a case by virtue of sin, Dr. Navarrus argued that the defendant could use another remedy to take the case away from the Church's jurisdiction. This remedy was not dependent on the competence of the judge but on the behavior of the plaintiff. The defendant could object that the plaintiff took him to the ecclesiastical court through malice, deceit and fraud, leaving aside the secular court, even though he, the defendant, would have been prepared to stand by the decision of the secular court[362]. Dr. Navarrus also indicates why the ecclesiastical courts must abide by this exception. If they did not, the Church would appear arrogant, envious and greedy for power rather than justice[363]. In other words, Dr. Navarrus gives lay tribunals space to breathe by telling the Church that she should practice greater modesty.

2.4.3 Secret compensation

The debate on evangelical denunciation has revealed some of the structural elements of a fundamental tension between Church and State, which determined legal and theological thinking from the late Middle Ages through to the early modern period. This tension strikes the contemporary Western ear as almost entirely alien. In the eyes of a modern legal positivist, the assumption that evangelical denunciation must allow judges in the ecclesiastical courts to enforce Christian moral principles comes across as preposterous. Accordingly, other conceptions, too, which were at the heart of this past tension between rival normative powers, such as 'secret compensation' (*occulta compensatio*), cannot but sound strange. This should not hide the fact that they lived on in the work of so-called modern natural lawyers such as Hugo Grotius.

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[360] Azpilcueta, *Relectio in cap. Novit de iudiciis*, not. 6, num. 18, f. 76v-77v: 'Respondeo igitur (…), et quod fallitur Durandus quatenus ait, omnem Christianum esse utriusque fori quoad omnia et actoris esse optionem eum conveniendi coram quo iudice maluerit, ecclesiastico scilicet vel saeculari.'

[361] Azpilcueta, *Relectio in cap. Novit de iudiciis*, not. 6, num. 22, f. 78r: 'Qua nova ratione illa Hostiensis et Joannis Andreae a quibus nemo recedit antiqua doctrina defenditur, quam etiam satis sensisse videtur Innocentius, num. 4.'

[362] Azpilcueta, *Relectio in cap. Novit de iudiciis*, not. 6, num. 22, f. 78r: 'Reum autem excipere posse, non quidem quod iudex ecclesiasticus non est competens ad cognoscendum de tali causa tali modo proposita, sed quod actor malitiose, dolo ac fraude videtur eum trahere ad forum ecclesiasticum, omisso saeculari, cuius iudicio se ait paratum stare.'

[363] Azpilcueta, *Relectio in cap. Novit de iudiciis*, not. 6, num. 22, f. 78r: 'Et si Ecclesia non admitteret eiusmodi exceptionem, arrogans videretur, et alieni cupida, et potius velle quaerere potentiam quam facere iustitiam.'

Secret compensation was a way of satisfying and enforcing rights in secret, without recourse to a public institution. It was still recognized by the famous Dutchman from Delft[364]. It existed alongside the public alternative to enforce rights in court, notably when the courts failed to render your due as a matter of natural law. It offered a way for the plaintiff to take the law in his own hands in the event that the public court system was deficient. For example, if an employee did not receive just salary for the service he rendered, and if he could not obtain his compensation through the courts, then the theologians would allow him to take the law in his own hands and procure secret compensation, for instance by stealing. As was sharply remarked by Domingo de Soto, we are talking here about taking the law into our own hands, or private justice (*Selbsthilfe*), in the field of what is now known as 'patrimonial law' (*ius externorum bonorum*), not in criminal affairs[365]. Curiously, private justice in matters of private law has received little attention in the past, while the historical use of *Selbsthilfe* in criminal affairs has been a rather popular topic of interest.

As a private enforcement mechanism, secret compensation was naturally controversial and politically sensitive[366]. It posed a threat to the secular political authorities' claim to exclusivity in regulating human affairs. Not surprisingly, it became suspect and even forbidden by the theologians themselves in the mid-seventeenth century as the State celebrated its victory over concurring normative universes, and as the secular authorities claimed the monopoly in settling disputes at the expense of rival tribunals, such as the ecclesiastical court and the *forum internum*. The following paragraphs will briefly concentrate on Hugo Grotius' adoption of the moral theologians' teachings on secret compensation. The aim of this quick glance at secret compensation is to show that enforcement mechanisms then were not entirely conceived of in the same way as they are today. As a preliminary remark, it should be noted that Grotius did not use the term secret compensation (*occulta compensatio*) expressly, preferring the term *acceptatio* instead, as other scholastics, such as Cajetan, had done before him.

Grotius set out to explain that as a matter of natural law the alienation of property occurs either through the satisfying of right (*expletio iuris*) or through succession. The satisfying of right denotes that every time something is not yet mine but is due to me, I take something of equal value from the person who is my debtor[367]. For example, the Israelites stole goods from the Egyptians to compensate for the unpaid services which they rendered to

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[364] A succinct comparison of 'Selbshilfe' in Francisco de Vitoria and Hugo Grotius is offered by G. Otte, *Das Privatrecht bei Francisco de Vitoria*, [Forschungen zur neueren Privatrechtsgeschichte, 7], Köln-Graz 1964, p. 142-145.

[365] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 3), lib. 5, quaest. 3, art. 3, dub. 3, p. 423.

[366] The political significance of secret compensation is highlighted in Decock, *Secret compensation*, p. 263-280.

[367] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 7, par. 2, num. 1, p. 268: 'Lege naturae, quae ex ipsa dominii natura ac vi sequitur, dupliciter fit alienatio, expletione iuris et successione. Expletione iuris fit alienatio, quoties id quod meum nondum est, sed mihi dari debet, aut loco rei meae, aut mihi debitae, cum eam ipsam consequi non possum, aliud tantundem valens [Sic ipso naturae iure defendit Hebraeos Irenaeus quod in compensationem operae res Aegyptiorum ceperint] accipio ab eo qui rem meam detinet, vel mihi debet [Thom. 2.2., 66, art. 5]. Nam iustitia expletrix quoties ad idem non potest pertingere, fertur ad tantundem, quod est morali aestimatione idem. [Sylv. v. bellum, p. 2, q. 13].'

Pharaoh. Through this example, Grotius immediately betrayed his indebtedness to the scholastic tradition. He even literally cited the passage in Thomas Aquinas' *Secunda Secundae* which contained this illustration. Furthermore, he adduced the passage in Sylvester Prieras' manual for confessors, in which Sylvester acknowledged that if the judicial system was deficient, the creditor was allowed to take the law in his own hands[368]. Grotius indicated that, in principle, taking the law in your own hands went against Roman laws prohibiting self-justice (*legibus civilibus vetitum sibi ius dicere*). His observation that it also ran counter to the existence of the judicial system as a public institution was reminiscent of Thomas. From this he inferred that secretly enforcing private rights was only allowed if the judicial system entirely collapsed[369].

Following the sixteenth-century Dominican theologians Cajetan and Soto, Grotius went on to claim, however, that under certain conditions self-help in private affairs could be allowed. The statutory prohibition on self-justice yielded to the principles of natural law if there could be no doubt about the creditor's right (*ius certum*), and if, simultaneously, there was moral certainty that the courts were not capable of rendering the creditor his due for lack of formal proof[370]. Grotius' thought clearly bears the marks, then, of the existence of parallel jurisdictions, and, accordingly, of a plurality of enforcement mechanisms, which was so typical of the medieval and early modern theologians. Grotius also repeated his standpoint further on in his discussion of compensation in general. If there is no other way of enforcing your rights and obtaining your due, he recalled, you can compensate by several means. You can take something of equal value from your creditor (*accipere*), you can retain something of equal value (*retinere*), or you can refrain from performing a promise (*non praestari*)[371].

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[368] Sylvester Prierias, *Summa sylvestrina*, part. 1, s.v. *bellum* 2 (*bellum privatum*), num. 13, Lugduni 1553, p. 9: 'Alioquin, si non potest [recuperare rem suam per iudicem], potest dominus in defectu iudicis rem suam violenter recuperare, si aliter non potest.'

[369] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 7, par. 2, num. 2, p. 268-269: 'Legibus quidem civilibus [D. 41,2,5; D. 47,8,2, 18; D. 4,2,13; D. 48,7,7-8] scimus vetitum esse sibi ius dicere; adeo quidem ut vis dicatur, siquis quod sibi debitum est, manu reposcat, et multis in locis ius crediti amittat qui id fecerit. Imo etiamsi lex civilis hoc non directe prohiberet, ex ipsa tamen iudiciorum institutione sequeretur hoc esse illicitum. Locum ergo habebit quod diximus ubi iudicia continue cessant; quod quomodo contingat explicavimus supra: ubi vero momentanea est cessatio, licita quidem erit acceptatio rei, puta si alioqui nonquam tuum recuperare possis, aufugiente forte debitore. Sed dominium a iudicis addictione erit exspectandum, quod fieri solet in repressaliis, de quibus infra erit agendi locus.'

[370] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 7, par. 2, num. 2, p. 268-269: 'Quod si ius quidem certum sit, sed simul moraliter certum per iudicem iuris explementum obtineri non posse, puta quia deficiat probatio; in hac etiam circumstantia, cessare legem de iudiciis, et ad ius rediri pristinum verior sententia est. [Soto, de Iust, q. 3, a. 2; Caiet., a. 66].'

It might be noted that the editors have mistakenly attributed the marginal references to Soto and Cajetan to the subsequent paragraph (3) in Grotius' text, which deals with succession. Those references clearly pertain to Grotius' discussion of secret compensation in paragraph 2. On Cajetan's and Soto's teachings on secret compensation, which marked a clear departure from Thomas Aquinas, see Decock, *Secret compensation*, p. 271-274.

[371] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 3, cap. 19, par. 15, p. 822: 'Compensationis originem alibi indicavimus, cum diximus nos, si quod nostrum est aut quod nobis debetur consequi aliter non possumus, ab eo qui nostrum habet aut nobis debet tantundem in re quavis accipere posse: unde sequitur ut multo magis possimus id quod penes nos est sive corporale est sive incorporale retinere. Ergo quod promisimus poterit non praestari si non amplius valet quam res nostra quae sine iure est penes alterum.'

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3 TOWARD A GENERAL LAW OF CONTRACT

3.1 Introduction

'All accepted offers are binding.' 'Liberty has wisely been restored to the contracting parties.' 'The will, possessing its freedom, imposes contractual obligation upon itself as a private legislator.' There are many ways to describe the legacy of the early modern scholastics to the development of a general law of contract, but these three quotes should definitely form part of any standard account. They may create surprise, or they may sound familiar. Either way, the scope of this chapter is to give an introduction to the moral theologians' understanding of contractual obligation against the background of a particularly rich, varied and age-old tradition of thinking about the words that bind men together as yokes join the oxen. The first part of this chapter proposes to explore the long and manifold roads that led to the consensualist approach to contractual obligation, which was more or less unanimously adopted from the sixteenth century onward. The second part is devoted to the elaboration of a voluntaristic and general law of contract in the moral theological literature of the early modern period.

Without taking into account the fundamentally pluralistic character of law before the age of the codifications, it seems hard to come to grips with the historical development of contract law[372]. How can one understand the enforceability of all contracts in most secular courts from the sixteenth century onwards without taking into account the alluring influence of ecclesiastical jurisdiction ? How is it possible to explain the emergence of the canonical principle that all bare agreements are binding in the first place, if not by reference to the parallel normative order governed by the law of conscience? How should one make sense of the French humanists' reluctance to grant actionability to all agreements without awareness of the denaturation of the original Roman law of contract in the civilian tradition? To summarize, by concentrating on the multi-dimensional nature of the normative universe up until and including the early modern period, the first part of this chapter intends to shed light on the gradual victory of the consensualist principle from natural law over canon law to civil law.

Arguably, it is no coincidence that the scholastic movement of the early modern period came up with a singularly systematic and in-depth treatment of contract as promise and acceptance. After all, its roots lay on the Iberian peninsula, and Spain has undoubtedly been one of the most exciting laboratories for the development of a consensualist and open category of contract. Already back in the early sixteenth century, Fortunius Garcia (1494-

[372] J.-L. Halpérin, *Le fondement de l'obligation contractuelle chez les civilistes français du XIX siècle*, in: J.-F. Kervégan – H. Mohnhaupt (eds.), Gesellschaftliche Freiheit und vertragliche Bindung in Rechtsgeschichte und Philosophie / Liberté sociale et lien contractuel dans l'histoire du droit et la philosophie, [Ius commune, Sonderhefte, 120], Frankfurt am Main 1999, p. 325: 'Il convient de se demander à chaque fois de quelle loi (loi divine, loi naturelle fondée sur l'équité ou la raison, loi du for intérieur et de la conscience, loi romaine, loi du royaume…) il est question.'

1543) argued from natural law and canon law that all agreements, however naked, ought to be enforceable in the civil courts[373]. He could do so because there was evidence that Spanish statutory law had always been favorable to the general actionability of agreements. A couple of decades later, the consensualist principle of contract was made sacrosanct by Antonio Gómez, one of the favorite jurists of the theologians. Hence, by the time scholastics such as Molina applied their sophisticated method of analyzing human business to contract law, the idea that *pacta quantumcumque nuda sunt servanda* had gained firm ground.

What will be of concern in the second part of this chapter is the broader, anthropological foundations on which the moral theologians rested the consensualist account of contractual obligation. The elaboration of a general category of contract based on free consent could gain such weight in their writings, because, unlike the jurists, theologians could formulate it on the basis of a broader theory of the will and its freedom of action[374]. Another concern in the second part will be to analyze the basic requirements that the theologians singled out for contracual obligation to arise. The basic principle that all offers are binding was developed through the meticulous linguistic and psychological analysis that the theologians were able to bring to bear on contract law. The three basic ingredients of contractual obligation were considered to be the will of the promisor, the outward communication of his *animus obligandi*, and the acceptance of the offer by the promisee. In addition, the impact of the voluntaristic account of contract will be measured in what the theologians had to say about the right way of interpreting contractual obligation.

3.2 The long roads to consensualism

3.2.1 Haunted by the Romans

'If our jurisprudence, now burgeoning, bore the fruits of industry, I would impose, through solid arguments, the view which denies naked pacts any action.' These are the words of Callidemus, a Greek polymath staged by Étienne Forcadel (c. 1519-1578) in a fictitious dialogue with the Roman jurists Triphoninus and Julianus[375]. Through Callidemus' mouth,

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[373] For short biographical notices, see J.F. von Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts*, Band 3.1: *Von der Mitte des 16. Jahrhunderts bis zur Gegenwart*, Graz 1956, p. 715. M.J. Peláez, s.v. *García de Arteaga de Ercilla, Fortún (1494-1543)*, in: M. J. Peláez (ed.), Diccionario crítico de juristas Españoles, Portugueses y Latinoamericanos (Hispánicos, Brasileños, Quebequenses y restantes francófonos), vol. 1 (A-L), Barcelona-Zaragoza 2005, p. 344. Fortunius Garcia is briefly mentioned without further details in A. Van Hove, *Prolegomena ad Codicem iuris canonici*, [Commentarium Lovaniense in Codicem iuris canonici, 1.1], Mechliniae-Romae 1945, p. 510, num. 477.

[374] Incidentally, Luis de Molina boasted that the theologians were superior to the jurists in that they had a firmer grasp and a methodic understanding of underlying principles; cf. *De iustitia et iure*, tom. 1, col. 1: 'Cum enim via et ratione ex suisque principiis res intelligent, in quo longo intervallo iurisperitos superant (…).'

[375] Étienne Forcadel, *Necyomantiae sive occultae jurisprudentiae tractatus*, in *Opera S. Forcatuli*, Parisiis 1595, part. 1, dialogo 69, num. 1, p. 160: 'Si nostra iurisprudentia, quae nunc in herbis est, fructum ferret industriae, urgerem validis argumentis pro illa sententia, quae pactis nudis actionem adimit.' For details on Forcadel's life and writings, see F. Joukovsky (ed.), *Étienne Forcadel, Œuvres poétiques, opuscules, chants divers, encomies et élégies*, Genève 1977 and G. Cazal's biographic note s.v. *Forcadel*, in P. Arabeyre - J.-L. Halpérin - J. Krynen (eds.), Dictionnaire historique des juristes français, XIIe-XXe siècle, Paris 2007, p. 337-338. For an illustration of Forcadel's typically Renaissance blending of legal argument and classical literature, see W. Decock, *Law on*

Forcadel, a top-notch professor of law at the university of Toulouse, aired a view fashionable amongst many humanist jurists of his glorious age. As part of a more general effort to revive the pristine law of ancient Rome, the great majority of jurists belonging to the so-called *mos gallicus* held that the actionability of naked agreements was to be considered a contradiction in terms. In so asserting, the humanists sacrificed four centuries of ecclesiastical jurisprudence on the altar of strict obedience to the ancient sources. Concurrently, they dismissed the civilian tradition as a denaturation of original Roman contract law.

The jurists of the late medieval *ius commune* had been engaged in a strenous effort to overcome the *Typenzwang*[376] characteristic of original Roman contract law. The closed Roman system of contracts implied that, except in the case of a limited set of expressly designated contracts, namely *emptio-venditio*, *locatio-conductio*, *mandatum* and *societas*, mutual consent alone could not produce obligation. What was needed was either the conveyance of the thing in question (real contracts) or the construction of the agreement in the solemn form of a *stipulatio*[377]. Agreements falling outside these categories were called contracts 'without name' or innominate contracts[378]. They could be enforced through an *actio praescriptis verbis* in the presence of *causa*, if the plaintiff had already performed[379]. Consequently, neither an open system of contracts, nor a general law of contract, let alone a universal principle of 'freedom of contract' could be constructed on the basis of the *Corpus Justinianeum*. Through increasingly far-stretching interpretations, the civilians nonetheless tried to bring the sacred text of Justinian in line with the changing needs of their own societies. The canonists, for their part, advocated the bindingness of sufficiently motivated naked pacts as a matter of Church law on the basis of moral principles.

The following paragraphs are devoted to the medieval jurists' attempt at liberating themselves from the Roman tradition and the sixteenth century reaction to it. Competing with the canonists, the medieval civilians were eager to open up the closed system of contracts by making ever more exceptions to law *Iusgentium* while trying to remain faithful to the Roman principle that naked pacts are not binding. The reaction this provoked with the humanistically minded jurists and canonists of the sixteenth century will be the next subject of examination.

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love's stage, Étienne Forcadel's (c. 1519-1578) Cupido Jurisperitus, in: V. Draganova – S. Kroll – H. Landerer – U. Meyer (eds.), Inszenierung des Rechts, Law on Stage, München 2011, p. 17-36.

[376] Dilcher, Der *Typenzwang im mittelalterlichen Vertragsrecht*, p. 270-303.

[377] Apart from its formal nature, the flexibility of the *stipulatio* probably granted the Romans more 'freedom of contract' than is usually accepted; see Birocchi, *Causa e categoria generale del contratto, un problema dogmatico nella cultura privatistica dell'età moderna, 1. Il cinquecento*, Torino 1997, p. 47-48.

[378] S. Lepsius, *Innominatkontrakt*, in: A. Cordes – H. Lück – D. Werkmüller (eds.), Handwörterbuch zur Deutschen Rechtsgeschichte, Band 2, Lieferung 13 (2011), cols. 1225-1226.

[379] As we will see below, there is a seemingly unending debate about the meaning of *causa*. Yet in D. 2, 14, 7, 4, to which we come back in the following pages, the meaning of *causa* seems to be 'a preceding juridical act'. On account of his performance, the plaintiff has sufficient interest to be worthy of 'consideration' by the courts; cf. L. Waelkens, *De oorsprong van de causaliteit bij contractuele verbintenissen*, in: B. Dauwe e.a. (eds.), Liber Amicorum Ludovic De Gryse, Brussel 2010, p. 675.

3.2.1.1 The civilian tradition

The multi-layered nature of 'law' in medieval societies calls for a nuanced approach to the question whether bare agreements were deemed binding by the jurists of that period. The glossators and the postglossators, also known as the 'civilians', acknowledged that naked pacts are binding as a matter of natural law. They also recognized that the bindingness of bare agreements, as a matter of natural law, had some major consequences in the realm of civil law[380]. Yet, at the same time, they advocated the principle of non-actionability of naked agreements in the secular courts, as a matter of civil law. This can be seen, for instance, in the commentary on D. 2,14,7,4 by the most famous among the commentators, Bartolus de Saxoferrato[381]. Consequently, Bartolus argued, even if I promised you today by virtue of a bare agreement that I would go to Rome for you, but no *causa* intervened, no obligation or civil remedy would be created for you to enforce my promise[382]. The meaning of *causa* in this context is simply *datio* or *factum*, as will be explained below.

It appears that evolutions in statutory law, legal practice and canon law - all of which will be briefly touched upon below - urged the post-glossators to gradually adapt their reading of Roman contract law to the rising tenet that all agreements should be binding in principle. It will be seen that this process of adaptation proceeded along the lines of the theory of the 'clothes of agreements' (*vestimenta pactorum*). For example, immediately after he had set out the rule that bare agreements are not binding, Bartolus set out to explain this theory of the clothes that could make naked agreements binding[383]. This process came to fruition in the work of late medieval civilians such as Giasone del Maino, who carefully argued that, for the sake of the salvation of souls, naked agreements should be actionable even in the civil courts. As Ennio Cortese remarked in more general terms, the pressure of morality and religion urged the civilians not only to contemplate the ultimate ideal of natural law, but also to apply it in the civil court[384].

From a doctrinal perspective, it is not unlikely that it was canon law doctrine that eventually provided the decisive incentive for the civilians to search for a middle ground somewhere in between the natural law and the civil law point of view, regarding the actionability of bare agreements. The canonists' idea that pacts, however naked, bring about an obligation that can be enforced before an ecclesiastical court, undoubtedly acted as a magnet attracting the civilians to stretch the interpretation of the Roman texts far enough to

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[380] Aptly summarized in Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 4, num. 23, p. 198. For further discussion, see below.

[381] Bartolus de Saxoferrato, *In primam Digesti veteris partem*, Venetiis 1570, ad D. 2,14,7,4, par. *Igitur*, f. 81r: 'Nuda pactio non parit actionem, igitur nuda pactio non parit obligationem, neque actionem civilem, sed quaeritur an exceptionem pariat? Et respondetur quod sic, licet hoc non inferatur ex praemissis, sed suo motu ponitur hic a iurisconsulto.'

[382] Bartolus, *In primam Digesti veteris partem*, ad D. 2,14,7,4, par. *Sed cum nulla*, f. 81r: 'Unde si etiam hodie promitterem tibi nudo pacto ire pro te Romam, nulla adiecta causa, nulla oriretur obligatio, neque actio.'

[383] Bartolus, *In primam Digesti veteris partem*, ad D. 2,14,7,5, par. *Quinimo*, f. 81v.

[384] E. Cortese, *La norma giuridica, Spunti storici nel diritto comune classico*, [Ius nostrum, 6], Milano 1962, vol. 1, p. 91.

get closer to the dictates of natural reason and Church authority. There was definitely more involved in this act of *rapprochement* than mere passion for consistency in between the logic of the various legal orders. If the civilians wished to keep up with the highly successful ecclesiastical courts, they had to develop their doctrines more into the direction of the Church's law.

The story of how the medieval jurists bent and stretched the Roman texts on contract law has formed the subject of many excellent studies[385]. Hence, it seems both refreshing and more fruitful for present purposes to concentrate on the reflection of the civilian tradition in the writings of the early modern jurists and theologians. Arguably, the upshot of previous studies is that the civilians left the closed Roman system of enforceable contracts intact, while widening the scope for actionability through the doctrine of the so-called 'clothes' (*vestimenta*), which can enforce naked agreements (*pacta nuda*)[386]. At the centre of all debates stood paragraph *Sed cum nulla* of law *Iurisgentium* taken from Justinian's Digest (D. 2,14,7,4). It held that, in the absence of *causa*, a naked pact could bring forth an exception but not an action[387].

'A naked pact is a pact to which, besides consent and agreement, nothing is added from the outside,' Covarruvias explains[388], 'as if this kind of agreement were naked since it had not been turned into a contract of its own with a specific and proper name and had not received any support from outside.' Crucially, from D. 2,14,7,4 it is inferred that naked pacts are not binding as a matter of civil law and, hence, not actionable[389]. Metaphorically speaking, the only way naked pacts can become enforceable as a matter of civil law is through their getting clothes, being dressed up and becoming 'hot'. As Baldus explained two centuries earlier, naked pacts are as dysfunctional as naked men. While the naked body grows numb and stiff with the cold, the body's vigor and force (*virtus*) is aroused by the external heat brought to it by clothes. By the same token, naked agreements, such as innominate contracts, require an external cloth (*vestimentum*) if they wish to gain enforceability[390].

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[385] Among recent contributions, see R. Volante, *Il sistema contrattuale del diritto comune classico, struttura dei patti e individuazione del tipo, glossatori e ultramontani*, [Per la storia del pensiero giuridico moderno, 60], Milano 2001.

[386] Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*, p. 31-45.

[387] D. 2,14,7,4 (Ulpian): 'Sed cum nulla subest causa, propter conventionem hic constat non posse constitui obligationem: igitur nuda pactio obligationem non parit, sed parit exceptionem.'

[388] Diego de Covarruvias y Leyva, *Relectio in cap. quamvis pactum de pactis, libro 6*, part. 2, par. 5, num. 12, in: Opera omnia, Augustae Taurinorum 1594, tom. 2, p. 273: 'Primum, pactum nudum id dici, cui praeter consensum et conventionem nihil extrinsecus accedit, quasi ea pactio, quae in propriam et speciale nomen contractus minime transierit, nec aliquod extrinsecus fomentum acceperit, nuda sit.'

[389] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 13, p. 273: 'Secundo principaliter constituendum est, iure civili ex pacto nudo nec nasci civilem obligationem nec itidem actionem civilem dari.'

[390] See Baldus de Ubaldis, *Super Decretalibus*, Lugduni 1564, ad X 1,6,16, num. 1, f. 57r: '(…) et vestiuntur isti contractus [innominati] vestimento extra rem sicut homo qui calefit ab igne calefit calore extraneo et non calore innato. Et ita est natura contractuum frigidorum sive innominatorum, quia secundum glossam iuris civilis frigide naturae sunt et non vestiuntur nisi per vestimentum appositum eis ad similitudinem hominis nudi, ut not. ff. de pactis, l. iurisgentium, par. quinimmo, et ad similitudinem hominis qui nascitur nudus. Item hominis qui frigore contrahit nervos, et propter frigiditatem non est aptus ad aliquid agendum, riget enim corpus propter frigiditatem et extenditur virtus eius propter caliditatem, et philosophi legum imitati sunt philosophos naturae.' Also cited in

The aforementioned Triphoninus apparently elaborated on Baldus' metaphor:[391] 'a clothed agreement produces an action, inasmuch as it is hotter, more excellent and more beautiful once it has covered its nudity.' In a burst of poetic inspiration, Triphoninus even goes as far as comparing the transformation of a naked pact into a vested agreement with Ulysses' rebirth from a naked vagabond into the godlike hero praised by the lovely Nausicaa after she had dressed him up. Would any serious person have doubted the connection between Eros, attire and legal enforceability ? In any case, Triphoninus rather sanctimoniously ends by deploring the vocabulary of clothing used by the medieval doctors, which, he says, was uncommon to the Roman jurists[392].

So if these 'clothes' were so powerful, what did they look like in the eyes of the medieval jurists ? In a brief synthesis of the civilian tradition, for which he is clearly inspired by Accursius' gloss, Leonardus Lessius concludes that a bare agreement can get dressed up through one of the following six *vestimenta pactorum*[393] : 1) performance on the part of one of the parties (*reipsa*) ; 2) the use of formal wording (*verbis*), for instance a *stipulatio*; 3) the use of writing (*litteris*), as in the case of an *acceptilatio* ;4) being a nominate contract (*specifico nomine contractus*), although it should be kept in mind that not all nominate contracts are consensual contracts[394]; 5) coherence with a vested agreement (*cohaerentia cum contractu vestito*), according to the maxim that an accessory thing goes with the principal (*accessorium sequitur principale*) ; 6) confirmation through an oath (*iuramento*).

The history of the doctrine of vested agreements reaches back to the glossators. Traditionally, the twelfth-century jurist Placentinus, a disciple of Martinus Gosia and founder

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M. Kriechbaum, *Philosophie und Jurisprudenz bei Baldus de Ubaldis, 'Philosophi legum imitati sunt philosophos naturae'*, Ius commune, 27 (2000), p. 302-303.

[391] Forcadel, *Necyomantiae*, dialogo 69, num. 2, p. 161: 'Ergo vestitum pactum actionem tribuit, utpote calentius, nuditateque seposita multo excellentius ac pulchrius, quemadmodum Nausicaa Alcionos, Odysseae lib. 6 cum nudum Ulyssem invenisset, ac deinde vestes pretiosas eum induisset, ait Ulyssem, qui antea visus foedissima specie: νῦν δὲ θεοῖσιν ἔοικε, τοὶ οὐρανὸν εὐρὺν ἔχουσιν [= Odysseia 6, 243], id est, *Nunc instar divûm, caelum, quos detinet amplum*.' A minor note regarding the Latin translation of the Greek might be that, although there is no doubting the poetic quality of the Latin verse, it would have been more consonant with the grammar of the original Greek verse if the Gods, instead of Ulysses, had been taken as the subject of the verb 'detinet' (which in the Greek original is actually an active present participle masculine dative plural added as an adjective to the Gods). This is confirmed by Murray's translation in Homer, *The Odyssey*, Books 1-12, with an English translation by A.T. Murray revised by George E. Dimock, [Loeb Classical Library, 104], Cambridge Mass. – London 1995, p. 239: 'Before, he seemed to me uncouth, but now he is like the gods, who hold broad heaven.'

[392] Forcadel, *Necyomantiae*, dialogo 69, num. 3, p. 161: 'Utinam tamen abstinuissent doctores hoc nomine, vestiti, in pactis, iurisconsultis inusitato.'

[393] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 3, num. 18, p. 197. Compare with glossa *Quinimo* ad D. 2,14,7,5 in *Corporis Iustinianaei Digestum vetus*, tom. 1, col. 263.

[394] Consequently, as a matter of civil law, the establishment of other nominate contracts depends either on the conveyance of a thing (*re*), the use of writing (*scriptura*) or the expression of solemn formulas (*verbis*). As long as they consist of mere mutual consent, these contracts, however nominate, are not enforceable in civil courts: 'ante traditionem, dum in solis verbis consistunt, dicuntur pacta nuda, quae non pariunt obligationem civilem, nisi ex aliquo iuris privilegio'; see Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 2, num. 7, p. 196. Interestingly, Lessius notes, firstly, that the *stipulatio* is only of relevance to the secular courts, and, secondly, that even in the daily business of those courts, stipulations have become extremely rare (*parvum usum nunc habent*); cf. *De iustitia et iure*, lib. 2, cap. 17, dub. 2, num. 11, p. 196.

of the law school at Montpellier, is cited as the father of the theory[395]. In a modest attempt to systematize Roman contract law, he first made a distinction between *pactum* as the generic term and *contractus* as a specific class of agreements. Contracts were those agreements that were enforceable and, therefore, coincided with the vested pacts. In a certain sense, Placentinus thereby substituted the distinction between vested pacts and naked pacts for the Roman distinction between nominate and innominate contracts. The *vestimenta* he recognized coincided with the four substantial elements of the nominate contracts (*consensus*, *res*, *scripta*, *verba*)[396].

By the time Accursius wrote his gloss to law *Iurisgentium*, other 'clothes' had been added to this list. As is rightly noted by Lessius, the so-called *pacta praetoria*, e.g. the *constitutum debiti*, and the *pacta legitima*, e.g. the *pactum donationis*, became considered as actionable[397]. More importantly, with the advent of the postglossators from the fourteenth century onwards, a shift occurred in the approach to the question of naked pacts. While the glossators gave a more systematic expression to the Roman texts, successive generations of jurists increasingly searched for exceptions to the rule that naked pacts are not producing civil obligations[398]. This often led to lengthy catalogues of cases in which law *Iurisgentium* did not apply. A notorious example is André d'Exea's (†1575) list of sixty-four exceptions to the Roman rule that naked pacts are not binding[399].

The cracks in the civilian tradition become apparent in the list of sixteen exceptions to law *Iusgentium* singled out by Giasone del Maino (1435-1519), the famous professor of law who taught at Pisa, Padova, and Pavia, where he counted Andrea Alciati (1492-1550) among his students[400]. One of the exceptions flagged by Giasone reads as follows[401]: 'Even though it is not possible to sue on the basis of a naked pact as a matter of civil law, performance can still be demanded by virtue of evangelical denunciation, *even in the civil court*.' Certainly, the commentators of Roman law knew that different rules than the one expressed in D. 2, 14, 7, 4 prevailed in the canon law. Yet, through statements of this kind, Giasone del Maino was attacking the civilian system from within. It is therefore baffling to find him claiming that by

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[395] However, Birocchi, *Causa et categoria generale del contratto*, p. 48-49 raises the possibility that the doctrine of *vestimenta pactorum* found its expression even earlier on in (Anglo-)Norman sources, particularly in the *Ulpianus de edendo*, a treatise on procedure that now is said to have been influenced by Placentinus in the first place; see A. Gouron, *Un traité écossais du douzième siècle*, Tijdschrift voor Rechtsgeschiedenis, 78 (2010), p. 1-13.

[396] For a more detailed account of Placentinus' reflections on contract law in his *Summa Codicis*, lib. 2, tit. 3, see Birocchi, *Causa et categoria generale del contratto*, p. 50-52.

[397] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 4, num. 24, p. 198. Compare Birocchi, *Causa et categoria generale del contratto*, p. 52-54.

[398] Birocchi, *Causa et categoria generale del contratto*, p. 63-67.

[399] Birocchi, *Tra tradizione e nuova prassi giurisprudenziale, La questione dell'efficacia dei patti nella dottrina italiana dell'età moderna*, in: J. Barton (ed.), Towards a General Law of Contract, [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, p. 275-277, n. 135.

[400] For biographical information, see the notice by F. Santi in the online Dizionario biografico degli Italiani (URL: http://www.treccani.it/enciclopedia/giasone-del-maino_(Dizionario_Biografico)/, last visited 20.09.2011).

[401] Giasone del Maino, *In primam Digesti Veteris partem commentaria*, Venetiis 1579, ad D. 2,14,7,4, num. 14, limitatione 4, f. 138r: 'Quamvis ex pacto nudo agi non possit de iure civili, tamen potest peti executio per viam denunciationis evangelicae *etiam in foro civili* (…).' [the italics are ours]

means of a remedy based on canon law, naked pacts can in fact become actionable as a matter of civil law. Giasone del Maino's argument would be cited later in the sixteenth century by Matthias van Wezenbeke, who also claimed that bare agreements were actionable as a matter of civil law.

By the beginning of the sixteenth century, the Roman way of thinking about contractual obligation met with growing skepticism. Some scholars expressly stated that the civil law tradition should conform to the canon law of contract. As Covarruvias is perplexed to find[402], 'some believe, against the common opinion, that even as a matter of civil law a civil obligation and action arise out of a naked pact.' Covarruvias is taking issue here with Fortunius Garcia. This eminent jurist, born in the same year as Domingo de Soto, argued that in contractual affairs, civil courts should abide by canon law (*in foro civili standum est iuri pontificio*), since violating contractual obligations is a matter of sin[403]. Remarkably, Covarruvias, one of the foremost canonists of the Spanish Golden Age, does not follow Fortunius' opinion.

3.2.1.2 Classical convulsions

Covarruvias' resistance against Fortunius Garcia's far-stretching, if not slightly dishonest interpretation of law *Iurisgentium*, is part of a general trend in the early modern period to protest against the denaturation of the classical Roman law of contract. The aforementioned opinion by Callimachus expressed in Forcadel's dialogues is but one of many examples of this. One should not infer from their resistance against the denaturation of Roman contract law that critics such as Covarruvias did not recognize the need for an open system of contracts or the general actionability of bare agreements. On the contrary, they would insist that, as a matter of canon law, or, for that matter, natural law, all pacts should be binding. Again, it seems crucial to bear in mind the multi-layered nature of law until the rise of the State's monopoly on the creation of norms and the settlement of conflict.

Barring exceptions, these classical convulsions, as we might call them, are symptomatic of what was a general concern to carefully distinguish between different levels of normativity, rather than a reluctancy to stimulate the development of a general law of contract in practise and canon law. Moreover, the crusade for a philologically correct understanding of Justinian's *Corpus* had the ironical effect of making original Roman law

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[402] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 13, p. 274: 'Quidam autem adversus communem opinantur, etiam iure civili ex pacto nudo obligationem civilem nasci et actionem competere, idque probare conantur, primo, quia in materia peccati adhuc in foro civili standum est iure pontificio, quo datur ex pacto nudo actio, non civili.'

[403] See Fortunius Garcia, *Repetitio super cap. 1 de Pactis*, in: *Commentaria in titulum Digesti de Pactis, difficilem, uberrimum, omniumque contractuum parentem cum repetitione cap. 1 Extra in eodem titulo*, Francoforti 1592, num. 118, p. 1119: 'Hinc singulariter constat quod in utroque foro hodie ex pacto nudo habebimus ius agendi. (…) Cum ergo in iustitia pactorum nudorum ius civile negligenter se habuerit, quia ea praetermisit, succedit regula iuris canonici etiam foro seculari (ut credo) observanda, qua regula pactis ius ministratur.' For further discussion of Fortunius Garcia's seminal contribution to the development of a general law of contract, see below.

increasingly irrelevant. Whether that was an intended or an unintended consequence of the humanist jurists is beyond the scope of this argument.

Equally uncertain is whether a sharp distinction between so-called humanist jurisprudence and traditional legal scholarship, or, alternatively, between humanism (*mos gallicus*) and Bartolism (*mos italicus*), is adequate in the first place, if we want to come to grips with contract doctrine in the early modern age[404]. It is not unthinkable that in distinguishing too sharply between *mos gallicus*, the 'French' way of teaching law, and *mos italicus*, the Italian way of teaching law, traditional historiography has been deceived by the polemic tone of the sources. In addition, preconceptions about the positive or negative meaning of terms such as 'scholasticism' and 'humanism' have played a sad role in historical scholarship[405]. Modern scholarship rightly places the emphasis on the interaction between humanism and Bartolism in the sixteenth century[406]. It has been suggested that overly excessive emphasis on the distinctive ways of teaching law in the late fifteenth and the sixteenth centuries might be the misleading result of unduly nationalistic tendencies. One should not forget that in the late nineteenth and early twentieth century, when a lot of legal histiographical scholarship emerged, France and Italy were at political loggerheads with each other[407].

Consider Covarruvias' fierce rebuttal of Andrea Alciati's suggestion that naked pacts might be actionable even as a matter of civil law if sin cannot be prevented otherwise[408]. The writings of both authors unite characteristics usually thought to be in the almost exclusive province of either a 'humanistic' or a 'scholastic' jurist. With a commitment to authenticity typical of the humanists, the rather 'scholastic' Covarruvias wants the original meaning of paragraph *Sed cum nulla* to be respected at all costs, whereas the allegedly 'humanistic' Alciati overstretches the interpretation of the same law with a sense of pragmatism typically associated with the scholastics. Particularly in this context, it should not be omitted that Alciati studied with Giasone del Maino.

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[404] The inadequacy of this pair of terms in dealing with sixteenth century jurists has already been illustrated in regard to André d'Exea; see Birocchi, *Causa e categoria generale del contratto*, p. 66, n. 106. Some authors suggested that d'Exea belongs to a movement in between *mos italicus* and *mos gallicus*; cf. F. Carpintero Benitez, *'Mos italicus', 'mos gallicus' y el humanismo racionalista, Una contribución a la historia de la metodologia juridica*, Ius commune, 6 (1977), p. 143; Carpintero has been followed by R.C. van Caenegem, *An historical introduction to private law*, Cambridge 1992, p. 58, n. 52.

[405] Invaluable warnings against the tenacity of the misconceptions on this distinction can be found in D. Maffei, *Gli inizi dell'umanesimo giuridico*, Milano 1972[3], p. 15-23. Birocchi, *Alla ricerca dell'ordine*, p. 236, n. 17 notes that, if anything, the typically sixteenth century polemic was closed by the Protestant and humanist jurist Alberico Gentili (1552-1608), whose *De iuris interpretibus* (1582) was designed as a defence of the *mos italicus*.

[406] R. Lesaffer, *European legal history, A cultural and political perspective*, Cambridge 2009, p. 353.

[407] Thus the critical analysis by no less than Manlio Bellomo in *Perché lo storico del diritto europeo deve occuparsi dei giuristi indiani?*, Rivista internazionale di diritto comune, 11 (2000), p. 30-32.

[408] See the argumentation by Andrea Alciati in *Paradoxa iuris civilis ad Pratum*, Lugduni 1532, lib. 5, cap. 3, p. 79, and the reaction it provoked in Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 13, p. 274: 'Unde manifeste errare videtur Andreas Alciatus in rubr. ff. de verborum obligatione, num. 13 et lib. 5 Parad., cap. 5 (sic), dum scribit ex pacto nudo iure etiam civili actionem oriri in his casibus quibus eiusdem pacti violatio mortalem culpam habet.'

There were also more subtle ways that genuine Roman contract law could be undermined and, consequently, needed to be refuted. One of them concerned the standard explanation for the non-actionability of naked pacts in Roman law. According to that account, the Romans had been careful not to make bare agreements enforceable, since that would have led to the actionability of ill-considered and rash promises. In other words, if a promise had been made through a naked pact, the Romans rightfully presumed that it ensued from levity (*praesumptio levitatis*). This opinion can be traced back at least to Andrea Alciati, who attributes it in a not wholly convincing way to Alexander Tartagni of Imola (1424-1477)[409]. It became widespread among the jurists in the sixteenth century and endures in textbooks to this day.

Covarruvias is anxious to express his misgivings about the *praesumptio levitatis*-theory for explaining the Roman law of contract[410]. If paragraph *Sed cum nulla* rests on a presumption, then it must be a conclusive presumption (*iuris et de iure*), according to Covarruvias. Yet even a conclusive presumption can be rebutted if he in whose favor it has been established provides evidence through confession that the presumption is not true[411]. However, D. 2, 14, 7, 4 would not admit of such a confession, since it establishes a general rule. In other words, even if it could be proven that consent had been made deliberately, then paragraph *Sed cum nulla* would still not make a bare agreement actionable. Consequently, the assumption that the non-enforceability of naked pacts in Roman law rests on a presumption of levity is false.

There is a second argument why the non-actionability of naked pacts cannot rest on a presumption of lack of deliberation[412]. Does not D. 2,14,7,4 itself recognize that even a naked

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[409] E.g. Alciati, *Paradoxa*, lib. 5, cap. 3, p. 79: '… ratio cur ex pacto iure civili actio non nascebatur, ea tradita est, quod improvide huiusmodi promissio facta praesumitur (Alex. in rub. de verb. oblig.).'

The reference to Tartagnus is suspiciously imprecise and probably not justified. Perhaps the following passage could be cited, though, to argue that Tartagnus was indeed of the opinion that the non-actionability of naked pacts must be ascribed to a lack of proof that consent had been given deliberately; cf. Alexander Tartagnus Imolensis, *Lectura novissima de verborum obligatione*, rubr., num. 9 (*factum ad interrogationem dicitur magis deliberate fieri*), in *Ad frequentiores Pandectarum titulos, leges et paragraphos*, Venetiis 1595, f. 158r.

On Tartagni and his counsels, see A.A. Wijffels, *La bonne foi en droit savant médiéval: bona fides - mala fides dans les consilia d'Alexander Tartagnus (Imolensis)*, in: La bonne foi, [Cahiers du centre de recherches en histoire du droit et des institutions, 10], Bruxelles 1998, p. 23-52.

[410] Interestingly, Covarruvias levels his criticism against Tartagni instead of Alciati, although it seems unlikely that Covarruvias read Tartagni directly, given that he copies Alciati's reference with the same lack of precision. In any case, Tartagni did not state the *praesumptio levitatis*-idea with the same clarity as Alciati.

[411] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 13, p. 274: 'Adhuc tamen haec ratio Alexandri et aliorum minime satisfacit, quippe quae convinceret, si vera foret actionem iure civili dari ex pacto nudo ubi per confessionem constaret animus deliberatus, cum praesumptio iuris et de iure in contrarium admittat confessionem illius pro quo praesumitur secundum communem (…) et vere, si communi omnium sententiae standum est et ipsis quidem iuris civilis responsis, plane dicendum erit etiam in hoc casu actionem ex pacto nudo minime dari, nec obligationem oriri.'

[412] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 13, p. 274: 'Praesertim ratio Alexandri ex eo deficit, quod ius ipsum civile fatetur ex pacto nudo oriri naturalem obligationem debiti quidem legalis ad retinendum, ad excipiendum et compensadum. Quae profecto minime oriretur praesumptione constituta non deliberatae promissionis. Nam praetor ipse adversus iuris civilis praesumptionem non defenderet pacta nuda ratione consensus minus perfecti non praemissa animi integra deliberatione, imo praesumpta levitate quadam.

pact produces legal effects of some kind? After all, a bare agreement produces an exception. The Romans would certainly not have granted this remedy to an agreement they considered to be unthoughtful. Moreover, the *praetores* would not have granted actionability to a limited set of pacts if they had considered them as being indeliberate. Last, if the non-enforceability of naked pacts truly rested on a presumption of lack of deliberate consent, then there would be no distinction between the civil law, the canon law and the law of conscience. Under the assumption of rash consent, naked pacts cannot be enforced in the ecclesiastical courts and the court of conscience either (*praesumpta levitate nec iure pontificio nec in animae iudicio pacta nuda servanda sunt*).

Clearly, the spectre of confusion between the different levels of normativity was abhorred by Covarruvias. Yet if the distinct character of Roman law could not be explained by reference to a presumption of levity, then what was the true foundation of its rule that naked pacts are not actionable (*quid ergo ius civile hac in re statuit*)? In the footsteps of earlier canonists, Covarruvias gives an explanation that fully integrates the basic, pre-modern insight that 'law' is a multi-layered phenomenon. Within this multi-dimensional reality, a different objective is pursued at each level, all of the objectives and the levels being complementary. The civil law, in particular, aims at the preservation of society without necessarily striving for the highest degree of morality. As Antonio de Butrio (ca. 1338-1408) pointed out when explaining why civil law does not enforce naked pacts: 'it is not the chief aim of civil law to attain the end of divine law, but primarily to pursue the end of public utility (*finis publicae utilitatis*)'[413]. Covarruvias assented to this argument. It became standard among the early modern theologians.

Because the overextension of the courts were a major evil, according to Covarruvias, D. 2,14,7,4 laid down that naked pacts are not enforceable, in order to prevent the courts from being flooded by an endless stream of useless disputes (*actionem civilem pactis nudis negavit ad utilitatem reipublicae ut tot lites foris cederent*)[414]. For the same reason, the civil law tolerated prostitution, did not grant an action but for lesion beyond moiety, and did not impose an obligation of remuneration on the donee. Covarruvias' explanation of the non-actionability of bare agreements as a matter of civil law became standard doctrine among the moral theologians. The view that Roman law neither actively promoted, nor actively resisted bare agreements (*pacto nudo lex civilis nec adsistit nec resistit*) became equally standard[415]. It left room for the theologians to argue that bare pacts are still enforceable as a matter of natural law without having to go against Roman law.

Quo casu si de hoc constet nec iure pontificio nec in animae iudicio pacta nuda servanda sunt, cum deficiat consensus ad conventionem necessarius, l. 1 de pactis.'

[413] Antonio de Butrio, *Super Decretalibus commentarii*, Torino 1967 [= anastatic reproduction of the Venice 1578 edition], tom. 2, ad X 1,35,1, f. 94v, num. 7: 'Et si dicatur secundum leges datur concursus iuris divini, et tamen non oritur, dico quod ideo, quia ius civile principaliter non insequitur finem iuris divini sed finem publicae utilitatis.'

[414] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 13, p. 274.

[415] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 10, p. 273.

Covarruvias' critical attitude towards the degeneration of Roman law was not an isolated case, of course. Classical convulsions could be seen, too, in the works of illustrious French jurists such as François Le Douaren (1509-1559), Jacques Cujas (1520-1590) and Hugues Doneau (1527-1591). Their standpoint resembles that of their less well-known but equally impressive compatriot Étienne Forcadel. Their aversion to medieval jurisprudence is notorious; their penchant for philological acriby widely praised. In view of the relative insignificance of the *mos gallicus* to the development of early modern scholastic contract law, they cannot receive extended study here. It is sufficient to say that Cujas plainly confirms the Roman rule that bare agreements produce an exception but not a civil action[416]. The same goes for Doneau (Donellus), who expressly rejects the medieval doctrine of the *vestimenta pactorum*[417]. Perhaps Le Douaren merits somewhat more attention, since he is generally considered to have initiated the *mos gallicus*, and because his commentary is typical of the humanist attitude toward contract law as well as canon law.

While emphasizing that the Roman pretor acknowledged that all agreements were binding as a matter of equity and fidelity, Le Douaren concedes that the civil law as such did accord actionability only to a limited set of contracts out of policy considerations. The performance of agreements that fell outside of this peculiar category was purely a matter of honesty, religion and fidelity[418]. In his commentary on D. 2,14,7*pr*, Le Douaren recalls that the Romans did not want to grant an action for all agreements, because that would have proved detrimental to society: if all contracts were enforceable, then the courts would be overextended[419]. At the same time, he recognizes that this is merely a regulation as a matter of civil law. The absence of a general category of enforceable contract is neither necessary nor natural. Le Douaren begrudgingly admits that this explains why not all people have followed the same path as the Romans, but sometimes developed a rule which grants binding force to

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[416] Jacques Cujas, *Paratitla in libros quinquaginta Digestorum seu Pandectarum Imperatoris Iustiniani*, Coloniae 1570, ad D. 2,14, p. 25: 'Ex pacto autem datur exceptio vel replicatio, formatur actio contractus, sed non datur vel tollitur actio, nisi lege confirmatum sit.'

[417] Hugues Doneau, *Commentaria iuris civilis*, Hanoviae 1612, lib. 12, cap. 9, p. 575: 'Quod si neutrum horum erit, id est, neque conventio transibit in proprium nomen, neque praeter conventionem quidquam datum aut factum erit, ut vicissim dares aut faceres, tum sit illa pactio, quae Ulpiano et veteribus dicitur nuda pactio et nudum pactum, ex quo obligatio et actio non nascitur (…).' For Doneau's rejection of the medieval doctrine of the *vestimenta pactorum*, see lib. 12, cap. 11, p. 578-580 (*quae solo consensu non pariunt obligationem conventiones, quibus rebus accedentibus confirmentur et pariant. Eas res esse, quae vulgo vocant vestimenta pactorum. In horum tum appellatione, tum divisione quam vulgo erretur, et refutatus in eo error vulgaris*). Doneau would argue that Roman law merely recognize two 'clothes', namely the *rei vel facti traditio* and the *stipulatio* (p. 578). For a more profound discussion of Doneau's views on contract law, see Birocchi, *Causa e categoria generale del contratto*, p. 178-188.

[418] François Le Douaren, *Commentarius in tit. De pactis*, in: Opera omnia, Lugduni 1554, f. 26r: 'Supra ostendimus, veteribus Romanis utile visum non fuisse, passim ex quibuslibet conventionibus actiones dari, ideoque paucas quasdam ex multis delegisse eos, quas ad agendum utiles esse ducerent. Caeteras honestae cuiusque voluntati, religioni, et fidei reliquisse.'

[419] Le Douaren, *Commentarius in tit. De pactis*, f. 26r: 'Nulla est igitur alia istius iuris ratio, quam quae supra a nobis commemorata est, ne videlicet litibus immodicis, contentionibusque abundet civitas, quibus minuendis potissimum studere legislatorem oportet.

all agreements, even if they are naked[420]. Not without a certain sense of irony, he goes on to indict the canon law for having abolished the Roman laws of contract. He suggested that, in his view, the world would have been a better place if this irreverend act had not occurred[421].

Le Douaren expressly attacked the late medieval juridical tradition, certainly its papalist character, and launched the Ciceronian program of *ius in artem redigere*, which he exposed in his famous letter of 1544 on the way to teach and to study law (*Epistola ad Andream Guillartum de ratione docendi discendique iuris*). It consecrated the legal humanist movement (*mos gallicus*) already set in motion in France by his master Guillaume Budé (1468-1540). It would stimulate generations of jurists to get a deeper historical understanding of pristine Roman contract law without preventing them from being creative in systematizing the Roman legacy in new ways. Particularly important, in this respect, is François Connan's (1508-1551) entirely idiosyncratic doctrine of contract based around the notion of *synallagma*. Connan only recognized the enforceability of synallagmatic contracts as a matter of civil law. He went as far as denying that naked pacts produce natural obligation[422]. Connan would draw heavy criticism of Hugo Grotius for his 'unscholastic' standpoints.

3.2.2 The refreshing spirit of canon law

If the weight of the Roman legal tradition turned out to be so oppressive as to stifle almost any attempt to overturn D. 2,14,7,4, then how could the consensualist principle eventually emerge? From where did the attempts made by some of the medieval jurists to open up the civilian tradition draw their inspiration? From where did the pressure to change the civil law, or even to depart from the Roman legacy altogether, come? In the past, eminent legal historians have pointed out the crucial role played by at least two factors in the rise of the consensualist principle: the law of the Church and commercial practice[423]. Given their

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[420] Le Douaren, *Commentarius in tit. De pactis*, f. 26r: 'Cum autem ea ratio tantum civilis, ac probabilis sit, non necessaria et naturalis (ut diximus), mirum profecto videri non debet, si non aeque omnes ei assentiantur, adeo ut quorundam populorum legibus cautum esse acceperimus, ne ex pactione ulla, quamlibet nuda, ac simplici, denegetur actio.

[421] Le Douaren, *Commentarius in tit. De pactis*, f. 26r: 'Ac merito sophistas nescio quos perstringit [Aristoteles] nihil facilius esse confirmantes quam multis legibus in unum locum collatis, optimas eligere, quibus, utinam neque nostra haec aetas, neque superiora secula similes aliquando tulissent. Non enim tam multa praeclare et utiliter legibus ac iure civili comparata, pontificum quorundam sanctionibus abrogata iacerent, et felicius aliquanto, mea sententia, cum rebus humanis ageretur.'

[422] For an in-depth discussion, see Birocchi, *Causa e categoria generale del contratto*, p. 95-136. Also noteworthy is Nanz's observation that Connan's extreme positions not only drew heavy criticism by Hugo Grotius but also by Matthias van Wezenbeke; *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*, p. 65-69 and p. 88-89. Other notes on Connan's understanding of contract law and the way in which it formed a counter-example for Grotius, can be found in Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen*, p. 31-34.

[423] *Inter alia*, see the syntheses of the historical development of the principle of 'freedom of contract' in W. Scherrer, *Die geschichtliche Entwicklung des Prinzips der Vertragsfreiheit*, [Basler Studien zur Rechtswissenschaft, 20], Basel 1948, p. 16-30; Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*, p. 46-64. As to the consensualist principle in commercial law, see Baldus' testimony in *Super Decretalibus*, ad X 1,35,1, num. 8, f. 112r. Whether there was such a thing as *lex mercatoria* in the late Middle Ages at all, see K.O. Scherner, *Lex mercatoria - Realität, Geschichtsbild oder Vision?*, Zeitschrift für Rechtsgeschichte der Savigny-Stiftung, Germ. Abt., 118 (2001), p. 148-167; A. Cordes, *Auf der Such nach der*

relatively major impact upon early modern scholastic contract doctrine, the following paragraphs will mainly focus on the canonists' development of the principle that all agreements are binding, provided that their cause be expressed[424].

3.2.2.1 *Pacta quantumcumque nuda servanda*

The legacy of canon law to contract doctrine can be aptly summarized through the title put above the famous canon *Antigonus* (X 1,35,1) in the *Liber Extra* (1234): all pacts, however naked, are binding (*pacta quantumcumque nuda servanda sunt*)[425]. This canon can be traced back to the Council of Carthago (348 AD), when bishop Antigonus accused bishop Optantius of not observing an agreement in which they had fixed the boundaries of their power (*cum inter se pactum fecissent quod alter non subtraheret alterius populos*)[426]. The council ruled that the agreement was binding because peace must be maintained and agreements observed (*pax servetur, pacta custodiantur*). The Council of Carthago's settling of this particular dispute is emblematic of the Church's deep-seated conviction that promises are binding. This is witnessed by several decisions taken by its authorities in subsequent centuries, which eventually found their way into Gratian's *Decretum*, such as canon *Quicumque suffragio* (C.12, q.2, c.66), canon *Quia Johannes* (C.12, q.5, c.3) and canon *Iuramenti* (C.22, q.5, c.12)[427].

The ruling by the council of Carthago on the bindingness of agreements was handed down to the medieval canonists through the 7th century *Collectio Hispana* only to re-appear in Bernardo di Pavia's *Breviarium Extravagantium* (1188). He could not have borrowed it from either Burchard von Worms or Yves de Chartres, yet probably took it from the Pseudo-

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Rechtswirklichkeit der mittelalterlichen Lex Mercatoria, Zeitschrift für Rechtsgeschichte der Savigny-Stiftung, Germ. Abt., 118 (2001), p. 168-184.

[424] We thereby heavily draw upon previous scholarship, owing special debt to L. Seuffert, *Zur Geschichte der obligatorischen Verträge*, Nördlingen 1881; F. Spies, *De l'observation des simples conventions en droit canonique*, Paris 1928; J. Roussier, *Le fondement de l'obligation contractuelle dans le droit de l'Église*, Paris 1933; P. Fedele, *Considerazioni sull'efficacia dei patti nudi nel diritto canonico*, Tolentino 1937, p. 5-90 [=Estratto degli Annali della R. Università di Macerata, 11]; P. Bellini, *L'obbligazione da promessa con oggetto temporale nel sistema canonistico classico con particolare riferimento ai secoli XII e XIII*, [Università degli Studi di Roma, monografie dell'istituto di diritto pubblico della facoltà di giurisprudenza, nuova serie, 19], Milano 1964; O. Behrends, *Treu und Glauben, Zu den christlichen Grundlagen der Willenstheorie im heutigen Vertragsrecht*, in: L. Lombardi Vallauri - G. Dilcher (eds.), Christentum, Säkularisation und modernes Recht, [Per la storia del pensiero giuridico moderno, 11-12], Baden-Baden/Milano 1981, p. 957-1006; Feenstra - Ahsmann, *Contract*; R.H. Helmholz, *Contracts and the Canon Law*, in: J. Barton (ed.), Towards a General Law of Contract, [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, p. 49-66; P. Landau, *Pacta sunt servanda, zu den kanonistischen Grundlagen der Privatautonomie*, in: M. Ascheri et al. (eds.), Ins wasser geworfen und Ozeane durchquert, Festschrift für Knut Wolfgang Nörr, Köln-Weimar-Wien 2003, p. 457-474.

[425] *Corpus juris canonici emendatum et notis illustratum, Gregorii XIII iussu editum*, Romae 1582 (=ed. Gregoriana), part. 2, col. 440, l. 10-24: 'Antigonus episcopus dixit: et infra. Aut inita pacta suam obtineant firmitatem, aut conventus (si se non cohibuerit) ecclesiasticam sentiat disciplinam. Universi dixerunt, pax servetur, pacta custodiantur.'

[426] See gloss *Antigonus episcopus* ad X 1,35,1 in *Corpus juris canonici* (ed. Gregoriana), part. 2, col. 439, l. 65-72.

[427] F. Calasso, *Il negozio giuridico, Lezioni di storia del diritto italiano*, Milano 1967^2, p. 264-266.

Isidorian decretals[428]. Bernardo di Pavia also excerpted a passage from a letter by Pope Gregory I (600 AD) where he urges the bishop of Cagliari to be sure that promises are kept (*studiose agendum est ut ea, quae promittuntur, opere compleantur*)[429]. Remarkably, he did not feel the need to put forward strong arguments as to why naked pacts should be deemed binding. It makes the argumentation of his contemporary and probable master, Huguccio, all the more important.

Indeed, in the same crucial year 1188 - which Landau not improperly calls the year of birth of *pacta sunt servanda* - Huguccio published his famous *Summa* of Gratian's *Decretum*[430]. In it, we find a gloss on canon *Quicumque suffragio* (C.12, q.2, c.66) which explains why and how bare agreements should be enforced[431]. Importantly, the argumentation of this early canonist is fundamentally 'moral' in nature, at least from the perspective of the modern reader[432]. According to Huguccio, agreements should be enforced because he who breaks a promise commits a sin. Moreover, he cites the argument, amply discussed in Gratian's *Decretum* (C.22, q.5, c.12) that God does not want there to be a difference between what a Christian says and what he swears. In other words, simple promises are as binding as oaths. Moreover, Huguccio considers circumstances which render the performance of a promise more difficult to be tests of virtuousness[433].

From the moral foundation of the bindingness of bare agreements, Huguccio infers that the procedural means to demand enforceability is not a normal juridical remedy, i.e. an *actio*. In Huguccio's view, the proper remedy to enforce a naked pact is a typically canonical technique, namely the *officium iudicis*[434]. In this manner he avoids a straightforward

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[428] Landau, *Pacta sunt servanda*, p. 458, n. 7 and p. 464-467.

[429] 1 Comp. 1,26,3 (= X 1,35,3); cf. E. Friedberg (ed.), *Quinque compilationes antiquae nec non collectio canonum Lipsiensis*, Lipsiae 1882, p. 10.

[430] On the date of composition of Huguccio's *Summa decretorum*, see W.P. Müller, *Huguccio*, [Studies in Medieval and Early Modern Canon Law, 3], Washington D.C. 1994, p. 68-73.

[431] See C.12, q.2, c.66 in *Corpus juris canonici* (ed. Gregoriana), part. 1, cols. 1345-1346: 'Quicumque episcopi suffragio cuiuslibet aliquid ecclesiasticae utilitatis providerint, et pro eo quodcumque commodum in remunerationem promiserint, promissi solutionem eos exolvere oportebit, ita ut it ad concilium provincial deferatur, ut eorum conniventia confirmetur, quia (sicut Paulus ait), dignus est operarius mercede sua. The standard gloss *Promiserint* ad C. 12, q.2, c.66 (which naturally postdates Huguccio's gloss) states the principle that naked pacts are binding in more express terms, adducing canon *Iuramenti*; cf. *Corpus juris canonici* (ed. Gregoriana), part. 1, col. 1345: 'Videtur quod aliquis obligetur nudis verbis, licet non intercessit stipulatio, ut extra de testa. indicante 22 q.5, et i.e. q.5 quia Ioannes; quod verum est; et potest dici quod competit actio ex nuda promissione, sc. condictio ex canone illo i. 22 q. 2 iuramenti.'

[432] Landau, *Pacta sunt servanda*, p. 463: 'Er begründet den Erfüllungszwang beim einfachen Versprechen mit dem Rückgriff auf den christlichen Sündenbegriff, also mit einer moralischen Kategorie. Darin liegt zweifellos eine Tendenz zur Moralisierung des Rechts, der sog. *Rigor iuris* Huguccios.'

Paradoxically, the end of the sixteenth century witnesses the opposite process of the moralization of canon law, namely the juridification of the moral theology of promise-keeping. For instance, according to Lessius, promises are binding, not merely because the promiser who does not perform commits a sin, but, fundamentally, because promising entails the transfer of a right upon the promisee. Cf. infra.

[433] Müller, *Huguccio*, p. 70-71.

[434] Huguccio, *Summa*, ad C.12, q.2, c.66, cited in Landau, *Pacta sunt servanda*, p. 463, n. 31: 'Sed quam actionem proponet cum ex nudo pacto non oriatur actio ? Sed non exigitur ut semper proponatur actio sed simpliciter proponatur factum et postuletur officium iudicis ut ille cogatur ad solvendum promissum.'

confrontation with D. 2,14,7,4, which says that no *actio* lies for naked pacts. However, whether the *officium iudicis* is the appropriate procedural means to enforce a naked pact remains a bone of contention among the canonists[435]. Even if the bindingness of naked promises was never questioned, finding the proper remedy to enforce this principle gave rise to controversy[436]. As we will see below, Pope Innocent IV opted for the *denunciatio evangelica*, rather than the office of the judge, although Johannes Teutonicus' view would prevail. Teutonicus held that pacts should be enforced through a *condictio ex canone juramenti*, at least in cases involving clergymen.

There are few examples in the history of law that offer as clear evidence to the decisive impact of Christian morality on the formation of the Western legal tradition as the emergence of the consensualist principle in contract law[437]. The call for peace, authenticity and truthfullness that pervades Christianity ended up laying the foundation for a basic legal concept in Western legal culture. Numerous passages from Scripture and the Church Fathers attest to the paramount importance of these moral values[438]. In a text that eventually found its way into the *Liber Extra* (X 5,40,11), Saint Isidore of Seville (ca. 560-636) explained that peace is a condition for agreement. Hence, he claimed that agreement (*pactum*) was etymologically derived from, as well as logically posterior to, peace (*pax*)[439].

Of course, some of the humanist jurists, such as Forcadel[440], would poke fun at Isidore's naive philosophical account (claiming from a more down-to-earth perspective that peace is the outcome rather than the precondition of agreement), but his etymological effort brilliantly illustrates the intimate connection that was supposed to exist between sound contract law and the establishment of peace. At the apex of scholastic contract doctrine, the

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On the *officium iudicis* as an *auxilium extraordinarium*, particularly as a way of sanctioning promises in Huguccio, see Roussier, *Le fondement de l'obligation contractuelle*, p. 106-136.

[435] For a brief synthesis of this discussion, see Spies, *De l'observation des simples conventions en droit canonique*, p. x-xi.

[436] Calasso, *Il negozio giuridico*, p. 277-279.

[437] Behrends, *Treu und Glauben*, p. 974-994; H.J. Berman, *The religious sources of general contract law, An historical perspective*, in: Faith and order, The reconciliation of law and religion, [Emory studies in law and religion, 3], Grand Rapids-Cambridge 1993, p. 187-208 [=reprint from Journal of law and religion, 4 (1986), p. 103-124.

[438] For a more detailed overview of the Greek and Latin Church Fathers' insistence on the moral duty to keep promises, see Spies, *De l'observation des simples conventions en droit canonique*, p. 1-22.

[439] Isidore of Seville, *Etymologies*, 5,24,18, in: *Isidori Hispalensis Etymologiarum sive originum libri XX*, recognovit brevique adnotatione critica instruxit W.M. Lindsay, [Scriptorum classicorum bibliotheca Oxoniensis], Oxonii 1911, tom. 1, [s.p.]: 'Pactum dicitur inter partes ex pace conveniens scriptura, legibus ac moribus comprobata.'

[440] In his *Cupido Jurisperitus*, Lugduni 1553, cap. 2, num. 7, p. 16, Forcadel cynically remarks that along Isidore's lines one can at least understand why love affairs fall apart so easily: 'Pactum a pace deduxit Isidorius (…) ne mirum sit pacta amantium non servari, cum pax eorum parvo duret tempore, vigent bella, et quaedam induciae, mox utcunque redeunt in gratiam (…).'

With other humanist jurists, Forcadel shares a low opinion of Isidore, preferring the classical Roman jurists and their rejection of a general law of contract to Isidore's absurd etymological deductions and the Catholic views they hide; see Forcadel, *Necyomantiae sive occultae jurisprudentiae tractatus*, in *Opera S. Forcatuli*, Parisiis 1595, part. 1, dialogo 69, num. 6, p. 159: 'Menander: Non expedit in iis rescriptis quae canonica vocant diem deterere, neque in nugis non prorsus mali grammatici nec boni iurisconsulti Isidori (cuius dicta pro oraculo pontificibus passim referuntur) in cap. pactum de verb. signific.'

Jesuit Pedro de Oñate boasts that 'a vast number of irritating and useless disputes and lawsuits have been removed thanks to the conformity of natural law, canon law and Spanish law in regard to the enforceability of naked pacts.'[441] In the eyes of these Christian writers, enforcing agreements, however naked, fosters peace. *Pax* and *pactum* are intrinsically intertwined with one another.

Typically, Biblical and patristic sources found their way into late medieval canon law through Gratian's epochal attempt to harmonize the Christian normative traditions and adopt them to the solution of practical cases. Salient for its impact is canon *Iuramenti* (C.22, q.5, c.12)[442], the preceding rubric of which is telling enough: for Christians, there should be no difference between an oath and a simple statement (*inter iuramentem et locutionem fidelium nulla debet esse differentia*). Hence, breaking a promise is tantamount to perjury and lying[443]. It poses a serious threat to the salvation of the soul. Put differently, in the *Decretum*, the enforceability of contracts is not a theme as such, but forms part of a moral exhortation against lying and falsehood[444]. It is basically a corollary of the moral duty of the promisor to keep his promise. The promisee is able to hold the promisor to the agreement merely in an indirect way, by accusing the promisor with the sin of breaking a promise.

Gratian's *Decretum* in itself, without the gloss, does not contain the principle that naked pacts are binding, let alone a general law of contract. As mentioned before, several canons express the idea that promises are binding. Yet the adage *pacta nuda sunt servanda* emerged only in the glosses of Bernardo di Pavia and Huguccio at the end of the twelfth century[445]. Moreover, given the fundamentally moral character of the early decretists' emphasis on the bindingness of naked agreements, the decretist had to cope with the question of how this principle could be enforced as a matter of canon law altogether. Huguccio resolved the conundrum by proposing a remedy through the judge's office (*officium judicis*). However, the canonists felt increasingly uncomfortable with this more or less external solution to the problem, trying to found the enforceability on the canons themselves instead.

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[441] Oñate, *De contractibus*, tom. 1, disp. 2, sect. 5, num. 166, p. 40. For a more ample discussion of Oñate, see below.

[442] See C. 22, q. 5, c.12 in *Corpus juris canonici* (ed. Gregoriana), part. 1, cols. 1703-1704: 'Iuramenti haec causa est: quia omnis, qui iurat, ad hoc iurat, ut quod uerum est, eloquatur. Et ideo Dominus inter iuramentum, et loquelam nostram, nullam vult esse distantiam: quia, sicut in iuramento nullam convenit esse perfidiam; ita quoque in verbis nostris nullum debet esse mendacium: quia utrumque et periurium et mendacium diuini iudicii poena damnatur, dicente scriptura: Os, quod mentitur, occidit animam. Quisquis ergo verum loquitur, iurat, quia scriptum est: Testis fidelis non mentitur.'

[443] Compare Gratian's d.p. C.22, q.2, c.2 in *Corpus juris canonici* (ed. Gregoriana), part. 1, cols. 1658-1659: 'Item qui falsum iurat, mentitur. Mentiendo autem iurare, nihil aliud est quam peierare. Cum ergo omnes, qui loquuntur mendacium perdendi sint, iuxta illud Psalmistae: Perdes omnes qui loquuntur mendacium, multo magis damnabiles sunt, qui mentiendo peierare convincuntur: quia nomen Dei sui in vanum assumunt.'

[444] The moral foundations of *pacta sunt servanda* are emphasized in Roussier, *Le fondement de l'obligation contractuelle*, p. 1-20.

[445] It remains true, nonetheless, that the enunciation of the *pacta sunt servanda*-rule formed an indispensable stage in the subsequent development of a general law of contracts; see H. Coing, *Common law and civil law in the development of European civilization - possibilities of comparisons*, in: H. Coing - K.W. Nörr (eds.), Englische und kontinentale Rechtsgeschichte: ein Forschungsprojekt, [Comparative studies in continental and Anglo-American legal history, 1], p. 36.

This ambition was accomplished by Johannes Teutonicus in his *Glossa ordinaria* (ca. 1215) on the *Decretum*.

Johannes Teutonicus worked out a solution that would become the majority opinion at least until the fourteenth century[446]. For this, he drew inspiration from a Roman technique to introduce new remedies : the so-called *condictio ex lege*. This is an action that is not mentioned, as such, in the *Corpus Iustinianeum*, and therefore no *actio* in the true sense of the word, but which nevertheless relies on a legal basis[447]. By the same token, Teutonicus argued, there is sufficient textual evidence in the canon law that there should be a remedy to enforce promises. A *condictio ex canone* for the actionability of promises could be construed around C.22, q.5, c.12, regardless of the absence of any express remedy to enforce promises. Accordingly, Johannes Teutonicus calls this action the *condictio ex canone Iuramenti*[448]. For the first time, then, an ordinary juridical means was developed to sanction the breaking of an agreement[449]. Still, the practical significance of this juridical enforcement mechanism remained limited, since it only applied to the clergy. Only if the promise had been joined with an oath could contracts between laymen become subject to the Church's spiritual jurisdiction[450].

In 1234, the principle that naked pacts are binding becomes a definitive and substantial part of the canon law through its consecration in X 1,35,1. However, Johannes Teutonicus' proposal that this principle should be enforced through a *condictio ex canone* soon met with fierce and relatively short-lived criticism, coming from a quite unexpected quarter. Trying to reconcile *pacta sunt servanda* with the Roman idea that there lies no action for a naked agreement, Pope Innocent IV recommended an alternative way of enforcing bare agreements: evangelical denunciation (*denuntiatio evangelica*), which, if the convicted person persisted in his sin, could result in excommunication. Innocent thought of naked pacts as producing a natural obligation. In addition, he considered the *denuntiatio evangelica* as the appropriate, universal remedy to enforce natural obligations in the ecclesiastical court[451]. He would have any party bring a claim in the ecclesiastical court by virtue of evangelical denunciation out of charity or even to pursue his own interest.

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[446] For its adoption by Hostiensis, Guillaume Durand and Baldus, amongst many other canonists, see Spies, *De l'observation des simples conventions en droit canonique*, p. 40-65 and p. 72-94.

[447] D. 13,2,1: 'Si obligatio lege nova introducta sit nec cautum eadem lege, quo genere actionis experiamur, ex lege agendum est.'

[448] Glossa *Promiserint* ad C. 12, q. 2, c. 66 in *Corpus juris canonici* (ed. Gregoriana), part. 1, col. 1345: 'Videtur quod aliquis obligetur nudis verbis, licet non intercessit stipulatio (…), quod verum est et potest dici quod competit actio ex nuda promissione, scilicet condictio ex canone illo infra 22, q. 2 (sic) Iuramenti.'

[449] Roussier, *Le fondement de l'obligation contractuelle*, p. 137-148.

[450] See the *caveat*s by Helmholz, *Contracts and the Canon Law*, p. 51.

[451] Innocentius IV, *Apparatus in Quinque libros Decretalium*, Francoforti ad Moenum 1570, ad X 2,1,13, p. 193r, num. 4: 'Item dicimus quod iste modus agendi habet locum ubi aliquod temporale, in quo est reus naturaliter obligatus, debet dari vel fieri, etiam si ad illud petendum nulla competit actio civilis vel canonica ut quando quis iuravit dare vel facere sine stipulatione locum habet denunciatio ut hîc. Et est idem in omnibus aliis quae debent dari vel fieri et peccat qui promisit nisi promissum impleat, ut hîc, ubi dicit quod ad papam pertinet de omni peccato mortali quemlibet corripere.'

Pope Innocent IV's argumentation was not taken very seriously by his contemporaries. For example, Hostiensis rejected Innocent's extensive view of the *denunciatio evangelica* as a universal remedy to enforce natural obligations, calling instead for a more restrained use of the remedy[452]. Only later, with canonists such as Francisco Zabarella (1335-1417) and Giovanni d'Imola (ca. 1372-1436), is the enforcement of bare agreements through a *condictio ex canone* being contested again[453]. Yet, at the same time, Innocent IV's establishing evangelical denunciation as the interface in between natural law and canon law might explain why he was widely appreciated by moral theologians. Pope Innocent IV's alternative solution is not insignificant for the simple reason that even the advocates of Teutonicus' opinion considered the field of application of the *condictio ex canone iurmanenti* to be restricted to the clergy. As Baldus de Ubaldis (1327-1400) and Felinus Sandaeus (1444-1503) famously put it, excluding the lands of the Church, the common opinion does not concern lay people[454]. Consequently, lay people have to appeal to the *denunciatio evangelica* if they wish to enforce a promise. Baldus' and Sandaeus' opinion would become mainstream in the moral theological tradition[455]. Still, dissenting opinions circulated. It should not be forgotten, for instance, that Abbas Panormitanus advocated the universal applicability of a canonical remedy for enforcing promises, for laymen as well. Panormitanus cared less about the appropriateness of a specific remedy than about its general availability[456].

Apart from the initial discussions on the appropriate remedy for enforcing naked pacts, canonists throughout the late Middle ages unanimously agreed on the religious foundations of *pacta sunt servanda*. Famous *doctores utriusque iuris* such as the aforementioned Antonio de Butrio remained very explicit about the moral grounds for enforcing naked pacts as indicated in Gratian (C.22, q.5, c.12). 'Canon law strives for the good and the equitable in God's eyes (*bonum et aequm secundum Deum*) and God does not distinguish between oaths and simple statements,' he remarks[457]. Butrio infers from this that 'consequently, as a matter of canon

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[452] Landau, *Pacta sunt servanda*, p. 471, n. 66.

[453] Spies, *De l'observation des simples conventions en droit canonique*, p. 98-113, and Bellini, *Denunciatio evangelica*, p. 120 and p. 128.

[454] Baldus de Ubaldis, *Commentaria in quartum et quintum Codicis libros*, Lugduni 1585, ad C. 4,32,16, num. 16-18, f. 107v: 'Illud c. [novit] intelligitur in clericis vel laicis subiectis ecclesiae quo ad temporalem iurisdictionem. In aliis autem nullum est remedium nisi per viam evangelicae denunciationis, in qua requiritur peccatum et qui denunciatur sciat vel scire debeat se teneri (…). Cum non scit, facit contra conscientiam; est autem conscientia sensus animi cognoscentis bonum et malum; cum vero debet scire, habet conscientiam erroneam et ideo cogitur ad correctionem erroris. Nam errare in eo in quo non est errandum, est peccatum (…).'; Felinus Sandaeus, *Commentaria in quinque libros Decretalium*, Basileae 1567, ad X 1,35,1, part. 1, col. 1402, num. 10: 'Inter laicos subiectos imperio non habet locum ista communis opinio (…) Sed inter eos habet locum denunciatio evangelica, quam possunt practicare in curia episcopi, secundum omnes hîc (…) Sed in terris subiectis ecclesiae, bene habet locum communis opinio etiam in foro seculari, quia in terris ecclesiae praevalet canon legi, et in foro seculari.'

[455] See Molina, below.

[456] Abbas Panormitanus, *Commentaria super Decretalibus*, Augustae Taurinorum 1577, tom. 2 (*Super secunda parte libri primi Decretalium*), ad X 1,35,1, f. 132v, num. 5: '(…) in effectu non refert, an detur actio seu condictio ex lege, vel officii imploratio, dummodo concludamus in iudicem ecclesiasticum posse etiam laicum praecise compellere ad observantiam pacti.'

[457] Antonio de Butrio, *Super Decretalibus commentarii*, ad X 1,35,1, f. 94v, num 7: 'Item ius canonicum assequitur bonum et aequum secundum Deum, sed Deus inter simplicem loquelam et iuramentum non facit

law, a pact, however naked, has force, since it has force in the eyes of God.' Another reason he gives for the canon law to enforce naked pacts is that canon law conforms to the ends of natural law, bare agreements being binding as a matter of natural law, which for him is synonymous with divine law.

Similar reference to divine order (*divina ordinatio*) as the basis for *pacta quantumcumque nuda sunt servanda* is contained in Baldus de Ubaldis' commentary on X 1,35,1[458]. However, Baldus also qualifies the rule that all agreements are binding in a way that has troubled scholars from the Middle Ages till the present day[459]: 'In that text, nl. *pacta custodiantur etc.*, no distinction is made between naked and vested agreements, since God and good conscience do not make that distinction either, provided that there is a *causa* which could be brought into a stipulation.' Having been trained both as a canonists and a civilian, Baldus infuses the canon law of naked pacts with a notion, *causa*, derived from the Roman law on innominate contracts and stipulations, which had already formed the subject of brief annotations by the glossators. Yet, at least from the renaissance of Aristotelian metaphysics in the 13th century and its Christian reformulation in Thomas Aquinas, this concept simultaneously evoked associations with the Greek philosophy of being. Some of that philosophical tradition resonates in Baldus, for instance when he states that 'there is no caused thing where there is no cause', inferring from this that the action to a pact, being a caused thing, cannot exist without there being a cause for its being[460]. The elusiveness of *causa* might derive, at least in part, from this coming together of different legal and intellectual traditions.

3.2.2.2 *Causa*

Given the multiple contexts in which the notion of *causa* comes to the fore, it is not surprising to find that the meaning of *causa* remains obscure, despite generations of scholars having given full rein to their exegetical creativity when trying to find its historically correct interpretation. Already in the late sixteenth century, Molina complained that the jurists had made a mess out of the doctrine of *causa*. Given our methodological focus on the early modern scholastics, it falls outside the scope of this dissertation to settle the dispute regarding the multiple significations of *causa* throughout the centuries. We cannot afford to investigate the possible connections and disconnections between the continental tradition on *causa* and the common law notion of *consideration* either[461]. Modesty demands that we rely on recent

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differentiam, 22, q. 5 iuramenti: ergo secundum ius canonicum pactum habet firmitatem, quantumcumque nudum, quia habet quantum ad Deum.'

[458] Baldus, *Super Decretalibus*, ad X 1,35,1, num. 5, f. 112r.

[459] Baldus, *Super Decretalibus*, ad X 1,35,1, num. 5, f. 112r: 'In tex. ibi pacta custodiantur non distinguunt inter nuda et vestita: quia nec Deus nec bona conscientia distinguit dummodo talis causa subsit quae esset deducibilis in stipulationem.'

[460] Baldus, *Super Decretalibus*, ad X 1,35,1, num. 8, f. 111v: 'Ubi non est causa ibi non est causatum, et immo ex pacto nudo non insurgit actio, quia actio est quoddam causatum, ergo non potest sine causa oriri (…)'.

[461] It should be sufficient to note here that at least in regard to certain notions of *causa* and certain notions of *consideration*, prominent scholars have found evidence of interaction between the continental and common law traditions; see A. Guzmán Brito, *La doctrina de la consideration en Blackstone y sus relactiones con la causa en el ius commune*, in: id., Actio, negocio, contrato y causa en la tradición del derecho Europeo e Iberoamericano,

scholarship to lift just a tiny corner of the veil that covers the meaning of *causa* in general contract law. In any case, we think that future scholarship on this topic will continue to fail to come to grips with *causa* unless the following caveats expressed by two outstanding scholars in Roman law are taken seriously.

In his study advocating a procedural understanding of *causa* in the Roman texts on *stipulatio*, Laurent Waelkens points out that *causa* received a plethora of different meanings over the centuries. As regards the *stipulatio sine causa*, for instance, he advocates a methodology in three steps to come closer to the truly historical meaning of D. 44,4,2,3[462]. Firstly, the medieval, early modern and contemporary layers of interpretation that condition our understanding of the *stipulatio sine causa* should be bracketed out. Secondly, awareness is needed of the fundamentally procedural character of Roman law as opposed to the substantial approach to law during the medieval *ius commune* and in contemporary civil legal systems. Thirdly, a linguistic sensitivity is required to the different meanings of *causa* in other contexts within the *Corpus Iustinianeum* itself[463]. All in all, this is a much wider applicable methodology, which makes operational the lucid plea for a functional approach to the history of private law as promoted by the late Yan Thomas. Undoubtedly inspired by Derrida's deconstructivist analysis of language, Thomas warned historians of law not to turn a largely contingent concept such as *causa* into an absolute entity leading a sort of metaphysical life[464].

In recent years, a similar concern to find a historically correct understanding of *causa* seems to have been at the basis of at least three contributions to the debate by Antonio

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Navarra 2005, p. 441-477 [= reprint from Revista de estudios histórico-jurídicos, 25 (2003), p. 375-406]. James Gordley remarks that, despite similarities that persist until Blackstone and occasionally even beyond, the common law eventually departed from the doctrine of *causa* because the purpose of the common law judges was to limit the promises that could be enforced in *assumpsit*, therefore refusing to enforce gratuitous promises, even though, in terms of the *ius commune*, liberality could constitute a legitimate *causa*; cf. Gordley, *The philosophical origins of modern contract doctrine*, p. 137-139. For a study of the sixteenth century origins of *consideration*, see J.H. Baker, *Origins of the 'doctrine' of consideration, 1535-1585*, in: M.S. Arnold (ed.), On the laws and customs of England: essays in honor of Samuel E. Thorne, Chapel Hill 1981, p. 336-358.

[462] L. Waelkens, *La cause de D. 44, 4, 2, 3*, Tijdschrift voor rechtsgeschiedenis, 75 (2007), p. 204.

[463] The upshot of the application of this methodology to D. 44, 4, 2, 3 is that *causa* must be taken in that context to mean something like a juridical act; cf. Waelkens, *La cause*, p. 209: 'A chaque fois la signification la plus conforme au sens général de *causa* semble être celle d'acte juridique. L'expression *sine causa* apparaît plusieurs fois en dehors de D. 44,4,2,3 et sa meilleure traduction semble également être "sans acte juridique" et quelquefois "sans procès". (…) Vu tout ce qui précède, nous sommes tentés de la traduire par une stipulation faite sans problèmes, sans conflit, sans controverse. (…) En tout cas il n'est pas nécessaire d'y voir ni la causalité des Temps Modernes ni l'absence de contreprestation des romanistes qui ont combiné la causalité moderne avec la *causa finalis* médiévale.'

[464] Y. Thomas, review of Carlos Cossio, *La causa y la comprension en el derecho*, Buenos Aires 1969, in: *Dimensions religieuses du droit et notamment sur l'apport de Saint Thomas D'Aquin*, [Archives de philosophie du droit, 18], Paris 1973, p. 464-467: 'Le problème soulevé par la présence éventuelle du concept de causa dans un système juridique donné doit être traité à partir des seuls éléments de ce système. C'est dire que toute recherche sur ce sujet devrait se ramener à la question de savoir si tel droit (par exemple, le droit romain; la common law; le droit français à partir du code civil) fait appel à la notion de cause (…) et, dans l'affirmative, quelle fonction remplit, au sein du système, un tel instrument. Or, d'une part, il n'est pas évident que tous les systèmes utilisent ou aient utilisé une notion qui n'a rien d'universel: à cet égard, une approche philosophique du sujet risque de poser en absolu ce qui n'est qu'un moyen relatif, dans le temps et dans l'espace, que le droit peut se donner.' Compare Y. Thomas, *Le langage du droit romain, problèmes et methodes*, in: *Le langage du droit*, [Archives de philosophie du droit, 19], Paris 1974, p. 339-346.

Guzmán Brito, Raffaele Volante, and Italo Birocchi. In an impressive article, Guzmán Brito writes the history of *causa* from ancient times until the present, carefully paying attention to discontinuities and ruptures as well as to apparent similarities[465]. In his frequently cited monograph, Birocchi analyzes the emergence of *causa* in conjunction with the rise of a general law of contract in the sixteenth century. In a more specialized volume, Volante dwells on the distinction between *causa finalis* and *causa impulsiva*, famously made by Azo in his commentary on title *De condictionibus ob causam datorum*[466]. He concludes that the distinction between these two *causae* should not be understood in modern terms as a differentiation between the intrinsic, State-guaranteed, socio-economic function of a contract (*causa finalis*) and the highly personal motivation (*causa impulsiva*) that lies behind the contract[467]. According to Volante, even the final cause merely points to 'a relation between facts that have acquired normative value through the preceding agreement between the parties'[468].

Interestingly, Birocchi associates the penetration of the State into contract law through the concept of *causa* with Hermann Vultejus (1555-1634) amongst others[469]. In Vultejus' view, only those agreements that are backed up by the civil law, or, as he puts it, those agreements that have *causa*, are enforceable[470]. In this context, *causa* is closely intertwined with a new theory of law trying to explain the transition from facts to norms by the

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[465] See A. Guzmán Brito, *Causa del contrato y causa de la obligación en la dogmática de los juristas romanos, medievales y modernos y en la codificación europea y americana*, in: id., Actio, negocio, contrato y causa en la tradición del derecho Europeo e Iberoamericano, Navarra 2005, p. 197-406 [= reprint of Revista de estudios histórico-jurídicos, 23 (2001), p. 209-367].

[466] Azo, *Summa codicis et institutionum*, Venetiae 1499, lib. 4, ad C. 4,6, f. 67r: 'Inducit autem istam actionem [sc. condictionem ob causam datorum] causae defectus ut ff. de condictione ob turpem causam, lex prima, § ob rem igitur [= D. 12, 5, 1, 1]; hoc ita si causa fuerit finalis, id est qua finita vel non completa voluit uterque restitui quod datum est. Secus si fuerit impulsiva causa id est in corde tradentis retenta ob quam impellebatur animo suo ad dandum illa, nam non secuta non parit repetitionem, ut puta dedi tibi ut te mihi redderem amiciorem vel ut te provocarem ad proficiscendum mecum nec profectus es nec amicior factus es, non ideo datur repetitio.' This text has been considered as seminal in the development of a theory of 'causa negoziale' by E. Cortese, *Il diritto nella storia medievale, II. Il basso medioevo*, Roma 1995, p. 189.

[467] Volante, *Il sistema contrattuale del diritto comune classico*, p. 294-300 and p. 307.

[468] Volante, *Il sistema contrattuale del diritto comune classico*, p. 297.

[469] Hermann Vultejus, *Jurisprudentia Romana a Justiniano composita*, Marpurgi Cattorum 1628, lib. 1, cap. 26, p. 157: 'Causa summa, quae omnibus aliis juris effectibus est communis, est jus: inferior hominis factum, quod obligationi occasionem magis praebet, quam ut obligationem inducat. Etsi enim ut obligatio constituatur mens atque voluntas ut plurimum sit necessaria, ex ea tamen obligatio oritur, non quod homo ita velit, sed quod jus ex facto ejusmodi obligationem oriri concedat; et e diverso saepe fit, ut homo obligari nolit, obligetur tamen nihilominus, si ejusmodi aliquid fecerit, ex quo jus ipsum obligari voluit. Jus igitur causa obligationis est proxima, factum hominis remota: et haec sine qua non, illa principalis.' This passage is partially cited in Birocchi, *Causa e categoria generale del contratto*, p. 143, n. 17.

See also Birocchi, *Causa e categoria generale del contratto*, p. 176-177: 'Si può parlare di una dialettica tra *causa proxima* (individuata nel *ius*) e *causa remota* (individuata nella volontà delle parti), in cui però tutta l'enfasi è posta sulla prima: il contratto - inteso obiettivamente come effetti che si producono - è tale non tanto perché le parti l'hanno voluto (questo è solo il presupposto), quanto perché l'ordinamento così ha disposto.' Birocchi also discusses similar tendencies to introduce the approbation of State power into contract law in Hugues Doneau and Giulio Pace; see *Causa e categoria generale del contratto*, p. 137-202.

[470] Vultejus, *Jurisprudentia Romana.*, lib. 1, cap. 30, p. 168: 'Conventio quae causam habet, contractus dicitur, unde contractum definio quod sit conventio cum causa. Causa autem negocium est, quod cum a jure probatum sit, facit ut obligatio ex contractu sit, et ex contractu actio.'

intervention of an institution, namely the State, which has the monopoly over civil law to decide what facts are of normative value by granting *causa* to it. At the same time, this new doctrine of *causa* instantiates the separation of the individual and the community, or, alternatively, of the private and the public[471]. This sounds very modern. Not surprisingly, Vultejus was familiar with the thought of French jurists such as Jean Bodin and Hugues Doneau. Incidentally, he had been a student of Doneau at Heidelberg somewhere between 1571 and 1574[472], eventually publishing his *Jurisprudentia Romana* in 1590, at about the same moment Doneau's *Commentaria iuris civilis* appeared[473]. In Doneau, the same dichotomy is present between the factual consent of the parties and its endorsement by the civil law as a necessary condition for its enforceability[474].

It is precisely in the work of Hugues Doneau, or, better still, in the Aristotelian interpretation of Doneau by Oskar Hilliger, that Laurent Waelkens perceives the problems of the modern notion of *causa*[475]. As we have mentioned in the section on the classicial convulsions in 16th century law, the humanist jurists, mostly protestants, could not identify with the canon law tradition. They scornfully rejected the canonists as servants of 'papal law'. What they wanted was to restore the pristine Roman law of contract. What is distinctly modern about this return to Roman law is the reduction of the plurality of normative sources - typical of the medieval period - to the State-backed civil law as the only source of legal validity. In a fairly conservative manner, Doneau repeats D. 2,14,7,4, stating that no action lies for a pact unless there is *causa*. However, he unwittingly implements the ideas of the canonists by interpreting pact as any agreement[476]. Now let us combine this with the insight, revealed by Birocchi, that *causa* in Doneau is to be understood as the approval by the State. Then perhaps one could argue that in Doneau, *causa* comes close to the function it seems to have in, for instance, art. 1131 of the French Civil Code.

The early modern theologians did not think along the lines of Vultejus or Doneau. They still lived in the late medieval universe where several competing legal orders co-existed.

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[471] See I. Birocchi, *Causa e definizione del contratto nella dottrina del Cinquecento*, in: L. Vacca (ed.), Causa e contratto nella prospettiva storico-comparatistica, II Congresso Internazionale ARISTEC, Palermo, 7-8 giugno 1995, Torino 1997, p. 212: 'Quell'istanza è dunque, nel contempo, un'istanza di liberazione dell'individuo, che rientra in primo luogo nel processo di separazione dell'individuo dalla comunità o, il che è lo stesso, del privato dal pubblico; e, como è noto, è allora che comincia ad acquistare autonomia lo studio e l'insegnamento del diritto pubblico.'

[472] See A. Mazzacane, *Umanesimo e sistematiche giuridiche in Germania alla fine del Cinquecento, equità e giurisprudenza nelle opere di Herman Vultejus*, Annali di Storia del Diritto, 12-13 (1968-1969), p. 257-319.

[473] The *Commentaria iuris civilis* successively appeared in 1589 (books 1-5), 1590 (books 6-11) and 1595-1596 (books 12-28); cf. Birocchi, *Causa e categoria generale del contratto*, p. 179, n. 132.

[474] Cf. Doneau, *Commentaria iuris civilis*, lib. 12, cap. 6: 'Duorum pluriumve consensus in hoc, ut unus alteri quid det aut faciat, jure ad eam rem et praestationem comprobatus.' Compare Birocchi, *Causa e categoria generale del contratto*, p. 186-187: 'Come a più riprese ribadiva il giurista ugonotto, l'*approbatio* significava che l'accordo teso a stabilire una obbligazione di dare o fare raggiungeva il suo fine solo a certe condizioni previste dall'ordinamento. Salvo ritornare su questo punto centrale della dottrina di Doneau, si può dire comunque che concretamente esso svolgesse le funzioni che nella concezione di Vultejus erano assegnate alla *causa*.'

[475] L. Waelkens, *De oorsprong van de causaliteit bij contractuele verbintenissen*, in: B. Dauwe e.a. (eds.), Liber Amicorum Ludovic De Gryse, Brussel 2010, p. 676-679.

[476] Waelkens, *De oorsprong van de causaliteit*, p. 678.

This is one of the reasons why their thought is often considered as 'early modern' and not as 'modern'[477]. Moreover, when taking a closer look at the early modern scholastic writings, one has to admit that, in fact, *causa* is not the subject of autonomous discussions in their treatises in the first place. We may not have to infer from this that the concept of *causa* did not play any role for them. At first sight, their notion of *causa* was chiefly related to their consensualist doctrine of contract, a lack of *causa* indicating mistake and, hence, the absence of a ground for the contract to exist because of lack of consent. Distinctions such as between *causa finalis* and *causa impulsiva*, or between *causa proxima* and *causa remota*, do not appear to be fundamental concepts in their thinking on contracts. This should not come as a surprise. As we have seen, the context in which these pairs of concepts were created by Azo and Vultejus, respectively, radically differ from the context in which the scholastics dealt with contract law.

Interestingly, while scholars such as Vultejus were reshaping the debate on *causa* and contract, adapting it to a new type of society, Luís de Molina was writing his voluminous treatise *De iustitia et iure*, published, partially posthumously, between 1593 and 1609. Its second volume was entirely dedicated to contract law. Even more curiously, at the outset of his discussion on the bindingness of agreements, we find him making a unique effort to explain the meaning of the doctrines of *causa* in the civilian tradition and the canon law tradition, respectively. The scope of his exposition is to clarify the meaning of *causa*. He does not mean to be original. Yet his synthesis of both normative traditions brilliantly highlights that he as well as other moral theologians of the early modern period fully realized that the meaning of *causa* within the system of canon law was fundamentally different from the role *causa* plays in the civilian tradition. It also gives us an exceptional insight into the moral theologians' perception of the meaning of *causa* in normative traditions other than natural law.

Addressing the question of the enforceability of innominate contracts in the civilian tradition, Molina cites paragraph *Sed cum nulla* (D. 2,14,7,4). In other words, if there is *causa* to the bare agreement or innominate contract, then the general rule that bare agreements are not actionable as a matter of civil law does not apply. Molina's phrasing is more precise and is worthwhile mentioning[478]:

> An exception lies [against an action to enforce an innominate contract] unless an act (*factum*) intervenes or a cause (*causa*) that lies in the nature of things and on account of which something is owed beyond the agreement, or unless those bare agreements are added and sticked directly, not after a certain time, to a nominate contract or to a contract in which an act or cause intervenes.

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[477] Compare M. Meccarelli, *Ein Rechtsformat für die Moderne, Lex und Iurisdictio in der spanischen Spätscholastik*, in: C. Strohm-H. de Wall (eds.), Konfessionalität und Jurisprudenz in der frühen Neuzeit, [Historische Forschungen, 89], Berlin 2009, p. 285-311.

[478] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 255, col. 13, num. 1: 'Excipitur nisi vel interveniat factum seu causa posita in rerum natura, ob quam, ultra conventionem, sit iam aliquid debitum, vel nisi eiusmodi pacta in continenti et non ex intervallo cohaereant et coniungantur cum contractu aliquo nominato, aut cum contractu in quo intervenit factum seu causa.'

Molina illustrates what he means by this through the following example[479]. Let us assume that we agree that I exchange twenty sheep for your one ox. This is a bare agreement or an innominate contract, since this type of exchange has not received a particular name in Roman law. Therefore, a *vestimentum* is needed to make this agreement enforceable. One possibility is to use solemn verbs so as to turn this agreement into a *stipulatio*. Another possibility, though, is that I give you the twenty sheep. Through this act of conveyance (*traditio*), or, put differently, through this objective act (*causa posita in rerum natura*), I have an action in court to claim the ox or to claim compensation. The foundation of this action lies beyond the agreement itself. The action is called an *actio praescriptis verbis* or an *actio in factum*. Because of my preceding act, it becomes now possible for me to demand in court either that your promise be enforced or that I get a full compensation. Alternatively, I can urge you to give back what I gave you through a *condictio causa data causa non secuta*. It is up to me to decide whether I want to use rather the *actio* or the *condictio*.

The disjunction of *factum* and *causa* might require some historical explanation[480]. Originally, the Romans would only consider an innominate contract in which the first performance was a *datio* as a bare agreement that could be enforced by virtue of the preceding *causa*[481]. This is notably the case in the innominate contracts *do ut des* and *do ut facias*. However, the glossators held that the same regime must apply to the two other types of innominate contracts, involving a *factum* as the first act, namely *facio ut des* and *facio ut facias*[482]. Consequently, *causa* in the Roman sense of a preceding act that makes an innominate contract enforceable beyond the agreement itself consisted of either a *datio* or a *factum*. The Accursian gloss clearly indicates this[483]. Probably Molina wanted to separate the original Roman meaning of *causa* from the medieval extension of its meaning by using the expression *factum seu causa*, thus implying that *causa* originally coincided with *datio*[484].

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[479] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 255, col. 14, num. 4: 'Simili modo, si eodem nudo pacto de commutandis viginti ovibus pro uno bove superveniret, non quidem stipulatio, sed traditio ex altera parte, quia vel tu traderes alteri viginti oves, vel alter traderet tibi bovem, eo ipso pactum illud maneret vestitum ea traditione et causa, propter quam, ultra pactum, is qui nondum ex sua parte contractum implevit, obligatus civiliter maneret ei, qui implevit, ac proinde huic, qui implevit, conceditur actio, quam iura praescriptis verbis aut in factum vocant, qua, si alter tempore debito ex sua parte non impleat, cogere illum potest, vel ad interesse, nempe ut, quod promisit, solvat, aut quantum id solvisse sua intererat, vel ut condictio seu actio ut sibi restituat, quod accepit, tanquam datum ob causam, causa non sequuta, optioque est penes eum qui implevit, ut agat, quo ex his duobus maluerit modis.'

[480] For which we rely on the limpid considerations in A. Guzmán Brito, *La doctrina de Luis de Molina sobra la causa contractual*, in: id., Actio, negocio, contrato y causa en la tradición del derecho Europeo e Iberoamericano, Navarra 2005, p. 413-415 and p. 420-423.

[481] D. 2,14,7,2.

[482] D. 19,5,5,1.

[483] Glossa *Causa* ad D. 2,14,7,2 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 261: 'id est datio vel factum quod vestiet pactum'; Compare glossa *Causa* and glossa *Igitur* ad D. 2,14,7,4 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 262.

[484] On other occasions, though, he seems to use *causa* as a generic term, mentioning *factum* and *traditio* as its species. Then, *traditio* seems to be tantamount to *datio*. Cf. Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 255, col. 13, num. 3: 'Ratio est, quoniam contractus ille est innominatus, do ut des, ex nulloque capite transit in contractum nominatum et ex neutra parte intervenit traditio, factum, seu causa, unde, ultra pactum, unus alteri teneretur, neque cohaeret in continenti cum aliquo alio contractu.'

Having explained the civilian notion of *causa*, Molina then goes on to elucidate the meaning of *causa* in the canon law tradition. His direct sources of inspiration appear to be Felinus Sandaeus and Diego de Covarruvias y Leyva. He sets out by recalling the motivation behind the canon law enforcing naked pacts[485]: for the sake of reason (*ratio*) and the salvation of the soul (*salus animarum*), canon law must conform to the dictates of the court of conscience, where there is no doubt whatsoever regarding the natural obligation ensueing from a bare agreement. Still, this principle is to be qualified in two ways. First of all, the enforceability of naked pacts is limited to the clergy and to lay people living in territories ruled by the Church. In other cases, laymen have to enforce their claims indirectly through evangelical denunciation. Secondly, the *causa* underlying the naked agreement should be expressed. Both qualifications can be ultimately traced back to Baldus[486].

The expression of cause (*causae expressio*) is a notorious requirement for the actionability of bare agreements in the ecclesiastical courts. It shifts the burden of proof to the plaintiff if he wants to enforce the obligation of the defendant despite there being no cause expressed. Conversely, if the cause is expressed, then the defendant can now only discharge himself of his obligation by proving that he was actually mistaken about the cause or that there actually was no cause at all. The fundamental reason why the expression of *causa* was deemed essential for an agreement to becoming binding as a matter of canon law, is because the canonists modelled the canon law of contract on the Roman *stipulatio*[487]. As Covarruvias explains[488]:

> As a matter of canon law, a pact does not have more force than a stipulation as a matter of civil law. Now a stipulation without cause does not have an action in regard to its effect, as can be derived from D. 44,4,2,3. Hence, neither does a naked pact.

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[485] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 257, col. 19, num. 2: 'Cum enim ex pacto nudo naturalis obligatio oriatur, hominesque in conscientiae foro nudis pactis, ut ostensum est, stare teneantur, utique ratio, animarumque salus ac bonum postulabant, ut canonico iure ex pacto nudo actio concederetur, quod et factum est.'

[486] Cf. supra.

[487] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 257, col. 20, num. 9: 'Confirmant doctores citati, quando causa non est expressa, aut aliunde non sufficienter probatur, iure canonico non concedi actionem ex pacto nudo, qua reus pactum implere cogatur, quoniam non plus iure canonico conceditur actio ex pacto nudo, quam iure civil ex stipulatione concedatur. Sed iure civil ex stipulatione non conceditur actio, qua promittens stare cogatur promissis, nisi expressa fuerit promissionis causa, sive ea fuerit donationis titulus sive aliqua alia, ut patet l. 2, par. firca, ff. de doli exceptione. Quamvis enim de stipulatione et promissione subsequuta constet, si tamen causa talis promissionis non fuit expressa, potest, qui promisit, opponere ei, qui iudicio secum contendit ut stet promissis, dolo malo agere, eo quod adimpleta non sit causa, ob quam promisit. Dicet namque, se promisisse dare illi centum tali die propter totidem, quae mutuo ab eo erat accepturus, neque accepit vel propter aliam similem causam, quae non extitit, et tunc ad actorem pertinebit probare, causam fuisse impletum aut donationis titulo ea promisisse. Eadem ergo ratione ex pacto nudo non concedetur actio iure canonico, nisi de causa constet ob quam aliquid fuit promissum.'

[488] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 14, p. 274: 'Nam pactum iure canonico non habet maiorem vim, quam habeat stipulatio iure civili, sed stipulatio sine causa non habet actionem quo ad effectum, l. 2, par. circa, ff. de doli exceptio [= D. 44,4,2,3], igitur nec pactum nudum'. Whether the canonists were reading the Roman text in its authentic sense here, could be disputed on the grounds of Waelkens, *La cause*, supra n. 463.

The shadow of the Roman *stipulatio* sometimes complicated matters, notably in regard to the question whether a pact without expressed cause should be presumed to be a donation. Felinus argued on the basis of law *Campanus* (D. 38,1,47) that since there was a presumption of gift in stipulations without cause, the same presumption should lie in naked pacts as a matter of canon law[489]. Following Covarruvias, Molina rejected this argument. A presumption of donation in a pact without expressed cause could only lie if, first, the promisee proved that the promisor knew that there was no other cause for promising at the moment of concluding the agreement. Also, a presumption of donation could lie if it was an established fact that the promisee disposed of this knowledge, excluding doubt or mistake. Yet in principle, a pact without cause must not be presumed to have a gift as its cause[490].

The fact that donation is not presumed as a cause does not mean that the *animus donandi* or liberality cannot constitute a valid *causa* producing a remedy to enforce an agreement[491]. This may be especially worthwhile noticing, given that contemporary courts in the common law are reluctant to enforce gratuitous promises for want of consideration. As Molina observes, donation is a title that grants sufficient *causa* for the donee to claim the gift in court. If the deed of gift expressly mentions this title, then the contract is enforceable. By the same token, if the donee convincingly proves that liberality or compassion was the cause behind the contract, then he can claim the gift in court. Moreover, this holds not only true in the ecclesiastical courts, but also in the secular courts. For, allegedly, by virtue of law *Si quis argentum* (C. 8,53,35), the naked pact to make a gift was turned into a *pactum legitimum* which is enforceable in court[492].

Last, Molina addresses the question to what extent the concept of *causa* in the civil law tradition and the requirement of *causa* in the canon law are the same or differ. He expressly makes an attempt at elucidating a point, which, to say the least, has been treated by

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[489] Felinus, *Commentaria in quinque libros Decretalium*, col. 1404, num. 15. It is not entirely clear, though, how Felinus could have inferred this conclusion from law *Campanus*; cf. *Infortiatum seu pandectarum iuris civilis*, in: *Corpus Iustinianeum* (ed. Godofredi), tom. 2, col. 1929: 'Campanus scribit, non debere praetorem pati donum, munus, operas, imponi ei qui ex fideicommissi causa manumittatur. Sed si cum sciret posse se id recusare, obligari se passus sit, non inhibendam operarum petitionem, quia donasse videtur.'

[490] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 257, col. 20, num. 5: 'Quod si quis ita objciat, qui absque causae expressione promittit, donare voluisse praesumitur, iuxta l. Campanus, ff. de operis libertorum, quando ergo in scriptura continetur debitum, neque expressa est causa, praesumendum est fuisse donationem, isque qui promisit, cogendus est solvere, nisi ipse contrarium probet. Dicendum est, id intelligendum esse, quando constat, aut sufficienter probatur, eum, qui promisit, habuisse scientiam dum promittebat, nullam aliam subesse causam, ex qua promitteret, ut ex verbis eiusdem legis constat; tunc enim donasse praesumitur. Si tamen constet, promittentem credidisse aliquam subesse causam, quae non erat, aut simus in dubio an forte ductus causa aliqua, quae non suberat, vel quae non est sortita effectum, promisit, tunc non tam vehementer praesumitur donare voluisse, ut cogatur stare pacto nudo.'

[491] This point has rightly been stressed by James Gordley, who emphasizes that the late scholastic thought of contract as 'either acts of commutative justice or acts of liberality'; cf. Gordley, *The philosophical origins of modern contract doctrine*, p. 73. When speaking of the Jesuit moral theologians such as Molina, Lessius and Oñate, it could perhaps be slightly more precise to say that they conceived of the *causa* of a contract to be either onerous or gratuitous, while considering the rights and obligations ensuing from contract to be governed by the virtue of commutative justice.

[492] Along with the so-called *pacta praetoria*, the *pacta legitima* were recognized as exceptions to D. 2,14,7,4. On these agreements, which were privileged by the praetor or the law, see Deroussin, *Histoire du droit des obligations*, p. 128-130.

others in inferior manners (*non ut oportet loquantur*)[493]. He concludes that the difference of the understanding of *causa* by the canonists and the civilians is huge[494]. Molina also explains why[495]:

> The latter [civil law] speaks of a *causa* which has been performed, therefore vesting the pact and not leaving it within the limits of a naked pact ; the former [canon law] speaks of a *causa* which is expressed in the pact itself, or proven from elsewhere, or confessed by the defendant, regardless of whether or not it has been performed.

This fundamental insight is illustrated by our Jesuit theologian in the following way. Let us assume that Peter concludes an agreement with John to lend John a hundred guilders. From the perspective of canon law, John will be able to enforce this agreement even though nothing else has happened subsequent to the agreement. The reason John gets his *actio* is that a money-loan (*mutuum*) includes an onerouse cause, since John will have to render the money when due. As a matter of civil law, however, the agreement is not actionable, since as long as neither of the parties has performed, there is no *causa* to the agreement in the sense of D. 2,14,7,4. It is only subsequent to *causa* in the sense of the performance of one of the obligations, that the agreement becomes enforceable in favor of the party who has already performed. From the civilian perspective, the *causa* is not intrinsic to the pact but an external cloth which vests the bare agreement.

In a similar vein, Covarruvias had insisted almost a generation before that the civil law and the canon law understanding of *causa* should not be confounded :

> It is beyond doubt that there is a big difference between the law of the Pope and the civil law. For, as a matter of civil law, a pact which is normally naked gets support from *causa* only when the effect of that *causa* has already taken place and not simply by that *causa* being attached to it. Hence, the naked pact is supported by the effect of the *causa* as is indicated in law *Iurisgentium.*

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[493] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 257, col. 22, num. 11: 'In hac doctrina doctores omnes Hispani videntur convenire, (…) tametsi quidam ex eis [sc. Antonius Gomezius et Antonio Padilla] et nonnulli alii non ut oportet loquantur, non attendentes ad varias illas acceptiones causae paulo ante explicatas.' Compare *De iustitia et iure*, tom. 2 (*De contractibus*), disp. 257, col. 22, num. 10, *in fine.*

[494] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 257, col. 21, num. 10: 'Illud postremo circa hanc secundam partem huius disputationis est observandum, latissimum esse discrimen inter ius civile et ius canonicum, dum dicimus iure civili non concedi actionem ex pacto nudo, si tamen vestiatur superventu causae dari eodem civili iure actionem, ut disp. 255 ostensum est; et dum hac disputatione dicimus, ut ex pacto nudo actio iure canonico concedatur, qua adversarius stare pacto nudo compellatur, necessariam esse causae expressionem aut probationem.'

[495] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 257, col. 21, num. 10: 'Illic namque sermo est de causa exequutioni mandata, quae proinde pactum vestit, neque illud relinquit intra limites pacti nudi. Hîc vero sermo est de causa expressa in ipso pacto aut aliunde probata, vel quam reus confiteatur, sive illa exequutioni sit mandata, sive non. Verbi gratia, si Petrus paciscatur cum Ioanne, se illi daturum mutuo centum, neque illa tradiderit, cum mutuum includat causam onerosam, nempe ut Ioannes totidem postea restituat, de iure canonico concedetur Ioanni actio adversus Petrum, ut illa mutuo det. De iure vero civili actio ei denegabitur, eo quod illud sit pactum nudum, ex neutraque parte facta sit ulla traditio seu adimpletio; quae adimpletio causae, pactum nudum vestiens appellatur.'

To summarize, the sixteenth century witnessed a growing awareness that *causa* is an essential element for the actionability of contracts in both the civil and the canon law tradition, albeit in radically different ways. Moreover, at the very moment that jurists and theologians claimed to have found the true meaning of *causa* in the *ius commune* tradition, the concept itself may have started to play a different role. In the work of Herman Vultejus, *causa* seems to be used as a device to introduce the State's approval into the law of contract. Also, the discrepancy between civil and canon law had apparently been superseded in practice in a number of countries, particularly in Spain. Last but not least, even though he came up with a brilliant synthesis of the canonical and civilian sources, Molina himself was actually proposing an even more interesting, natural law account of the whole story. It is precisely to these emerging perspectives on the bindingness of bare agreements that we will now turn our attention.

3.2.3 A new world: the victory of consensualism

After this brief tour d'horizon of the attempts by the medieval civilians to adapt Roman law to their own societies and of the canonists' effort to promote the bindingness of agreements on the basis of simple moral principles, it is probably difficult to prevent readers from sympathizing with Molina's call for harmonization and simplification[496]:

> All those subtle rather than useful concoctions, invented and introduced as a matter of civil law by pagans about naked agreements and vested agreements, innominate contracts and nominate contracts, should be abolished (*aboleri deberent*)…

More precisely, what Molina urges lawmakers to do is to follow the example of the Kings of Castile and accommodate statute law to the canon law, or, better still, to accommodate civil and ecclesiastical jurisdiction to the court of conscience. As he goes on to say, the contrived arguments of the civilians should be abolished[497],

> …as has occurred, in conformity with the canon law, almost completely in the Kingdom of Castile; and the external court should be brought into line with the court of conscience (*exterius forum conscientiae foro aequari deberet*).

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[496] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 258, col. 25, num. 9: 'Quin omnia etiam, quae de pacto nudo et vestito, et contractibus innominatis et nominatis, subtiliter potius quam utiliter de iure civili ab ethnicis hominibus inventa atque introducta sunt, aboleri deberent…'

Given this call by Molina to radically depart from the civil tradition, Guzmán Brito criticizes Birocchi for his interpretation that Molina did not feel dissatisfied by the doctrine of *vestimenta pactorum*; cf. Guzmán Brito, *La doctrina de Luis de Molina sobra la causa contractual*, p. 434, n. 86.

[497] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 258, col. 25, num. 9 (continuation of sentence in previous footnote): '… ut in Regno Castellae, l. illa 3 citata, aut omnino aut magna ex parte, consentanee ad ius canonicum factum est, exteriusque forum conscientiae forum aequari deberet.'

In Molina's view, harmonizing positive law with the law of nature would help political society to achieve its ambition of maintaining peace. As has been pointed out before, the traditional argument to explain Roman law's refusal to enforce naked agreements in D. 2,14,7,4 was that the courts would otherwise be overextended. Molina reverses this argument: the principle that all agreements are binding will promote rather than disturb civil peace[498]. He even urges the Pope to intervene and abrogate the civil laws that are contrary to canon law, because these civil laws promote sin and strife, not in the least because they are so complex.

So, if the court of conscience was considered to be the ultimate standard for advocating the bindingness of all bare agreements in the temporal courts, what did the natural law tradition really say about the consensualist foundations of contractual obligation? Moreover, to what extent were the natural law principle of the universal bindingness of agreements, the canon law of contract and statute law imbricated in the Castilian law of contract in the early modern period ? To what extent did the civil jurisdictions in practice already adhere to the consensualist principle of natural and canon law ? The following section proposes to successively answer these questions.

3.2.3.1 Natural law

Not wholly without reason, introductory textbooks of legal history often share a tendency to associate 'natural law' primarily with a number of eminent philosopher-jurists whose activity lies roughly in the seventeenth and eighteenth centuries, such as Hugo Grotius (1583-1645), Jean Domat (1625-1696), Samuel von Pufendorf (1632-1694), Christian Wolff (1679-1754), Francis Hutcheson (1694-1746), Robert-Joseph Pothier (1699-1772), and Emerich de Vattel (1714-1767)[499]. Another proposition frequently expressed in, if not outside the textbooks by way of oral exposition, is the proposition that these natural law doctrines were largely the products of admirable intellectual lucubration, yet quite disconnected from the law in action. The farther we move away from the written textbooks and the closer we come to the oral traditions of academic knowledge, the more frequent becomes the credo that natural law is a beautiful system of ideal norms which, unfortunately, the jurist can no longer truly believe in.

Whatever the intrinsic merit of these widespread opinions, they do not help us much further in trying to understand the early modern scholastics and their contribution to contract law. In order to come to grips with the expositions on contract law of Molina and his fellow moral theologians, awareness of the thoroughly pluralistic character of European legal cultures until at least the seventeenth century seems to be, once again, material. Although frequently bracketed out from legal historical scholarship, the court of conscience as a truly

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[498] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 258, col. 25, num. 9: 'Nec dubito ea ratione minuerentur potius, quam augerentur lites, hominesque liberarentur a difficili admodum harum rerum praescrutatione, prout hactenus sparsim atque involute iure civili traditae sunt.'

[499] This is not to deny, of course, that very profound and balanced histories of natural law exist. For a recent example, see M. Scattola, *Das Naturrecht vor dem Naturrecht, Zur Geschichte des 'ius naturae' im 16. Jahrhundert*, [Frühe Neuzeit, 52], Tübingen 1999.

juridical notion has played a vital role in the shaping of legal doctrine throughout the Middle Ages and the early modern period, only to gradually stop making sense with the natural lawyers of the seventeenth and eighteenth centuries. References to natural law and conscience are still rife in jurists such as Pothier, but it is not clear whether they could still function as more than a theoretical and moral frame of reference to 'law' properly called so.

Natural law was principally understood as the law that applies to man as man. This law has not as its chief aim to regulate man's behavior as a member of a particular civil or religious community, but as a man in his naked condition before the ultimate judge of his existence, God. Naturally, this approach to natural law gained increasing currency with the discovery of the Americas. It was considered the task of the moral theologian to anticipate the Last Judgment in the afterlife for all men, pagans included, by reasoning with *recta ratio* what the law applying to man as man was and what it meant in concrete circumstances of life. This was far from being a mere intellectual enterprise. In trying to figure out the dictates of natural law, and by designing the sacrament of penitence as a court of conscience, the Church essentially helped people to prepare for the day of Last Judgment[500]. Through its power of the keys, the Catholic Church claimed the power to make decisions in conscience that would affect Last Judgment.

The imminent reality of the Last Judgment is obvious from even the most superficial of historical tourist trips through any European city. It requires a belief in the soul and the afterlife, though, which, for better or for worse, falls on deaf ears in the majority of European countries today. Still, Lessius' juridical treatise *De iustitia et iure*, to cite but a famous example, does not make any sense without reference to his equally successful treatise *On divine providence and the immortality of the soul* (*De providentia numinis et animi immortalitate*)[501]. This needs to be stressed, here, since natural law appears to have been the fundamental motor behind the drive towards contractual consensualism and a general law of contract. This is not exactly the same 'natural law', though, that was adhered to by some of the intellectual coryphaei mentioned at the outset of this section. Yet without taking the literature for confessors, i.e. the judges in the court of conscience whose task it is to enforce natural law, seriously, it is impossible to get a sense of why the development of contractual consensualism could have arisen in the first place. Given the predominance of the soul over the body and the spiritual over the temporal, even the civilians could not escape regarding natural law and the court of conscience as benchmarks for their own juridical thought.

As a tribunal where natural law is enforced, the court of conscience is a jurisdiction parallel to the ecclesiastical and the civil courts. For centuries, it allowed its secular counterparts to look at themselves in a mirror *sub specie aeternitatis*. It permitted jurists and theologians to go straight to the essence of things and leave historical contingencies as well as practical considerations aside. Hence, the court of conscience is the court of equity and truth.

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[500] For more details on the 'court of conscience', see higher, chapter 2.

[501] A work considered of such importance that it was even translated into Chinese by Martino Martini s.j. (1614-1661).

As Juan de Valero remarks[502], 'the sophistication and subtleties of law are not allowed in the court of conscience, nor are they a matter of concern, nor a source of excuse.' Ideally, equity (*aequitas*) as the basic principle of judgment in the court of conscience is enforced in space and time through evangelical denunciation before the ecclesiastical courts - the bishop being for Catholics what the praetor was for the Romans, to wit, the guarantor of equity.

Interestingly, for his definition of the court of conscience, Valero expressly relies on jurists usually not remembered for their familiarity with the moral theological tradition, such as Pieter Peck (1529-1589) and Francisco Vivio (1532-1616). Peck argued in true Aristotelian-Thomistic fashion that just laws were binding in the court of conscience, admitting, at the same time, that the subtleties and the rigidness of laws could not apply in that court[503]. In his overview of the practical decisions issued by the Royal Court of Naples, Vivio showed himself thoroughly familiar with the scholastic teachings on mistake and deceit, citing all of the famous scholastic theologians and canonists by name, ranging from Adrian of Utrecht over Domingo de Soto to Diego de Covarruvias y Leyva. He defined the court of conscience as the court of the good and the equitable[504]. It was oriented towards the salvation of the soul and regarded truth and justice in an absolute sense. The rigor and the subtlety of the laws could play no role in conscience. Both Peck and Vivio expressly borrowed from the following passage in Baldus for their description of the court of conscience[505]:

> The court of conscience is the court of the good and the equitable taken together. It is the court of truth and not of fiction, for when the equitable is found in opposition and contradictory to the good, then divine justice embraces the equitable rather than that which is called good by the civil law. This is obvious from the beginning of the first title of the Digest *On justice and*

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[502] Valero, *Differentiae*, s.v. *Iudicium*, diff. 3, p. 209, num. 1 and 3: 'Apices et subtilitates iuris in foro conscientiae non admittuntur nec curantur neque excusant. (…) Et hinc in institutum fuit et adinventum tribunal praetorium pro aequitate servanda instar cuius inter Catholicos habetur ille recursus ad episcopos per denunciationem evangelicam.'

[503] Pieter Peck, *Tractatus de amortizatione bonorum a principe impetranda*, cap. 7 (*an clerus tuta conscientia legem amortizationis fraudare possit*), in: *Opera omnia*, Antverpiae 1679, p. 445-446: 'Propositae quaestionis decisio ex iustitia vel iniustitia constitutionis, quia necessitas petendae amortizationis indicitur, tota dependet. Nam si iniusta sit constitutio, conscientias humanas non obstringit, ut nec aliae quaecumque leges, quae vel pietatem laedunt, vel a non habente potestatem legis ferendae, latae sunt. (…) Sin autem iusta sit et legitima, nihil dubium, quin etiam conscientias nostras alliget (…). Licet in foro conscientiae summi ac rigidi juris apices remitti solent. (…) Si conscientia ligat, quem natura ligat (…) natura porro eos ligat quos proprius consensus ligat (…), quae temeritas est, libertatem fraudandae legis illis permittere qui a tot annis in legem consenserunt.'

[504] Francisco Vivio, *Decisiones regni Neapolitani*, Venetiis 1592, lib. 1, decis. 160, num. 10-11, p. 229: 'Et tanto libentius concurro cum opinione ista communi, quanto quod ubi agitur de salute animae, non attenduntur ápices iuris (…), et ulterius concludit Baldus multum eleganter (…) quod apices iuris in foro conscientiae non excusant. Et sic subtilitas seu subtilizatio in materia rescriptorum et similium, penitus et omnino vitanda est, cum in illis non veniat aliter de apicibus iuris disputandum (…). Forum enim conscientiae, secundum Baldum (…) est fórum boni et aequi coniuncti, quae perfecta iustitia requirit. Ideo vocari debet tribunal veritatis non fictionis (…).'

[505] Baldus de Ubaldis, *Commentaria in septimum, octavum, nonum, decimum et undecimum Codicis libros*, Lugduni 1585, ad C. 7, 59, 1, num. 3, f. 99v: 'Forus enim conscientiae est forus boni et aequi coniunctim, et est tribunal veritatis et non fictionis, nam quando aequum bono opponitur contradictione, divina iustitia potius amplectitur aequum quam id quod ius civile vocat bonum, ut ff. de iustitia et iure, l. 1 in princip. Perfecta enim iustitia requirit haec duo simul, ut ibi patet.'

right, where it is stated that perfect justice requires both the good and the equitable simultaneously.

A major consequence of the irrelevance of the subtleties of Roman law in conscience is that the provisions regarding the *stipulatio* in the Digest, Code and Institutes are of no importance to the moral theologians. 'What the jurists laid down regarding stipulations is of no concern in the court of conscience,' Valero explains[506], 'because all that matters as a matter of conscience is consent between the parties (*consensus paciscentium*) and natural obligation (*naturalis obligatio*).' In other words, the view *sub specie conscientiae* allowed the Western legal tradition to depart from the classical legacy and radically re-think the foundations of contract law. From the point of view of conscience, the ultimate point of reference for measuring contractual obligation is mutual consent between the parties, not the solemn wording of promises.

The fact that they were not constrained by the Roman legal tradition did not entirely prevent the keepers of the court of conscience from caring about what the *Corpus Iustinianeum* said. After all, there was a certain mutual understanding among civilians, canonists and theologians that each had its own distinct yet legitimate role to play in society. As mentioned before, Covarruvias' view that civil law neither actively promotes nor actively resists bare agreements (*pacto nudo lex civilis nec adsistit nec resistit*) would be repeated time and again by the moral theologians[507]. By the same token, much emphasis was laid on the fact that D. 2,14,7,4 still recognized that, on account of the *ius gentium*, an *exceptio* followed from a naked agreement. The *ius excipiendi* was generally taken to mean that the Romans recognized that a natural obligation (*obligatio naturalis*) ensued from a bare agreement. This could easily be inferred from the Accursian gloss, which held that obligations ensuing from *ius gentium* were tantamount to natural obligations[508]. The Accursian gloss went even as far as expressly stating that a natural obligation ensues from a naked pact[509]. The medieval jurists would not cease to repeat this[510].

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[506] Valero, *Differentiae*, s.v. *contractus*, diff. 5, p. 70: 'Decreta a iurisconsultis circa stipulationes in foro conscientiae non curantur. Quia in eo solum attenditur consensus paciscentium et naturalis obligatio ; licet nulla intervenerit solemnitas et interrogatio ultra pactum nudum.'

[507] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 10, p. 273.

[508] See glossa *Obligationes* ad D. 1,1,5 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 58: 'Item quaero de qua obligatione dicit hîc, quod est de iure gentium, cum duae tantum sunt obligationes, sc. civilis et naturalis. De civili non. Item de naturali non videtur. Sed dic de naturali, quia obligatio iuris gentium dicitur naturalis et e converso.'

[509] See glossa *Is natura* ad D. 50,17,84 in *Corporis Iustinianaei Digestum novum* (ed. Gothofredi), tom. 3, col. 1894: 'Naturaliter autem quis tenetur de iure gentium nudo pacto.'

[510] E.g. Baldus, *Commentaria in quartum et quintum Codicis libros*, ad C. 4, 32, 16, num. 18, f. 107v: '(…) quia licet de iure civili non oriatur civilis obligatio propter defectum solemnitatis et contractus, tamen de iure gentium oritur naturalis, ut ff. de pactis, l. iurisgentium, par. igitur nuda.'

See also Volante, *Il sistema contrattuale del diritto comune classico*, p. 150-156 on the glossators' discussion of the result of a *pactum de non petendo*, which naturally binds the creditor not to claim anymore the debt owed to him on the basis of a preceding contract, and a successive *pactum de petendo*, through which this natural obligation following from the *pactum de non petendo* is removed again.

Proof for the claim that bare agreements produce natural obligation was found in the consequences that Roman law attached to naked pacts even as a matter of civil law[511]. The most obvious juridical effect in the civil court is the *exceptio* mentioned in paragraph *Sed cum nulla*, of course, but other consequences were recognized. For example, the right for the creditor of a naked pact to hold back what he had already received from the debtor or to retain what had been given to him by the debtor as a pledge (*ius retinendi*). In any case, the debtor could no longer claim back what he had already paid. Also, the right for a creditor to compensate (*ius compensandi*) his own debt with the outstanding debt owed to him by virtue of the naked pact[512]. Last but not least, even though the debtor himself was only bound as a matter of natural law, his guarantor (*fideiussor*) was bound on account of civil law (D. 46,1,16,3).

The insight that bare agreements produce natural obligation was crucial for the argument that naked pacts are enforceable in the court of conscience, and, hence, in the ecclesiastical court. As Valero put it[513]:

> The reason why in the ecclesiastical court a naked pact produces an obligation efficacious enough for bringing an action is related by Fortunius Garcia (…), namely that a natural obligation arises out of a naked pact. Whenever you are bound as a matter of natural law (*obligatus naturaliter*), you are bound in the court of conscience and, hence, in the ecclesiastical court, at least by way of denunciation.

That Valero expressly relied on Fortunius Garcia for this syllogism is no coincidence. Fortunius was a constant and major source of inspiration for theologians and jurists on the Iberian peninsula in the early modern period. What is more, he did pioneering work in transforming the civilian tradition of thinking about contracts from within by arguing that pacts could be enforced even as a matter of civil law. Granted, Fortunius was very

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[511] For a quick overview of the effects of naked pacts in the secular court which were thought to be following from the natural obligation inherent in bare agreements, see Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 257, cols. 18-19, num. 1: 'Quamvis ex nudis pactis concedere noluerit civilem obligationem et actionem (paucis quibusdam pactis exceptis, ut disput. 255 ostensum est) nihilominus vim suam, quam, stando in solo naturali ac gentium iure ad naturaliter obligandum habebant, ab eis non abstulit, quin potius, propter illam, varios ex illis effectus introduxit. Nempe, ut is cui ex pacto nudo aliquid debebatur, quamvis exigere illud in foro exteriori non posset, posset tamen id sibi semel solutum in eodem exteriori fori retinere, neque posset cogi illud reddere. Item ut, si ipse eidem aliquid deberet, posset facere compensationem in eo, quod sibi ex pacto nudo creditor debebat, neque in exterior foro compelli posset plus solver, quam incrementum. Praeterea (et fere in idem recedit) posset excipere adversus exigentem esse sibi ex pacto nudo tantum vel tantum, debitum aut remissum, neque teneri id solvere. (…) Item propter obligationem ex pacto nudo remanentem, quamvis non detur civilis action adversus ita paciscentem, datur tamen adversus fideiussorem, si fideiussor pro talis pacti impletione est datus, retinerique eadem ratione potest pignus, si pro nudo pacto implendo sit datus (…).' Compare Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 4, p. 198, num. 23.

[512] Lessius only recognized this effect in the court of conscience.

[513] Valero, *Differentiae*, s.v. *obligatio*, diff. 10, p. 300, num. 2: 'Rationem autem quare in foro canonico ex nudo pacto oriatur obligatio efficax ad agendum, tradit Fortunius Garcia d.c. 1, col. 5 et in l. 1 col. 2 et in l. legitima, num. 14, ff. de pact., scilicet quia ex dicto pacto oritur obligatio naturalis. At ubi quis est obligatus naturaliter, est obligatus in foro conscientiae et consequenter in foro canonico, saltem per viam denuciationis, ut docent dd. In c. novit.'

circumspect in making his argument. He did not put forward his conclusion straight away. Yet, led by a deep desire to find out the truth and to know what true justice is like (*investigandi ac iustitiae cognoscendae dulcedine captus*), he dared question and doubt conventional wisdom[514]. As occasionally happens when people are driven by such lofty feelings, the outcome of his systematic doubt was shocking. His conclusion that naked pacts are actionable as a matter of civil law would have stunned generations of civilians and canonists[515].

In fact, Fortunius Garcia's is a wonderful illustration of the natural law and the canon law calling forth traditional jurisprudence to alter its course. Eventually, the civilian tradition collapsed before the vigorous consensualist drive inherent in the theologians' and the canonists' account of contractual obligation. Dozens of manuals for confessors used all over Europe, and, eventually, all across the world, kept hammering on the bindingness of bare agreements in the court of conscience. For example, Sylvester Prierias - Dominican friar famous not only for his dispute with Martin Luther, but also for his extraordinarily successful manual for confessors - considered not performing a bare agreement to constitute a mortal sin, at least in serious affairs, since pacts, however naked, produce an obligation in conscience[516]. Angelo Carletti de Chivasso, whose equally influential manual for confessors was ostentatiously burned by Martin Luther, propagated exactly the same view[517].

The central role of consent in the natural law tradition, particularly as mirrorred in the manuals for confessors, is closely intertwined with both the theologians' and the canonists' notion of *causa*. In the court of conscience, as in the ecclesiastical courts, *causa* expresses the concern that, given the definition of contract as mutual consent, there is true, motivated, and reasonable consent on the part of the assenting parties. Needless to say, this is a notion of *causa* that is far away from the Roman discussions on the enforceability of innominate contracts on account of a previous juridical act. For the theologians and the canonists, *causa* intervenes at the level of the will of the parties. This seems to have been so evident that there was hardly any need of convoluted theories about the meaning of *causa* among the theologians. In the writings of the early modern scholastics, there is no single *dubitatio* - the standard format to raise a controversial or a major issue - which deals with *causa*.

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[514] See Fortunius Garcia, *Repetitio super cap. 1 de Pactis*, num. 52, p. 1002-1003: 'Septimo ex superioribus inferri potest talis dubitatio, an de iure civili ex nudo pacto oriatur actio? At dices stultum et iuris ignarum tale dubium, cum tam iureconsulti quam imperatores saepissime dicant, ex tali pacto actionem non nasci (…) Sed etsi nunquam aliquis de hoc dubitaverit, quod ego dubitaverim, libidini non referas, non enim lascivia, non sequor | vulgum, sed investigandi ac iustitiae cognoscendae dulcedine captus.'

[515] Fortunius employed all rhetorical strategies to convince his audience; cf. *Repetitio super cap. 1 de Pactis*, num. 60, p. 1007: 'Responde, quod confirmari pacta a lege civili non est contra leges civiles, quia pacta erant praeter eas, ut in d. l. stipulatio, § alteri. Unde si confirmas id, quod numquam infirmasti, non tibi contradicis.'

[516] See Sylvester Prierias, *Summa Sylvestrina*, Lugduni 1520, part. 2, s.v. *pactum*, num. 4, f. 192r: 'Quarto quaeritur , utrum ex sola promissione sive ex pacto quis obligetur in conscientia? Et dico, quod sic sub peccato mortali, in rebus scilicet alicuius importantiae.

[517] Angelo Carletti de Chivasso, *Summa Angelica de casibus conscientiae*, Lugduni 1512, s.v. *pactum*, num. 4, f. 267v: 'Utrum ex nudo pacto sive ex sola promissione homo obligetur? Respondeo quod de iure canonico et in conscientia sic sub poena mortalis peccati.'

Among the few instances in which the notion of *causa* is paused upon for reflection, we find an interesting passage from the *Summa Sylvestrina*. Still, it basically deals with the enforceability of agreements in the ecclesiastical courts, for which, as is generally known, the expression of *causa* is needed. In line with expectations, Sylvester explains that the expression of *causa* is needed, because otherwise the agreement is presumed to rest on mistake (*error*)[518]. In that case, no natural obligation can be presumed to ensue from the agreement, without which even in conscience the contracting parties are not bound. In the event of mistake, there is no way to invoke a natural obligation, since nothing is as contrary to consent as mistake (*sic allegari non potest obligatio naturalis, cum nihil sit tam contrarium consensui quam error*). Incidentally, the will to make someone a gift out of pure liberality is a sufficient *causa* for creating an obligatory agreement.

Perhaps more unique, and certainly a bit more elaborated, are a couple of paragraphs devoted to *causa* by the canonist Dr. Navarrus in the context of his definition of a promise that binds on pain of mortal sin. He defines such a promise as 'every true, deliberate, and voluntary promise, however naked, with a licit, possible and notable object, which cannot be enervated by changed circumstances[519]. Dr. Navarrus expounds on *causa* in clarifying the first element of the definition, namely that a promise should be true (*vera*). In other words, a promise should not be fake (*ficta*), as when parties enter into an agreement without intending to bind themselves (*animo non obligandi*). Granted, such a false promise cannot constitute mortal sin, but it does not create contractual obligation. 'A promise of which the principal cause is not true,' Dr. Navarrus concludes, 'is not binding'[520]. He also indicates, that the *causa* need not be expressed for there to be a contractual obligation in the court of conscience (*nec refert quoad forum conscientiae utrum causa exprimatur aut taceatur*), since conscience does rely on the truth rather than on presumptions. This was part of the common opinion, repeated time and again by theologians and jurists including Hugo Grotius.

Consequently, there is nothing mysterious about the doctrine of *causa* among the theologians and canonists. The simplicity of the doctrine explains why it need not be the subject of lengthy expositions in the first place. As a caused thing (*causatum*) consisting of mutual consent, an agreement simply cannot exist if it is founded on vicious consent[521]. The

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[518] Sylvester Prierias, *Summa Sylvestrina*, part. 2, s.v. *pactum*, num. 3, f. 192r: 'Tertio quaeritur, utrum ex nudo pacto seu sola promissione obligetur homo iure canonico? Et dico, quod sic (…) quando exprimitur causa, ut promitto tibi decem, quia vendidisti mihi tale rem, vel mutuo concessisti et huiusmodi, quia si sit nudum, sic quod nulla causa sit adiecta, non obligat etiam in conscientia, quia praesumitur quis per errorem promisisse, et sic allegari non potest obligatio naturalis, cum nihil sit tam contrarium consensui quam error.'

[519] Azpilcueta, *Enchiridion sive manuale confessariorum et poenitentium*, Antverpiae 1575, cap. 18, num. 6, p. 407: 'Promissio autem quae obligat ad mortale est omnis vera, deliberata et voluntaria, etiam nuda, rei licitae, possibilis et notabilis, quam mutatio rerum status non enervavit.'

[520] Azpilcueta, *Enchiridion sive manuale confessariorum et poenitentium*, cap. 18, num. 6, p. 407: 'Ex quo infertur, non obligare promissionem cuius causa principalis non est vera, si ei qui promisit non erat animus se obligandi absque ea, nec refert quoad forum conscientiae utrum causa exprimatur aut taceatur. (…) Qui expressionem causae requirunt, intelligitur in foro exteriori, in quo absque ea, animus obligandi non praesumitur (…), non autem in foro conscientae in quo soli veritati standum est.'

[521] To a certain extent, one could say, then, that the meaning of the doctrine of *causa* in early modern scholasticism can be investigated in an indirect manner through studying their elaborate discussions on the vices of the will.

absence of *causa* is tantamount to the absence of reasonable consent and, by defintion, impedes the birth of an agreement. Where there is no cause, there is no caused thing (*ubi non est causa, ibi non est causatum*). If any, the remarks of early modern theologians such as Lessius on *causa* are even more cursory. They rehearse the common opinion that an agreement lacks *causa* if it is founded on mistake. In the following, Lessius' explanation is quoted for why the canon law does not enforce agreements unless *causa* is expressed[522]:

> Since it has been founded for the sake of the salvation of souls, the canon law observes the obligation in conscience and orders that it be fufilled, unless it presumes mistake or fraud. Therefore, the canon law does not grant an action to enforce the promise if the reason why the promise was made (*causa sur sit promissum*) is not expressed, as Sylvester explains. Otherwise, the canon law does not presume that the promise has been made seriously and freely (*alioquin non praesumit serio et libere promissum*).

Lessius' quote also offers another illustration of the determining role of the law of conscience for the canon law of contracts. The relevance of the concurrent jurisdicion of conscience to the spelling out of a consensualist doctrine of contract becomes even more obvious if we turn to one of the fundamental statements made by Lessius on the bindingness of all contracts in the court of conscience[523]:

> Every contract, even if it is naked, which has been freely and spontaneously made (*sponte libereque factus*), if the parties have the capacity to contract, produces a natural obligation in the court of conscience, so that you cannot rescind the contract against the other party's will, unless it is void through positive law or if positive law gives you the power to void it.

This statement, which comes down to a general principle of 'freedom of contract', is motivated by Lessius in two ways[524]. First, the distinction between naked and vested agreements is superseded by the law of nature (*iure naturae nulla est inter haec distinctio*). So

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[522] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 4, num. 23, p. 198: 'Ratio est, quia ius canonicum, cum sit conditum ad salutem animarum, respicit obligationem conscientiae, eamque iubet impleri, nisi forte praesumat errorem vel fraudem, quam ob causam non concedit actionem ad exigendum promissum, nisi exprimatur causa cur sit promissum. Sylvester supra. Alioquin non praesumit serio et libere promissum.'

[523] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 4, num. 19, p. 197: 'Omnis contractus, etiam nudus, sponte libereque factus, si contrahentes sint habiles, parit obligationem naturalem seu in foro conscientiae, ita ut parte invita non possis rescindere, nisi iure positivo sit irritus vel detur irritandi potestas.'

[524] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 4, num. 19, p. 197: 'Probatur primo, quia iure tenetur quisque praestare quod promisit, altero acceptante, sive promiserit titulo gratuito sive oneroso. Nec refert an pacto nudo an vestito promiserit, quia iure naturae et gentium nulla est inter haec distinctio, sed solo iure civili, quae etiam solum forum externum respicit. Secundo, quia ad obligandum sese, sufficit animus verbis expressus et acceptatus, ut communiter docent Theologi.'

Compare Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 257, col. 18, num. 1: 'Doctores communiter consentiunt (…) ex pacto nudo naturalem oriri obligationem, quae paciscentes in conscientiae for tenentur illis stare (…). Ratio est, quoniam, stando in solo iure naturali ac gentium, antequam civile ius introduceretur, nulla erat differentia inter contractus nominatos et innominatos (…) neque item inter pacta nuda et vestita. Quare in conscientiae foro, spectata ipsa rei natura, ex omnibus oriebatur obligatio quam ea de causa naturalem appellamus, ut a civili, ex qua actio civili iure conceditur, eam distinguamus.'

both gratuitous and onerous promises are binding as long as the promisee accepts the promise. Second, all that is required to bind yourself is a will expressed in words and accepted by the other party to the contract (*ad obligandum sese sufficit animus verbis expressus and acceptatus*). One could rightly wonder if there is any more clear expression of consensualism as the basis of contract than Lessius asserting that the will of the parties constitutes the basis of contractual obligation.

In principle, then, parties are free as a matter of natural law to agree on any agreement they want. The primary concern now in dealing with contracts becomes the will and its vices (as will be discussed in the next chapter 4). Also, Lessius would concede that the will can be restrained by the public authorities, who can limit 'freedom of contract' by imposing formality requirements for the sake of public utility (as will be discussed in chapter 5), and by basic principles of morality, such as sexual discipline and the virtue of commutative justice (as will be discussed in chapters 6 and 7, respectively.

3.2.3.2 *In utroque foro hodie ex pacto nudo habebimus ius agendi*

Previous scholarship shows that over the course of the sixteenth century, several public authorities across Europe and their jurists adopted the canon law principle that all agreements, however naked, are binding. Clearly, the pressure on the civilian tradition to conform to the moral theological and to the canon law tradition became irresistable, certainly because they were complied with in practice (*usu*). In a period that witnessed an increased desire among would-be absolutist princes to centralize and monopolize juridical power, parallel sources of norms and jurisdiction were neutralized by 'swallowing' them. The days of medieval legal pluralism were over. Better still, attempts were rife at integrating non-State jurisdictions into a renewed, single power structure controlled by the State.

Many examples of the civil law 'swallowing' the canon law tradition could be set forth[525]. In English legal history, there is evidence that suggests a link between the rise of *assumpsit* as a general contractual remedy over the course of the sixteenth century and the demise of ecclesiastical jurisdiction *pro laesione fidei*, which was moribund by the 1520s[526]. In France, the *ordonnance de Villers-Cotterêts* (1539) denied ecclesiastical courts all competence in contractual affairs. Only a couple of decades later, Charles Du Moulin (1500-1566) noted that in practice, all agreements were binding, in the secular courts as well[527]. The

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[525] This is a constant theme in Waelkens, *Civium causa*, illustrated in regard to the law of obligations on p. 300-302.

[526] For the nuances, see Helmholz, *Contracts and the canon law*, p. 59-65.

[527] Charles Du Moulin, *Nova et analytica explicatio Rubricae et legum 1. et 2. de verborum obligationibus ex lectionibus tam Tubingensibus quam Dolanis*, Parisiis 1562, num. 42 (*hodie nuda conventio serio conclusa stipulationi aequipollet*), p. 19: 'Sed hodie in praxi hae et omnes leges et theoriae de formulis stipulationum supervacuae sunt, quia etiam extra scripturam publicam vel privatam, sive confessione partis sive testibus aut alias legitime appareat de conventione serio pacta et conclusa in re licita nec prohibita, nec inter prohibitos aut inhabiles, pro stipulatione habetur et oritur efficax actio, juxta no. in c. 1, Extra de pactis, quod ita debet intelligi et restringi, et ita in utroque foro seculari et ecclesiastico observatur, nec de verborum forma aut solemnitate curatur, ita ut multorum prolixae et operosae commentationes supervacuae sint.'

aequitas naturalis of the canon law had been adopted by the civil courts. As the French jurist Antoine Loysel (1536-1617) famously put it, making a slight variation on the common medieval expression *verba ligant homines, taurorum cornua funes*[528]: 'on lie les bœufs par les cornes, et les hommes par les paroles, et autant vaut une simple promesse que les stipulations du droit romain'[529].

In Italy, the civilian tradition persisted until the the eighteenth century. However, as early as the sixteenth century the superior courts enforced bare agreements on account of the judge's office (*officium iudicis*)[530]. The remark by Giulio Cesare Ruginelli (†1628) is significant in this respect[531]: 'it cannot be denied that before whichever judge, equity (*aequitas*) and faith (*fides*) have force in pacts even though they are naked'. As elsewhere in Europe, the commercial courts in Italy enforced bare agreements, as is witnessed by Benvenuto Stracca (1509-1578) and Sigismondo Scaccia (1564-1634)[532]. The evolution of the doctrine on naked pacts reached its height in Giovanni Battista de Luca (1614-1683), a major Italian jurist and cardinal whose *Theatrum veritatis et iustitiae* is reminiscent of the work of the Spanish theologians and canonists[533]. In a rather familiar passage, De Luca concludes that the distinction between naked pacts and *stipulationes* is no longer of relevance in the courts, since all that matters is the truth as a matter of natural law, namely consent[534].

For further discussion, see Spies, *De l'observation des simples conventions en droit canonique*, p. 217-225 and J. Bart, *Pacte et contrat dans la pratique française (XVIe-XVIIIe siècles)*, in: J. Barton (ed.), Towards a General Law of Contract, [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, p. 125-127. Spies, *De l'observation des simples conventions en droit canonique*, p. 253 rightly wonders why Du Moulin was still aware of the canon law origins of the development of the principle that all agreements are binding, while this historical consciousness seems to have been completely lost by natural lawyers of the eighteenth century (with the exception of De Boutaric; cf. p. 253, note 2).

[528] See Glossa *Iuris vinculum* ad Inst. 3, 14 in *Corporis Iustinianaei Institutiones* (ed. Gothofredi), tom. 4 (*Volumen parvum*), col. 333: 'Ut enim boves funibus visualiter ligantur, sic homines verbis ligantur intellectualiter. Additio: iuxta illud, verba ligant homines, taurorum cornua funes; cornu bos capitur, voce ligatur homo.'

For further discussion, see G. Sautel - M. Boulet-Sautel, *Verba ligant homines, taurorum cornia funes*, in : Études d'histoire du droit privé offertes à Pierre Petot, Paris 1959, p. 507-517.

[529] Antoine Loysel, *Institutes coustumieres ou manuel de plusieurs et diverses reigles, sentences, et proverbes tant anciens que modernes du droict coustumier et plus ordinaire de la France*, Paris 1637, lib. 3, tit. 1 (*De conventions*), num. 2, p. 642.

[530] Birocchi, *Tra tradizione e nuova prassi giurisprudenziale*, p. 306-330.

[531] G. Ruginelli, *Practicarum quaestionum rerumque iudicatarum liber singularis*, Venetiis 1610, cap. 1, num. 117: 'Negari non potest, quin coram quocunque iudice vigeat aequitas et fides in ipsis pactis quamvis nudis.' Also quoted in Birocchi, *Tra tradizione e nuova prassi giurisprudenziale*, p. 309.

On Ruginelli, a lawyer from Milan, see M.G. di Renzo Villata, *Diritto comune e diritto locale nella cultura giuridica Lombarda dell'età moderna*, in: Diritto comune e diritti locali nella storia dell'Europa, Milano 1980, p. 361-362.

[532] Birocchi, *Tra tradizione e nuova prassi giurisprudenziale*, p. 303-306.

[533] It is therefore not surprising that, as is pointed out by Birocchi, *Tra tradizione e nuova prassi giurisprudenziale*, p. 335, n. 399, De Luca's argumentation on the bindingness of naked pacts seems to borrow directly from Covarruvias.

[534] Giovanni Battista de Luca, *Theatrum vertiatis et iustitiae*, lib. 8 (*de credito et debito, creditore et debitore, cum recentissimis Sacrae Rotae Romanae decisionibus*), Venetiis 1716, disc. 74, num. 9, p. 137: 'Hodie siquidem a foro, ob dictas limitationes in suis casibus veras exulasse videntur subtilitates iuris civilis circa distinctionem inter pacta nuda et stipulationes, sed principaliter attenditur substantia veritatis, an scilicet debitum alienum, pro quo quis se constituat, vere subsistat necne, quoniam eo non subsistente, corruit obligatio ex capite

As far as the Southern Netherlands are concerned, the Great Council of Malines claimed jurisdiction over canonical affairs from the early sixteenth century onwards. Its one time president Nicolaes Everaerts brought the fusion of canon law and civil law to unknown heights[535]. As the ultimate court of appeals, the Council was also used as an instrument in centralizing power, first by the Burgundians, from the late fifteenth century onwards, and then by the Habsburgs[536]. Both tendencies have been associated with intensified Byzantine influences on Western European jurisdictions[537]. Regarding contracts, the consequences of the absorption of canon law jurisdiction into the civil law were forthcoming. In 1568, Matthias van Wezenbeke noted in his commentary on the Digest that all agreements were considered binding now also in the civil courts[538].

Wezenbeke's argument is emblematic of a more general influence of the law of conscience, canon law and practice on the reshaping of civil contract law in the sixteenth century. He sets out his argument in the spirit of the theologians with the observation that the subtleties of the civilian tradition (*iuris veteris subtilitates*) are no longer in use today[539]. Subsequently, he cites two reasons for why that is the case. First, all agreements are now binding as a matter of canon law. Second, all supreme courts, in which judgments are rendered *ex aequo et bono*, such as the highest courts of the princes and the merchants, considered all agreements to be actionable. Wezenbeke concludes that it is the common opinion of his day as well as daily practice that all agreements, regardless of whether they are

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erroris, seu falsi praesuppositi. Unde propterea cum iste sit defectus naturalis, utpote proveniens a defectu consensus, istum non supplent neque iuramentum neque canonica aequitas vel mercatorum stylus, cum haec omnia percutiant solum remotionem subtilitatum iuris civilis, non autem ea quae sunt iuris naturae ipsamque veritatem percutiunt (…).'

[535] See Waelkens, *Nicolaas Everaerts*, p. 181-182.

[536] See L. Waelkens, *Le rôle de l'appel judiciaire romain la formation des Pays Bas au seizième siècle*, in: Podział władzy i parlamentaryzm w preszłosci i współczesnie, Prawo, doktryna, praktyka, Warschau 2007, p. 75-85.

[537] L. Waelkens, *Réception ou refoulement? Pour une lecture grecque de l'histoire du droit de la Renaissance*, in: B. Coppein – F. Stevens – L. Waelkens (ed.), Modernisme, tradition et acculturation juridique, Actes des Journées internationales de la Société d'Histoire du Droit, Louvain 29 mai -1 juin 2008, [Iuris Scripta Historica, 27], Brussel 2011, p. 145.

[538] For a discussion of Wezenbeke's insight that bare agreements are also binding as a matter of civil law, see Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*, p. 85-94 and R. Feenstra, *Pact and contract in the Low Countries from the 16th to the 18th century*, in: J. Barton (ed.), Towards a general law of contract, [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, p. 198-201.

[539] Matthias van Wezenbeke, *Paratitla in Pandectas iuris civilis ab authore recognita et aucta*, Basileae 1568, ad 2, 14, p. 110: 'Etsi autem hac de re plura subtiliter disputari possunt, tamen modus aliquis adhibendus est, maxime cum hae iuris veteris subtilitates hodie non sint in usu. Nam primum iure pontificio ex quolibet pacto oritur actio. Deinde hodie idem obtinet in omni foro ubi ex aequo et bono et ex suprema potestate iudicatur, ut sunt curiae summorum principum, arbitratorum, mercatorum et similium. Etsi autem longa disputatio est, an in reliquis curiis, in quibus secundum ius civile pronunciatur, ius pontificium obtinere debeat, tamen communis opinio est, et ita usus observat, ut indistincte ex pactis nudis, etiam in foro civili hodie detur actio. Quod verum puto et sequendum. Nam pacta cum obligent naturaliter et ex bono et aequo, sequitur eum qui pacta non servat contra naturam, conscientiam, atque adeo contra officium boni viri facere ac peccare, ut volunt canonistae, mortaliter; ac certe divus Paulus ad Rom. 1 asunthetas, hoc est, eos qui pacta non servant, in illus numerat qui capitaliter delinquunt. Est autem definitum inter doctores ut quotiescunque agitur de cavendo peccato, deque causa conscientiae, toties etiam in foro civili ius pontificium debeat observant.'

naked or vested, are enforced in the civil courts (*indistincte ex pactis nudis etiam in foro civili hodie detur actio*). He notes that there is discussion about the application of this principle in the lower civil courts.

Wezenbeke then goes on to give personal endorsement to this allegedly common opinion. Interestingly, the reason he adduces for doing so has received little attention in the secondary literature[540]. Only recently has it been noticed that Wezenbeke's statements are a typical expression of the deep moral theological impact on the evolution of contract law[541]. It is essentially religious in nature and a confirmation of the persistent influence of the law of nature and the court of conscience[542]:

> Still, it is common opinion, and so it is observed in practice, that today all agreements are indiscriminately actionable, even in the civil courts. I think this opinion is true and must be followed. For since agreements are binding naturally and as a matter of equity (*obligant naturaliter et ex bono et aequo*), it follows that he who does not keep an agreement acts and sins against nature, conscience and, therefore, against the duty of a good man. As the canonists wish, this is a mortal sin (*peccare mortaliter*). And, surely, in his first letter to the Romans, Paul includes those who do not keep their agreements among those who commit a capital crime. Now it is established among the doctors that each time we are dealing with the protection from sin and a matter of conscience (*causa conscientiae*), even in the civil court the canon law has to be observed.

Not surprisingly, Wezenbeke cites Giasone del Maino, whose argument we have discussed before, to support his view. After all, Wezenbeke's standpoint was not that unique in the early modern period. In France, too, similar viewpoints were aired, for instance by Charles Du Moulin - much to the displeasure of humanists such as the aforementioned Forcadel. Still, Wezenbeke deserves credit as a constant point of reference among later writers of the *usus modernus pandectarum* in the Dutch- and German-speaking territories[543]. His authority seems to have been as important in the development of the general enforceability of agreements as the self-promoted belief that German culture rested on *Treu und Glauben* from its early beginning - for which support was found in sources as early as Tacitus' *Germania*[544].

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[540] For example, the citation in Feenstra, *Pact and contract in the Low Countries*, p. 201, note 11 breaks off at '(…) etiam in foro civili hodie detur actio.'

[541] G. Hartung, *Zur Genealogie des Versprechens, Ein Versuch über die begriffsgeschichtlichen und anthropologischen Voraussetzungen der modernen Vertragstheorie*, in: M. Schneider (ed.), Die Ordnung des Versprechens, Naturrecht – Institution – Sprechakt, [Literatur und Recht, 1], München 2005, p. 285.

[542] The Latin text is quoted supra, note 539.

[543] See Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*, p. 85. I. Birocchi, *La questione dei patti nella dottrina tedesca dell'Usus modernus*, in: J. Barton (ed.), Towards a General Law of Contract, [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, p. 144-145 critically observes that the authors of the *usus modernus pandectarum* quoted a plethora of Spanish jurists and theologians (Fortunius Garcia, Gómez, Covarruvias, Molina, Fernando Vázquez de Menchaca) as much as Wezenbeke to defend the actionability of naked pacts.

[544] Behrends, *Treu und Glauben*, p. 994-1006 and Birocchi, *La questione dei patti nella dottrina tedesca dell'Usus modernus*, p. 165-183. For critical observations on the distinct nature of 'German' legal culture, see F. Schäfer, *Juristische Germanistik, Eine Geschichte der Wissenschaft vom einheimischen Privatrecht*, [Juristische

Wezenbeke's influence in German territories is not surprising, given his careers at Jena and Wittenberg after his escape from the Southern Netherlands, where the Spanish were prosecuting the Protestants. It has been suggested by Feenstra that Wezenbeke drew inspiration from Fortunius Garcia, who was a quite popular author in the Southern Netherlands throughout the sixteenth century[545].

If questions of originality matter at all, then the Iberian peninsula seems to have been the first place where the civilian tradition definitively managed to recreate itself in the image of the twin traditions of moral theology and canon law. Fortunius Garcia's sublime commentaries on Roman and canon contract law are a significant case in point. Unfortunately, we are not well informed about the life and works of this compelling jurist[546]. After obtaining a doctorate in canon law at Bologna and receiving a doctorate in civil law from Rome, Fortunius was apparently called back to Spain by Emperor Charles V as supreme royal judge of Navarra, where he later became president of the council. He refused a teaching position at the university of Pisa. Besides his commentaries on contracts (*Commentaria de pactis in titulum Digestorum de pactis*) and justice (*Commentara in titulum Digestorum de iustitia et iure*), Fortunius wrote a book on property law and unjustified enrichment (*De expensis et meliorationibus sumptis bonae et malae fidei possessorum*), and a more philosophical treatise on the aim of civil and canon law (*De ultimo fine iuris canonici et civilis*). Peláez mentions that an unpublished manuscript of his on the political tensions between France and Spain (*Discurso histórico y jurídico del desafío del emperador Carlos V y Francisco I rey de Francia*) is preserved in the Biblioteca Nacional de Madrid.

In the person of Fortunius Garcia we meet a legal jack-of-all-trades whose work lies at the crossroads of civil law, canon law, and moral theology - a fusion typical of many authors across the Spanish empire at the threshold of the sixteenth century[547]. Fortunius considers juridical problems consistently from the threefold perspective of civil law, canon law, and the law of conscience. This is very obvious in his large commentary on title *De iustitia et iure* in which he discusses a plethora of subjects including natural obligation, slavery and self-defence. For example, Fortunius argues against the gloss that killing an offender is not a sin. The gloss had interpreted the licence to kill by virtue of self-defence as only holding true in

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Abhandlungen, 51], Frankfurt am Main 2008, and L. Waelkens, *Droit germanique, La fin d'un mythe ? À propos d'un ouvrage récent*, Revue historique de droit français et étranger, 87 (2009), p. 415-426.

[545] Feenstra, *Pact and contract in the Low Countries*, p. 201, note 17. Feenstra's assumption relies partly on the fact that Wezenbeke cites Fortunius Garcia in one of his *Consilia*, precisely for the purpose of defending the rule that all agreements are binding.

The fact that Fortunius Garcia was widely read in the Southern Netherlands is shown by the presence of his writings in the libraries of important jurists such as Pierre Lapostole (d. 1532), *doctor iuris utriusque*, member of the Great Council of Malines and professor at Leuven university; cf. R. van Caenegem, *Ouvrages de droit romain dans les catalogues des anciens Pays-Bas méridionaux (XIIIe-XVIe siècle)*, Tijdschrift voor rechtsgeschiedenis, 28 (1960), p. 405 and p. 432.

[546] Scant biographical details can be found in Peláez, *García de Arteaga de Ercilla, Fortún*, p. 344. Von Schulte, *Prolegomena ad Codicem iuris canonici*, p. 715 admits that he cannot see on which grounds Fortunius Garcia could have been praised so highly by his contemporaries. This honest confession probably helps to explain why Fortunius Garcia has been overlooked in modern historical scholarship.

[547] In the Low Countries, similar observations could be made on Nicolaes Everaerts and Adrian of Utrecht, who were active about roughly the same period.

the civil and ecclesiastical courts. Yet, following the theologians, Fortunius claims that killing out of self-defence is permitted in the court of conscience, too, since this licence is founded both on natural reason and on the right to self-preservation instilled in all men by divine providence[548].

This compelling synthesis of law and morality is even more clear in Fortunius' commentary on the ultimate goal of canon law and civil law. The title of this work bears of its own witness to the Aristotelian-Thomistic, teleological world view underlying his entire juridical enterprise[549]. Canon law and civil law are like sailors leaving the harbour, Fortunius says : they first determine what their destination will be, only afterward do they start preparing their ships, otherwise they would be pointlessly bobbing up and down on the sea. Hence, defining the scope of canon law and civil law is crucial before laying down its provisions (*finem praeponere oportet*)[550]. Moreover, the ultimate standard by which to judge any secular law is natural reason and the court of conscience (*et quid sit tenendum ipsa iustitia*). Secular laws are subordinated to the law of nature just as the second mover is dependent on the first mover[551]. This is why Fortunius argues, for instance, that the civil laws allowing moneylenders to charge interest need to be altered and brought in line with conscience, since interest-taking is forbidden as a matter of natural law[552].

With a strange reference to the Greek orator Demosthenes, Fortunius claims that the ultimate aim of all laws must be to correct sin (*finis universalis legum peccata corrigere*) and to lead man to the felicity of eternal life (*foelicitas ad vitam aeternam*)[553]. Also, in the context of maintenance duties of a child born out of incestuous wedlock toward his father, he insists that the canon law must prevail over civil law whenever it is based on natural reason[554]. In regard to contract law this means that naked pacts must be enforceable also in civil courts, since they are actionable as a matter of canon law for the sake of felicity and the avoidance of

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[548] Fortunius Garcia, *Commentarius in l. ut vim, ff. de iustitia et iure*, num. 16-18, in: *Tractatus in materia defensionis*, Coloniae 1580, p. 528-529. This commentary on law *Ut vim* was published separately in this collection of treatises on self-defence, but originally formed part of Fortunius' greater commentary on title *De iustitia et iure*.

[549] Fortunius Garcia, *De ultimo fine iuris civilis et canonici, de primo principio et subsequentis praeceptis, de derivatione et differentiis utriusque iuris et quid sit tenendum ipsa iustitia*, Coloniae Agrippinae 1585.

[550] Fortunius Garcia, *De ultimo fine iuris civilis et canonici*, num. 2, p. 31: 'Itaque ut rectum cursum dirigamus finem praeponere oportet. Veluti nautae, qui antequam navem solvant atque expeditam velis et vento committant, constituunt portum ad quem sit navigandum, deinde ad cursum necessaria et convenientia parant. Cognito enim fine determinantur principia, quae tendant ad ipsum. Et hoc est quod philosophi dicunt, in omnibus agendis finem esse principium.'

[551] Fortunius Garcia, *De ultimo fine iuris civilis et canonici*, num. 14, p. 36: 'De legibus vero civilibus idem dicendum est: nam omnes pendent a lege naturae et in tantum habent de ratione legis in quantum participant de lege aeterna. (…) In omnibus enim quae ordinate moventur, necesse est, ut virtus moventis secundi derivetur et pendeat a virtute primi motoris. Nam motor secundus non movet, nisi ut movetur a primo, quod in his inferioribus facile colligimus.'

[552] Fortunius Garcia, *De ultimo fine iuris civilis et canonici*, num. 93, p. 74.

[553] Fortunius Garcia, *De ultimo fine iuris civilis et canonici*, num. 32, p. 44-45 and num. 45, p. 51.

[554] Fortunius Garcia, *De ultimo fine iuris civilis et canonici*, num. 109-122, p. 83-93.

sin[555]. It is worth recalling Fortunius Garcia's famous statement in his treatise on contracts, which was published for the first time in Bologna in 1514[556]:

> It is therefore firmly and singularly established that today we shall have in both courts a right of action by virtue of a bare agreement (*in utroque foro hodie ex pacto nudo habebimus ius agendi*). For since the civil law showed itself negligent in regard to the justice of bare agreements, because it omitted them, the principle of canon law steps in, which (as I believe) has to be observed also in the secular court. Through this rule, justice will be effected in agreements.

Apart from the obvious canonical foundations of Fortunius' bold statement, what might have made it easier for Fortunius to claim that bare agreements are enforceable in civil courts is a long tradition in Spanish statutory law, which acknowledges at least some sort of force to naked pacts[557]. It may be recalled that, at the end of the sixteenth century, Luís de Molina called upon other regions and public authorities to abolish the subtleties of the civilian tradition precisely by citing the praiseworthy example of Casitilian law. 'In the Kingdom of Castile, just as in canon law and in the court of conscience,' Molina notes[558], 'there is no place for changing your mind and withdrawing from an innominate contract.'

The relevant passage from Castilian law is the famous *Ley Paresciendo*, which Molina cites from the *Ordenamiento de Montalvo* or the *Ordenanças Reales de Castilla* (1484). It can be traced back, though, to the *Ordenamiento de Alcalà* (1348) and reappears in the *Nueva Recopilación* (1567). Opening with an invocation of the Holy Trinity, the *Ordenamiento de Alcalà* is famous for its moral and religious undertone. In the 1774 edition of the *Ordenamiento*, the passage on the alleged enforceability of bare agreements reads that whether a man binds himself to another by promise, contract or otherwise, he is bound to fulfill his obligation[559]. He cannot object that he was bound through no stipulation (*non pueda*

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[555] Fortunius Garcia, *De ultimo fine iuris civilis et canonici*, num. 164, p. 121: 'sed cum iustitia pacti observandum sit utilis et tendat ad foelicitatem humanam (…) et ius canonicum ad evitandum peccatum praecipiat pacta observari, ut omnes fatentur in c. 1 [X 1,35,1], sequitur ab omnibus et in quocunque foro servanda (…).'

[556] Fortunius Garcia, *Repetitio super cap. 1 de Pactis*, num. 118, p. 1119: 'Hinc singulariter constat quod in utroque foro hodie ex pacto nudo habebimus ius agendi. (…) Cum ergo in iustitia pactorum nudorum ius civile negligenter se habuerit, quia ea praetermisit, succedit regula iuris canonici etiam foro seculari (ut credo) observanda, qua regula pactis ius ministratur.' Unfortunately, we have not been able to check whether there are any differences between the first edition (1514) and subsequent editions.

[557] Feenstra-Ahsmann, *Contract*, p. 15.

[558] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 258, col. 25, num. 8: 'Quinta conclusio. In Regno Castellae non est locus poenitentiae in contractibus innominatis, sicut nec de iure canonico, nec in foro conscientiae.'

[559] *El ordenamiento de leyes que Alfonso XI hizo en las cortes de Alcalá de Henares (1348)*, ed. I.J. de Asso y del Rio - D.M. de Manuel y Rodriguez, Madrid 1774, tit. 16 (*de las obligaciones*), l. 1 (come vale la obligacion entre absentes, aunque non aya y estipulacion): 'Paresciendo que se quiso un Ome obligar a otro por promision, o por algund contracto, o en alguna otra manera, sea tenudo de aquellos a quienes se obligò, e non pueda ser puesta excebcion que non fue fecha estipulacion, que quiere decir: prometimiento con ciertas solepnidades nel derecho; o que fue fecha a Escribano publico, o a otra persona privada en nombre de otro entre absentes; o que se obligò uno de dar, o de façer alguna cosa a otro: mas que sea valedera la obligacion o el contracto que fueren

ser puesta excebcion que non fue fecha estipulacion). Hence, Molina concludes, bare agreements are as binding in the Castilian civil courts as they are before ecclesiastical courts[560]. Molina does not pronounce explicitly whether *causa* is required for the actionability of naked pacts as a matter of Castilian law, since *Ley Paresciendo* does not mention *causa* in the first place[561].

From *Ley Paresciendo* it was not immediately inferred that all agreements were binding as a matter of civil law. The *Ordenamiento de Alcalà* was mostly interpreted in a restrictive way. It was held, for instance, that it applied to unilateral contracts but not to the synallagmatic, innominate contracts. Yet this restrictive interpretation was definitively refuted by Antonio Gómez, the influential professor of Roman law at Salamanca. In his *Variae resolutiones*, published for the first time in 1552, he reaches the conclusion that 'today, in our Kingdom, there shall be no place in innominate contracts for claiming back what has been performed because you changed your mind or because the other party's juristic act did not follow.'[562] So at least by the time Molina wrote, there was sufficient authoritative support for the view that Castilian law enforced bare agreements *tout court*. However, at the time Fortunius Garcia pleaded for the actionability of all bare agreements in the civil courts, there was no adequate support.

The arguments produced by Gómez to defend his extensive interpretation of the *Ordenamiento de Alcalà* are telling of the consensualist turn in early modern contract law, certainly on the Iberian peninsula[563]. The *Ordenamiento* enforces every agreement that is based on consent, according to Gómez, so innominate contracts should also be considered actionable, since they are based on consent and, therefore, they have cause (*datur consensus, ergo et causa*)[564]. He also insists on the natural obligation that ensues from an innominate contracts as a matter of the *ius commune*, again because innominate contracts are based on consent (*oritur obligatio naturalis virtute consensus partium*). Finally, the *Ordenamiento* is said to go even a step further than the canon law, since it does not even require mutual consent for one of the parties to be bound. In Gómez's interpretation, the sole will and intent to be bound are sufficient for the promisor to be bound on account of the *Ordenamiento* (*sufficit sola voluntas et animus obligandi*).

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fechos en qualquier manera que paresca que alguno se quiso obligar a otro e façer contracto con el.' [= Ordenamiento de Montalvo, lib. 3, tit. 8, l. 3 = Neuva Recopilación, lib. 5, tit. 16, l. 2]

[560] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 257, col 22, num. 11: 'Eo modo quo de iure canonico explicatum est dari ex pacto nudo actionem, affirmandum esse dari ex eodem pacto nudo in regno Castellae in foro seculari.'

[561] Guzmán Brito, *La doctrina de Luis de Molina sobra la causa contractual*, p. 438 and Birocchi, *Causa e categoria generale del contratto*, p. 261 are divided on this matter.

[562] Antonio Gómez, *Commentarii variaeque resolutiones iuris civilis, communis et regii, Accesserunt adnotationes Emanuelis Soarez a Ribeira*, Francoforti ad Rhenum 1572, tom. 2, cap. 8, num. 5, p. 288: 'Ex quibus notabiliter infero, quod hodie in nostro Regno in contractu innominato non habebit locum repetitio ex capite poenitentiae vel causae non secutae.'

[563] This is further evidenced with reference to more vulgarizing Spanish legal literature by Duve, *Kanonisches Recht und die Ausbildung allgemeiner Vertragslehren in der Spanischen Spätscholastik*, p. 389-408.

[564] Gómez, *Commentarii variaeque resolutiones*, tom. 2, cap. 8, num. 4, p. 287.

3.3 The making of contractual obligation

By the time the moral theologians started writing about contract law, there was a general feeling that consensualism was the basis of contractual obligation. Generally speaking, the formerly divergent legal traditions had been attuned to the natural law principle that all agreements are binding. The contribution of the early modern scholastics consists in their consecrating and systematizing this new paradigm. First, they highlighted the anthropological and religious foundations of the principle of 'freedom of contract'. Second, they thorougly analyzed the making of contractual obligation. More specifically, three elements were thought to be essential to create contractual obligation : the will of the promisor to be bound, the external communication of his promise, and the acceptance of the offer by the promisee. Hence, all accepted offers are binding. Third, the early modern scholastics elaborated on what the voluntarist account of contractual obligation implied for its interpretation. To summarize, they provide us with a unique, systematic insight into the fabric of contract law.

3.3.1 Liberty and the will

3.3.1.1 *Contrahentibus libertas restituta*

The gradual turn towards an open and consensualist doctrine of contract reached one of its apogees in the writings of the Jesuit moral theologians of the late sixteenth and early seventeenth century. They cherished the fact that by their time, the legal traditions that had something to say about contractual obligation had been brought into harmony with each other. Moreover, their explicit reason for being so happy about the outcome of the above-sketched evolution resided in the fact that it stimulated 'freedom of contract'. The universal enforceability of agreements guaranteed one of the values they esteemed to be priceless : freedom (*libertas*). The Spanish Pedro de Oñate (1567-1646), a tremendously busy Jesuit who founded dozens of colleges all across South America besides being the author of a voluminous treatise *On Contracts* (*De contractibus*), conveys his feeling of awe at the bindingness of all agreements stipulated by *Ley Paresciendo* this way[565]:

> Consequently, natural law, canon law and Hispanic law entirely agree and innumerable difficulties, frauds, litigations and disputes have been removed thanks to such great consensus and clarity in the laws. To the contracting parties, liberty has very wisely been restored (*contrahentibus libertas restituta*), so that whenever they want to bind themselves through concluding a contract about their goods, this contract will be recognized by whichever of both courts before which they will have brought their case and it will be upheld as being sacrosanct and inviolable. Therefore, canon law and Hispanic law correct the *ius commune*, since the

[565] Oñate, *De contractibus*, tom. 1, tract. 1, disp. 2, sect. 5, num. 166, p. 40 : 'Unde lex naturalis, lex canonica et lex Hispaniae omnino consentiunt et innumerae difficultates, fraudes, lites, iurgia hac tanta legum consensione et claritate sublata sunt, et contrahentibus consultissime libertas restituta ut quandocumque de rebus suis voluerint contrahere et se obligare, id ratum sit in utroque foro in quo convenerint et sancte et inviolabiliter observetur. Quare ius canonicum et ius Hispaniae corrigunt ius commune, concedentes pactis nudis omnibus actionem et obligationem civilem, quam illud negabat.'

> former grant an action and civil obligation to all bare agreements, while the latter denied them just that.

Few would disagree that Oñate delivers a brilliant synthesis here of the turn towards 'freedom of contract' in the early modern period. At the expense of the civilian tradition (*ius commune*), natural law, canon law and Hispanic law have prevailed. The result is that 'freedom of contract' has been restored to the contracting parties. Moreover, Oñate believes that the universal bindingness of agreements promotes peace rather than disturbing it. This is a point that was also made by Molina[566]. However, traditionally, the argument put forward to defend the Roman law principle that naked pacts are not binding was precisely the opposite : enforcing all agreements will overextend the courts and disrupt justice and peace. There is an obvious discrepancy in views, then, between moral theologians such as Oñate and the traditional jurists regarding the impact of the legal rule which stipulates that all agreements are binding[567].

Oñate's statement also highlights the theologians' custom of conceiving of contract as essentially being a legal instrument to convey property rights, or, as they would call it, types of lordship or *dominium* in a wider sense. At the outset of his discussion on contracts, Molina indicates that the scope of his argumentation will be to make intelligible to what extent *dominium* is transferred or not by virtue of the will of the contracting parties (*quousque contrahentium voluntate transferatur aut non transferatur domimium*)[568]. Francisco de Vitoria remarks that *dominium* includes a variety of property rights ranging from use over usufruct to ownership and possession[569]. More importantly, in raising the question how property rights are acquired after the original division of things, Vitoria points out three mechanisms : through the will of the lord (*ex voluntate domini*), by virtue of the authority of the prince and by prescription[570].

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[566] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 258, col. 25, num. 9, cited supra, n. 498.

[567] Compare the observations made by Birocchi, *Saggi sulla formazione storica della categoria generale del contratto*, p. 54.

[568] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 252, col. 1, num. 1: 'A disputatione 124 huius secundi tractatus de iustitia dicere coepimus de translatione dominii, propria dominii prioris voluntate, indeque hucusque egimus de ultimus voluntatibus. Nunc vero de contractibus est disserendum, ut intelligatur, quousque contrahentium voluntate transferatur aut non transferatur dominium, et quantum iuris ex unoquoque contractu aut quasi contractu comparetur. Prius autem dicemus de contractibus in genere, sumpto latissime vocabulo contractus, deinde vero ad singulos descendemus.'

[569] Vitoria, *Commentarii in IIamIIae*, quaest. 62, art. 1, num. 8, in: Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomás*, edición preparada por V. Beltrán de Heredia, tom. 3: *De justitia* (qq. 57-66), [Biblioteca de Teólogos Españoles, 4], Salamanca 1934, p. 67 (hereafter: ed. Beltrán de Heredia, tom. 3): 'Et in materia de restitutione indifferenter utemur dominio, scilicet sive sit dominus, sive usuarius, sive usufructuarius, sive possessionarius, quia in eo etiam cadit injuria quae est obnoxia restitutioni.'

[570] Vitoria, *Commentarii in IIamIIae* (ed. V. Beltrán de Heredia, tom. 3), quaest. 62, art. 1, num. 27, p. 81: 'Quomodo ergo isti qui modo sunt, facti sunt domini? (…) Facta prima divisione et appropriatione, duobus praecise modis et duobus tantum titulis potuit quis adquirere dominium rerum. Nam etiam duobus potest transferri dominium ad nos ab uno in alium. Et hoc est quod exspectat ad restitutionem. Primo ergo modo potuit transferri dominium ad nos voluntate prioris domini. Alio modo auctoritate principis.' Prescription as a third mode of acquiring dominium is dealt with in Vitoria, *Commentarii in IIamIIae* (ed. V. Beltrán de Heredia, tom. 3), quaest. 62, art. 1, num. 46-48, p. 102-105 (ed. B. de Heredía).

The scholastics consider contract to be the vehicle of a *dominus*' will to dispose of his property rights. It is not surprising to find, then, that two paragraphs after he has praised the now universal principle of the bindingness of all agreements, Oñate classifies all specific contracts into a three-column scheme depending on what type of property right they transfer: ownership (*dominium*), usufruct (*ususfructus*) or use (*usus*)[571]. In this context, he evidently employs *dominium* in its strict, Roman sense as meaning ownership. It is also worthwhile noting that the focus on property and goods did not prevent the scholastics from taking into consideration what are now called service contracts. Following the medieval jurists, though, they conceived of service contracts in terms of lease and hire of a right of labor use (*locatio conductio*).

One of the major consequences of the fact that contractual obligation gravitates around man as the lord of his property is that the limits of 'contractual liberty' depend on the limits of the capability of a *dominus* to freely dispose of his goods. This is clear from the work of Domingo de Soto, who suggests that every systematic treatment of contract law must begin with an elucidation of *dominium*, because this concept is the basis and foundation of all things done through exchange (*dominium basis fundamentumque omnium contractuum*)[572]. With Soto, the question of the limits to 'freedom of contract' is expressed in terms of the limitations imposed on the free exchange of *dominium*. Incidentally, Soto takes *dominium* in a narrower sense than Vitoria. Likewise, the Dominican theologian Domingo de Bañez (1528-1604) treats contract law in his discussion of the transfer of *dominium* by virtue of the will of the *dominus*[573]. Other authors, such as Molina, treat contract law separately from their lengthy discussions on *ius* and *dominium*, but on a conceptual level they continue to stress the connections between property and contract.

Although it is worthwhile being aware of the expressly instrumental character of contract in scholastic thought, modesty demands that scholastic property law falls outside the scope of this dissertaton. Already back in the sixteenth century, there were several diverging opinions on what ownership, possession, and property actually signify. The debate was complicated by at least three theologically sensitive issues : the creation of man as *dominus* in the image of God as *Dominus*, the *dominium* of Christ over the Church, and, eventually over the whole world, and, last but not least, the Franciscan poverty controversy. There was so much confusion about the meaning of *dominium* among theologians and jurists alike that Bañez's commentary on *quaestio* 62 of Thomas Aquinas' *Summa Theologiae* was preceded by a lengthy *Praeambulum de dominio Christi* in which he made a praiseworthy attempt to reconcile all opposite positions. Many thought-provoking dissertations could be written on this *praeambulum* alone.

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[571] See the scheme in Oñate, *De contractibus*, tom. 1, tract. 1, disp. 2, sect. 5, num. 166, p. 40.

[572] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 2), lib. 4, prooem., p. 278.

[573] Domingo de Bañez, *De iure et iustitia decisiones*, Salmanticae 1594, ad quaest. 62, p. 154.

3.3.1.2 *Voluntas libertatem possidens*

What should be retained from previous research is that the early modern scholastics had a remarkably liberal concept of property. As Paolo Grossi has convincingly demonstrated, this tendency towards liberalism is particularly present in the Jesuit moral theologians[574]. It is sufficient to recall that Lessius thinks it is the very sign of ownership that he who owns goods has the arbitrary power also to destroy them even out of pure lust (*perimere voluptatis causa*)[575]. Gregorio de Valentia (1549-1603) talks about the lawful love for one's own things (*ius amandi proprias res*)[576]. Juan de Lugo confirms that a private person only needs to look after his own interest (*privata commoda*), considering that to be an essential part of economic prudence (*prudentia oeconomica*)[577]. Further evidence of the liberal tendencies in Jesuit thought can be found throughout this dissertation.

Also, previous scholarship by Rudolf Schüssler has highlighted the development of the liberal notion of self-ownership in early modern scholasticism, which is again particularly evident in Jesuit writers[578]. How the notions of possession of the self and freedom of action tie in with the development of the doctrine of 'freedom of contract' has been the subject of previous study[579]. Lessius' statement in the controversy on grace and free will may be recalled here to the effect that human will is the owner of its very actions (*voluntas domina suorum actuum*) and therefore not just a passive agent in the process of salvation[580]. Tomás Sánchez literally mentions the individual will's indisputable right of possessing its own liberty (*ius certum possessionis libertatis*)[581]. The result of which was, of course, that the medieval law of property, particularly the maxim that the position of the possessor is the stronger (*melior est conditio possidentis*) could be applied to human freedom and moral agency.

Practically speaking, this means that man is free in principle to do what he wants to do, unless there is a superior law that can sufficiently demonstrate that in a particular case it limits the will's freedom[582]. This law will then be in the position of the plaintiff in a court

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[574] See the ground-breaking article *La proprietà nel sistema privatistico della Seconda Scolastica*, in : P. Grossi (ed.), La seconda scolastica nella formazione del diritto privato moderno, [Per la storia del pensiero giuridico moderno, 1], Milano 1973, p. 117-222.

[575] Lessius, *De iustitia et iure*, lib. 2, cap. 3, dub. 2, num. 8, p. 22 : 'Proprium est perfecti dominii ut possis re tua uti pro tuo arbitratu eam vel tibi servando vel vendendo vel donando vel vastando.' And Lessius, *De iustitia et iure*, lib. 2, cap. 4, dub. 10, num. 58, p. 40 : 'Proprium veri dominii est rem pro arbitratu suo posse perimere etiam voluptatis causa.'

[576] Gregorio de Valentia, *Commentaria theologica in Secundam Secundae D. Thomae*, Ingolstadii 1603, tom. 3, disp. 5, quaest. 10, punct. 5, litt. a-c, p. 1315.

[577] Lugo, *De iustitia et iure*, tom. 2, disp. 26, sect. 8, par. 2, num. 143, p. 337. Cited supra, n. 12.

[578] R. Schüßler, *Moral self-ownership and ius possessionis in late scholastics*, in : V. Mäkinen – P. Korkman (eds.), Transformations in medieval and early modern rights discourse, [The new synthese historical library, Texts and studies in the history of philosophy, 59], Dordrecht 2006, p. 149-172. For an older but still valuable contribution, see E. Ruffini Avondo, *Il possesso nella teologia morale post-tridentina*, Rivista di storia del diritto italiano, 2 (1929), p. 63-98.

[579] See our *Jesuit freedom of contract*, The Legal History Review 77 (2009), 423-458.

[580] See Lessius, *De gratia efficaci, decretis divinis, libertate arbitrii et praescientia Dei conditionata*, cap. 5, num. 11, p. 53.

[581] T. Sánchez, *Opus morale in praecepta Decalogi*, Antverpiae 1614, tom. 1, lib. 1, cap. 10, num. 11, p. 41.

[582] For a more detailed account, see *Jesuit freedom of contract.*

who has to prove that the defendant is no rightful possessor of his liberty. In the meantime, the defendant is free to do as pleases him. As long as there is doubt if there is a legal constraint of liberty, the will preserves its freedom of action, according to the principle that in a doubtful case the condition of the possessor is the stronger (*in pari delicto vel causa potior est conditio possidentis*). This is an excellent illustration of how medieval procedural law and property law helped the moral theologians, especially the Jesuits, to formulate freedom of action in the first place. As the Jesuit Antonio Perez (1599-1649) witnesses, they did so with the specific purpose of promoting liberty (*quia favent libertati operandi, et ab innumeris obligationibus homines liberant*)[583].

What these brief encounters with the moral theological conceptions of ownership of the self and liberty show is how the juridical treatment of contracts is now being set against the background of a much larger philosophy. It explains why contract law is suddenly being debated in much more general terms and from a broader anthropological perspective than in the *ius commune*. The theologians' way of grappling with contract law is distant from Romano-canon casuistry or dry juristic craftsmanship. Contract law becomes part of a broader theological story about man, his goods and the divine *telos* of life on earth. As we have seen Suárez explaining in the second chapter, human life is basically understood in terms of a pilgrimage in which the individual human being stays on the right track toward his eternal destination by following the right directions – directions essentially given to man by a multiplicity of laws ranging from natural law over canon law to statute law and laws which man has imposed upon himself through promise and contract (*promissio lex privata*)[584].

The theological elevation of man's will into a private legislator who can or cannot decide to impose an obligation upon itself through contract rests on a long-standing tradition. On the basis of D. 50,17,23 (*legem contractus dedit*) it was not unusual for the jurists of the *ius commune* to think of contract as an act of private legislation[585]. It would find one of its most famous expressions in article 1134 of the French Civil Code. Yet, again, in the grand universe of lofty theological argument it would resonate stronger than before. If Jesuits such as Molina, Lessius and Sánchez had prepared this rise of the will as a private legislator, Oñate definitively consecrated the principle that the individual will is the measure of all things in matters contractual. Without the reserve that could still be found in earlier moral theologians, Oñate straightforwardly holds that contractual obligation merely depends on the will of the person willing to incur it, from the moment he is willing to incur it and to the extent that he is willing to incur it (*nemo ex contractu se obligat nisi qui vult, et quando vult, et quantum vult*)[586].

Oñate extolls the principle that the sole measure of contractual obligation is the will as the lynchpin and the basis of the entire doctrine of contract (*cardo et basis totius materiae*

[583] Perez, *De iustitia et iure*, tract. 2, disp. 2, cap. 4, num. 78, p. 174.

[584] Juan de Lugo, *De iustitia et iure*, Lugduni 1642, tom. 2, disp. 23, sect. 1, num. 4, p. 103.

[585] Compare VI 5,13,85. On the Roman and medieval origins of the notion that a contract takes the place of law for the parties who make it, as well as Domat's programmatic restatement of it, see I. Birocchi, *Notazioni sul contratto*, Quaderni fiorentini per la storia del pensiero giuridico moderno, 19 (1990), p. 637-659.

[586] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 6, num. 93, p. 114.

contractuum). Not surprisingly, property law is invoked to motivate this highly liberal principle. An especially powerful argument is derived from the famous Roman maxim contained in C. 4,35,21 that everybody is moderator and arbiter of his own things (*suae quidem quisque rei moderator et arbiter*). Moreover, Oñate explains, not only is everybody the moderator and arbiter of his own things, but also of the rights and obligations that are derived from those things[587]. Hence, it is possible not only to transfer the goods to another person, but also the right to claim those goods and your obligation to transfer them. This obligation is almost tantamount to the thing itself: it is its substitute and vicar. So if property law allows you to dispose of your goods as freely as you wish, and obligations are rights acting as substitutes of these real things, it is equally allowed to freely impose obligations upon yourself regarding these goods.

Hence, the freedom to incur all kinds of obligations through promise and contract rests on a liberal conception of private property. The extent of this personally imposed obligation is also determined by the will. Consequently, not every promise results in an enforceable obligation as a matter of justice, according to Oñate. Some promises can be merely binding as a matter of honesty or friendship. The measure of the seriousness of the obligation entirely depends on the will of the private legislator. Using highly theological vocabulary, Oñate derives this from man's being created in God's image. Created in God's image, man is capable of having *dominium* over the goods of the world and over his will and actions. Hence, the measure of obligation must be the extent to which he wishes to bind himself[588]:

> God left man the freedom to take care of himself, as is expressed in Ecclesiastes 15, 14, one of the reasons being, no doubt, that He left it to man's will to bind himself when he wanted (*reliquit Deus in voluntate eius ut se obligaret quando vellet*). Now actions do not operate beyond the will and the intention of the agents, but in accordance with their will and intention.

As if to underline his fundamental belief in genuine, or, at least, typically Jesuit 'freedom of contract', he continues[589]:

> Otherwise man would not be the true and perfect owner of his goods (*alias non esset homo vere et perfecte dominus rerum suarum*), that is, unless he could give them when he wants, to

[587] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 7, num. 86, p. 112: 'Quia in in hoc casu promissio est quasi quaedam donatio, non quidem ipsius rei promissae quae tunc non traditur neque est praesens, sed obligationis loco illius quae tantumdem valet ac ipsa res promissa ; quae obligatio ex tunc donata et tradita per acceptationem alterius est substituta rei promissae et quasi vicaria illius. (….) Quia ergo unusquisque suae rei est moderator et arbiter, sicut rem suam donare posset si ad manum haberet, ita loco rei istam obligationem de qua loquimur, donat.'

[588] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 6, num. 74, p. 108 : 'Reliquit Deus hominem in manu consilii sui Eccles. 15, 14 sine dubio inter alia, quia reliquit Deus in voluntate eius ut se obligaret, quando vellet, et sicut actiones agentium non operantur ultra voluntatem et intentionem eorum, ita operantur iuxta voluntatem et intentionem eorum.'

[589] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 6, num. 76, p. 108: 'Quia alias non esset homo vere et perfecte dominus rerum suarum si non posset eas dare quando, et cui vult, et quomodo vult, et obligationem etiam contrahere, quando et quomodo vult.'

> whom he wants, in whatever way he wants, and unless he has the additional capacity to enter into contractual obligation when he wants and in whatever way he wants.

It would be hard to find a more limpid formulation of 'contractual liberty'. Oñate's particularly clear-cut phrases are the climax of a trend, witnessed among the scholastic theologians over a period of at least one century and a half, to re-found the law of contract on the autonomous will of the free individual. Not all moral theologians were as bold, though, as to spell out their belief in 'freedom of contract' so straightforwardly. There has always been an astounding plurality amongst the early modern scholastics all the more so as we move away from the limited set of core shared principles.

3.3.1.3 *De contractibus in genere*

The rise of a general law of contract has often been connected with the birth of the notion of individual autonomy. In conformity with wide-spread beliefs, Lipp and Diesselhorst therefore concluded that, although the influence of scholasticism on Grotius' doctrine of promising is substantial, the cradle of general contract law still lies in Grotius' *De iure belli ac pacis*. It is to the credit of Paolo Cappellini to have qualified these views by pointing out that the early modern scholastics, particulary Jesuit authors such as Molina, Lessius, Lugo and Oñate, formulated both the idea that contactual obligation rests on the autonomous will of the promisor and the first doctrines of contract as a general category[590]. We think it is obvious from the above paragraphs that there is no reason whatsoever to doubt Cappellini's observations on the rise of general contract law in the Jesuit scholastics. The concept of the will's self-ownership has hardly been described in more explicit terms than in the early modern Jesuit writers.

Having singled out the will's liberty to bind itself as the centerpiece of all contractual obligation, the early modern scholastics could now go on to develop a general law of contract even before discussing the particulars of the specific contracts. At least originally, this turn towards a systematic introduction to the general law of contract seems to have been the province of the Jesuit moral theologians. The efforts toward systematization are still very modest in scholastics such as Domingo de Soto, who, following Thomas Aquinas, did elaborate on contractual promise, but rather rapidly and merely in the margin of a discussion on the binding force of vows[591]. The same could be said of Domingo Bañez. The Jesuits, on the contrary, explicitly devoted one chapter to general contract law (*de contractibus in genere*) before systematically treating the specific contracts. 'We will first talk about contracts

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[590] See Paolo Cappellini's fundamental *Sulla formazione del moderno concetto di 'dottrina generale del diritto'*. Lipp's treatment of the Spanish scholastics can be found in *Die Bedeutung des Naturrechts*, p. 126-129.

[591] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 4), lib. 7, quaest. 2 (*De voti vigore ac virtute*), art. 1 (*Utrum omne votum obliget ad sui observationem*), p. 628-639.

in general, using the word 'contract' in its most wide sense,' Molina admonishes his readers[592], 'next we will descend to the specific contracts.'

A glimpse at the table of contents of the first three sections of Lessius' *De iustitia et iure* is revealing of a trend toward systematization of legal doctrine, not only in regard to contract law, but also property law and torts[593]:

SECTION I. ON JUSTICE, RIGHT, AND THE SPECIFIC TYPES OF RIGHT

1. On justice in general (*De iustitia in genere*)
2. On right in general (*De iure in genere*)
3. On dominion, usufruct, use and possession, which are specific types of rights
4. On who is capable of having dominion; on the objects of dominion
5. On the mode of acquiring dominion over goods that belong to nobody or over goods which are common to all, particularly on servitudes, hunting, fishing, fowling and treasures
6. On the mode of acquiring dominion over someone else's good, particularly on prescription

SECTION II. ON INJUSTICE AND DAMAGE AND THEIR NECESSARY RESTITUTION

7. On injustice and restitution in general (*De iniuria et restitutione in genere*)
8. On injustice against spiritual goods
9. On injustice against the body through homicide or mutilation
10. On injustice against the body through adultery and fornication
11. On injustice against reputation and honour through detraction and defamation
12. On injustice against property through theft, robbery or damage.
13. On cooperating to theft or injury
14. On restitution by virtue of the good received and the receiver of restitution
15. On the respective order and the way in which restitution has to be made, where restitution must be made and what to do with the expenses
16. On the factors which excuse from restitution

SECTION III. ON CONTRACTS

17. On contracts in general (*De contractibus in genere*)
18. On promise and donation
19. On testaments and legacies
20. On loan for consumption and usury
21. On sale-purchase
22. On rents
23. On money-exchange
24. On lease-hire, emphyteusis and feudal contracts
25. On companies
26. On games and gambling
27. On deposit and loan

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[592] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 252 (*pactum et contractus quid sint et de obligatione civili et naturali*), col. 1, num. 1: 'Prius autem dicemus de contractibus in genere, sumpto latissime vocabulo contractus, deinde vero ad singulos descendemus.'

[593] Lessius, *De iustitia et iure*, p. 13-14.

28. On suretyship, pawn, mortgage

Arguably, the sheer organization of Lessius' exposition on contracts points toward the birth of a general law of contract. Similar examples could be given for the other Jesuit authors mentioned[594]. By the time Oñate published his treatise on contracts, the entire first volume of his voluminous work, which is more than seven hundred in folio pages, were dedicated to contract law in general:

VOL. 1. ON CONTRACTS IN GENERAL (*De contractibus in genere*)
1. On the nature and the divisions of contract
2. On the causes of contract
3. On the effects of contract
4. On the qualities of contract
5. On adjacent pacts and other accidentals
6. On the termination and dissolution of contract
7. On quasi-contracts and distracts

VOL. 2. ON THE SPECIFIC, LUCRATIVE CONTRACTS (*De singulis contractibus lucrativis*)
8. On the four sacred contracts
9. On promise and stipulation
10. On donation in general and its species
11. On dowry
12. On loan for use
13. On mandate
14. On caretakers
15. On duties and mandates
16. On agency
17. On tutelage and curatorship
18. On sureties
19. On contracts of deposit
20. On pawn and mortgage

VOL. 3. ON THE SPECIFIC, ONEROUS CONTRACTS (*De singulis contractibus onerosis*)
21. On sale-purchase
22. On rents, certainly Spanish rents
23. On the invalid contract of simony
24. On money-exchanges
25. On the contract of exchange
26. On the contract of transaction
27. On compromises
28. On the company contract
29. On loan for consumption
30. On usury
31. On the contract of emphyteusis

[594] Cappellini, *Sulla formazione del moderno concetto di 'dottrina generale del diritto'*, p. 354-355, n. 53.

32. On feudal contracts
33. On usufruct, use and habitation
34. On rustic and urban servitudes
35. On lease-hire
36. On the four contracts of luck: insurance, gambling, lottery, gaming

Many pages could be spent describing the great variety of attempts for formulating an adequate definition of contract. It may suffice here to quote Oñate's simple and elegant definition of contract as an agreement which is binding as a matter of commutative justice (*contractus est pactum obligans ex iustitia commutativa*)[595]. What is worthwhile noting is that, following Lessius, Oñate puts an end to the controversy surrounding the status of lucrative contracts. In his view, the definition of contract as an agreement binding by virtue of justice in exchange allows one to think of lucrative contracts as contracts in the proper sense of the word, because even lucrative contracts are binding as a matter of justice for one of the parties involved (*etiam omnis contractus lucrativus obligat ex iustitia ex uno latere*)[596].

The problematic status of gifts as contracts derived not in the least from the Roman jurist Labeo's famous definition of contract as *synallagma*[597]. Since *synallagma*, or reciprocity in exchange, was deemed an essential feature of contracts, it was usually held that lucrative contracts such as gifts could not constitute true contracts[598]. Such was the authoritative opinion, for instance, of Domingo de Soto. He claimed that gifts were in the moral realm of liberality, which had nothing to do with justice. Therefore, Soto heavily criticized Summenhart's subtle attempt to consider gifts as contracts by stretching the Roman definition of contract[599]. As frequently occurred, Summenhart prepared the way for change

[595] Oñate, *De contractibus*, tom. 1, tract. 1, disp. 1, sect. 3, num. 26, p. 7. In the preceding numbers (12-25), Oñate rebukes the definitions offered by Labeo, Jean Gerson, Conradus Summenhart and Paolo Comitoli. For a thorough discussion of Gerson's and Summenhart's definitions of contract, see Birocchi, *Causa e categoria generale del contratto*, p. 208-218.

[596] Oñate, *De contractibus*, tom. 1, tract. 1, disp. 1, sect. 3, num. 27, p. 7.

[597] D. 50,16,19: 'Labeo libro primo praetoris urbani definit, quod quaedam agantur, quaedam gerantur, quaedam contrahantur: et actum quidem generale verbum esse, sive verbis sive re quid agatur, ut in stipulatione vel numeratione: contractum autem ultro citroque obligationem, quod graeci *sunallagma* vocant, veluti emptionem venditionem, locationem conductionem, societatem: gestum rem significare sine verbis factam.'

[598] On this debate regarding the status of gratuitous contracts, see the short notices in Cappellini, *Sulla formazione del moderno concetto di 'dottrina generale del diritto'*, p. 342-343 and in W. Decock, *Donations, bonnes mœurs et droit naturel, Un débat théologico-politique dans la scolastique des temps modernes*, in: M. Chamocho Cantudo (ed.), Droit et mœurs, Implication et influence des mœurs dans la configuration du droit, Jaén 2011, p. 185-188. Given the divergence of the historical traditions, it is not surprising to find that the status of gifts is still a point of dispute in today's scholarly literature; cf. R. Barbaix, *Het contractuele statuut van de schenking*, Antwerpen-Oxford 2008, p. 1013-1044.

[599] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 3), lib. 6, quaest. 2, art. 1, p. 541: 'Contractus namque omnis, si de suo nomine perpendas, actus iustitiae est, utramque colligantis partem. Laxant tamen alii latius nomen usque ad illas actiones ex quibus ex altera tantum parte oritur vinculum : veluti est donatio et simplex promissio. Et ideo Baldus, quem Sylvester citat in verbo, contractus, et Conradus sequitur, q. 16, distinguit de nomine contractus, quod accipiatur proprie, quando obligatio oritur ex utraque parte, et impropriissime quando ex neutra nascitur. Sed revera abusivae istae acceptiones abusu essent abigendae. Hoc enim est nomina a sua nativa significatione abalienare, siquidem neque donatio neque simplex promissio ad iustitiam attinent, sed sunt actus liberalitatis.'

and modernity by introducing clever distinctions that in the long run allowed other theologians to advocate new opinions[600]. Concretely, Summenhart introduces a distinction between three different conceptions of contract. The second, improper definition of contract includes donations[601].

Summenhart's subtle efforts to open up the definition of contract were brought to fruition in the writings of the late sixteenth century theologians. The Dominican Francisco García (1525-1585), who co-founded and taught at the University of Tarragona, argued that donations were contracts in the proper sense of the word. He defined contract in terms of mutual consent regardless of its synallagmatic nature, rejecting Soto's viewpoint and Summenhart's traditional conclusion as being too scrupulous[602]. Famous Jesuits such as Molina and Lessius continued García's line of reasoning, even though it is not clear whether they were familiar with his thought. Molina and Lessius argued that gifts could be properly called contracts. For example, Molina fiercely rebuked Soto's standpoint, stressing that even though donations are motivated by liberality and not by an act of justice, once they have been concluded, they are binding as a matter of justice (*quamvis ex liberalitate profecta, ex ea resultavit obligatio iustitiae*)[603]. Summenhart had not yet gone so far in his reasoning. Citing C. 4,21,17, in which donations are called contracts, Lessius suggests that Roman law itself considered gifts to be contracts. Lessius defines contract as an agreement between two parties creating an obligation for at least one of them (*contractus est conventio duorum obligationem saltem in alterutro pariens*), so that lucrative contracts are truly contracts[604]. Lessius expressly indicates that he uses the term 'contract' in a wide sense so as to be identical to 'agreement' and to include gratuitous contracts[605]. Oñate claimed that Lessius' was the right definition and that it was mirrored in his own definition.

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[600] Cappellini, *Sulla formazione del moderno concetto di 'dottrina generale del diritto'*, p. 341, n. 42 interestingly notes in making the threefold distinction in the conception of contract, Summenhart might have combined ideas that can be traced back to the late medieval jurists.

[601] Conradus Summenhart, *Opus septipertitum de contractibus*, [Augustae Vindelicae 1515], quaest. 16, par. *Distinctio*, [s.p.]: 'Secundo modo capitur improprie, et sic est factum vel actus ex quo oritur tantum ex una parte obligatio seu in quo tantum una pars obligatur. Hoc modo donatio, mutuatio et stipulatio sunt contractus et non primo modo.'

[602] Francisco García, *Tratado utilísimo y muy general de todos los contratos*, Valencia 1583, cap. 1 in: I. Zorroza – H. Rodríguez-Penelas (eds.), [Colleción de pensamiento medieval y renacentista, 46], Pamplona 2003, p. 61: 'Contrato es un legítimo consentimiento de muchos, que sobre alguna cosa convienen; del cual consentimiento nace en ambas partes, o en una tan solamente, alguna obligación. (…) Dijimos "o en una tan solamente", por causa de la promisión, de la donación, del depósito, de la prenda y semejantes contratos, en los cuales de la una parte tan solamente nace la obligación, como en la explicación de la naturaleza de estos claramente se verá. No ignoramos haber algunos doctores que dijeron tales conciertos no ser contratos; de cuyo número fueron: Soto (…) y Conrado (…), tratando esta materia algo escrupulosamente con los juristas y canonistas, los cuales no quieren que sea contrato, sino el que por ambas partes produce obligación.'

[603] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 252, col. 3, num. 6: 'Etenim quamvis promissio illa ex liberalitate donantis sit profecta, fueritque proinde actus liberalitatis promittentis et non iustitiae, ex ea tamen resultavit obligatio iustitiae, qua promittens eo ipso ex iustitia astrictus mansit ad id implendum, quod sola liberalitate ductus, promisit, ut inferius suo loco fusius explicabitur.'

[604] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 1, num. 4-5, p. 196.

[605] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 1, num. 5, p. 196: 'Nos nomine *contractus* utimur hîc ample, ut idem sit quod *pactum* et comprehendat contractus gratuitos, qui sunt veluti semicontractus.'

Oñate not only followed Lessius in considering unilateral, lucrative agreements as true contracts. He also endorsed Lessius' interpretation of Labeo (*contractus est ultro citroque obligatio*), to the effect that the synallagmatic aspect of a contract regards its effect rather than its formal structure[606]. This might need some explanation. Formally speaking, Lessius explains, a contract is something that is made up of a verbal expression, a written document or another external sign. Through these external signs, people express their mind, bind themselves toward each other, and exchange rights. A contract is not identical with contractual obligation. It is merely the cause of the obligation[607]. The obligation is the effect of the contract. Moreover, contract is an external sign producing obligation by virtue of the underlying consent of the contracting parties (*contractus est signum externum practicum ultro citroque obligationem ex consensu contrahentium pariens*).

If we wish to understand the general law of contract as developed by the Jesuit moral theologians, it is indispensable to turn to their discussion of promise (*promissio*). This may sound bizarre, but it need not be. As a matter of fact, 'promise' was used as a general term to denote the very abstract concept of contract. It is function was to serve as a kind of generic concept around which the general principles of contract could be built. It could refer both to onerous and gratuitous contracts. As Lessius put it[608]: 'It needs to be remarked that the term 'promise' is general in character (*nomen promissionis esse generale*), and that it can be extended to all contracts (*posseque extendi ad omnes contractus*), just as the term 'stipulation' can, since I can promise something in exchange for something (*sub onere*), e.g. a price or a good, or for free (*gratis*). On the other hand, the term promise can be used to denote a specific contract, namely a gratuitous promise, which is motivated by liberality or gratitude.

A most delightful analysis of the term 'promise' is offered by Oñate. Although it certainly builds on the work of the previous scholastics, it seems to be quite unique. It is not sure, therefore, whether all moral theologians would have seen things as clearly as Oñate did. In any case, Oñate's analysis is quite remarkable because he seems to have found a vocabulary with which to express ideas that are in conformity with the scholastic tradition but prefigure much later developments in the history of private law, particularly in nineteenth century Germany. He distinguishes between three different meanings of *promissio*: 1) *promissio* as a part of every contract, namely the offer, which, along with the acceptance, constitutes the basic skeleton of every contract; 2) *promissio* as the combination of offer and

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[606] Oñate, *De contractibus*, tom. 1, tract. 1, disp. 1, sect. 3, num. 17, p. 6: 'Referens praedictam definitionem [Labeonis], sic explicans, est pactum ex quo ultrocitroque oritur obligatio, quo fit ut illa Labeonis enunciatio formalis non sit, sed sit effective interpretanda, Lessius (...) cum hac definitione consentit.'

[607] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 1, num. 1, p. 195: '*Contractus est ultro citroque obligatio, quod Graeci sunallagma vocant*. Ita habetur l. 19, Labeo, ff. de verborum significatione, quae definition non sic est intelligenda quasi contractus sit formaliter obligation (obligation enim est effectus per contractum productus in contrahentibus) sed quod sit causa obligationis. Est enim formaliter locutio vel scriptura vel aliud externum signum, quo hominess exprimunt mentem suam et sese vicissim alter alteri obligant et iura commutant. Itaque *contractus* est signum externum practicum ultro citroque obligationem ex consensu contrahentium pariens, quod nomine Graeco clarius indicatur.'

[608] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 1, num. 1, p. 216: 'Notandum est, nomen *promissionis* esse generale, posseque extendi ad omnes contractus, sicut et nomen stipulationis. Possum enim promittere rem aliquam sub aliquo onere (v.g. ut detur pretium aut res alia) vel gratis.'

acceptance which precedes every contract; 3) *promissio* as a specific contract – which falls outside the scope of the following discussion.

In its first sense, 'offer', *promissio* comes down to the proposal (*propositum*) to do something that is of use to another person with the intention of obligation even before the other party has accepted the offer. Hence, *promissio* in the sense of 'offer' is part and parcel of every contract, since every single contract consists of the promise, that is the offer, to transfer a property right, on the one hand, and the acceptance of that offer, on the other hand (*omnes contractus ex promissione et acceptatione constant*)[609]. In this first sense, promise is different from contract in the way that a substantial part differs from the whole (*tamquam pars a toto differt*). For, as Oñate vividly explains[610]:

> Every contract is composed of a conflation of promise and acceptance, just as a physical thing is composed of matter and form, or a human being of soul and body. Now if promise is understood in the second manner, then it does not differ from contract, just as a man does not differ from the combination of his soul and body, or just as as the whole universally does not differ from the united combination of its two parts.

In its second sense, *promissio* denotes precisely that fundamental fusion of offer and acceptance that forms the backbone of contract understood both in generic and specific terms (*promissio simul cum acceptatione et sic est contractus*)[611]. Here, promise coincides with contract in the way that man coincides with the combination of his body and soul. Is there a more plastic way conceivable to elucidate the doctrine of offer and acceptance?

3.3.2 All accepted promises are binding

3.3.2.1 First requirement : *animus obligandi*

Voluntary intention as the foundation of contractual obligation was beyond doubt for the early modern scholastics. The most direct expressions of this principle can be found in the Jesuit writers. Lessius holds that the entire power of promise to bind stems from intention (*omnis vis obligandi promissionis est ab intentione*)[612]. Lugo couples this basic insight to the metaphor of contract as an act of private legislation. Promise is seen as a private law, which the

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[609] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 1, num. 6, p. 87 : 'Primo pro proposito aliquid faciendi in utilitatem alterius cum intentione se obligandi ante acceptationem, et sic est pars cuiusque contractus, quia omnes quotquot sunt contractus ex promissione transferendi dominium vel partem et acceptatione constant et conflantur.'

[610] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 1, num. 7, p. 87 : 'Componitur enim et conflatur omnis contractus ex promissione et acceptatione tanquam ex materia et forma compositum physicum, vel tanquam homo ex anima et corpore. Si vero secundo modo sumatur, non differt promissio a contractu, sicut nec homo non differt ab anima et corpore simul sumptis, nec totum aliquod in universum differt a duabus partibus suis simul sumptis et unitis.'

[611] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 1, num. 6, p. 87 : 'Secundo pro quacumque promissione simul cum acceptatione, et sic est contractus, et omnia genera et species contractus (quia omnes sunt promissiones quaedam) pervagatur.'

[612] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 1, num. 6, p. 216.

promisor imposes upon himself and by virtue of which he binds himself[613]. In the absence of will there can be no talk of a binding promise, since a law cannot be properly called a law if its outward expression does not rest on the inner will to bind[614]. If a legislator lacks the will to bind, his subjects are not bound. By the same token, if the promisor does not have the will to bind himself, then there will not be a private law or a promise (*deficiente animo se obligandi non erit lex privata nec promissio*)[615].

Not only is the will to be bound essential to contractual promise, Jesuits such as Lessius, Lugo and Oñate insist that contractual obligation also requires that the promisor intends to bind himself as a matter of commutative justice. The object of the intent of obligation must be the exchange of legally enforceable rights and obligations. We will come back to this point further in this text. It is sufficient to note here that the moral theologians were careful to distinguish between mere promises out of friendship or liberality and truly juridical promises. To put it in modern terminology, the theologians were aware that not all agreements are exactly the same as contracts. There is promising out of social convenience, gentleman's agreements, and serious contracts.

What also preoccupied theologians was the need to distinguish promises from other assertions about future action. As Soto put it in the margin of his treatment of the force of a vow (*votum*) – which is basically a promise between man and God instead of a promise in between men – a simple assertion about the future, e.g. 'I will do', is not necessarily a promise (*simplex assertio futuri non est semper promissio*)[616]. The difference is that plans can be changed whereas promises cannot. The distinction between a plan or resolution (*propositum*) and a promise (*promissio*) went back to Thomas Aquinas' succinct analysis of the making of a vow. In Thomas' view, a vow comes about in three successive stages[617] : 1) deliberation (*deliberatio*) ; 2) the resolution of the will (*propositum voluntatis*) ; 3) promise

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[613] Lugo, *De iustitia et iure*, tom. 2, disp. 23, sect. 1, num. 4, p. 103: 'Promissio enim est lex privata quam promittens sibi imponit et qua se ligat, ubi ergo ex defectu animi non se ligat, non est lex nec promissio.'

[614] Lugo, *De iustitia et iure*, tom. 2, disp. 23, sect. 1, num. 4, p. 103: 'Et quidem in hac quaestione de nomine placet magis quod deficiente voluntate interna non dicatur promissio, quia promissio simpliciter dicitur actus humanus inducens obligationem, sicut etiam lex exterius proposita sine voluntate obligandi non est lex proprie et in rigore, et sicut matrimonium externum sine consensu interno non est matrimonium et votum externum sine voluntate se obligandi non est verum votum, et sic de aliis.'

[615] Lugo, *De iustitia et iure*, tom. 2, disp. 23, sect. 1, num. 4, p. 103-104: 'Sicut si in legislatore desit animus ligandi et obligandi subditos, quantumvis proponat exterius et fingat se velle obligare, non obligat, nisi per accidens propter ignorantiam, qua subditi putant voluisse legislatorem obligare, ergo | deficiente animo illa non est lex vera, sed apparens. Sic ergo lex privata, deficiente animo se obligandi, non erit lex privata nec promissio.'

[616] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 4), lib. 7, quaest. 2, p. 631: 'Praeter haec ex superioribus recolendum est simplicem assertionem futuri non esse semper promissionem. Si enim dicas, faciam, id tantum exprimens quod in proposito habes, non subinde obligaris nisi illo id sensu proferas quod est, promitto facere, ut puta dum quis ex te quidpiam petit, et respondes, faciam. Alias iam supra diximus posse te mutare propositum.'

[617] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 9), IIaIIae, quaest. 88 (*De voto*), art. 1, concl., in: *Opera omnia iussu impensaque Leonis XIII edita*, tom. 9: *Secunda secundae a quaestione LVII ad quaestionem CXXII cum commentariis Cardinalis Cajetani*, Romae 1897 [hereafter: Ed. Leonina, tom. 9], p. 234: 'Promissio autem procedit ex proposito faciendi. Propositum autem aliquam deliberationem praeexigit, cum sit actus voluntatis deliberatae. Sic igitur ad votum tria ex necessitate requiruntur, primo quidem, deliberatio; secundo, propositum voluntatis; tertio, promissio, in qua perficitur ratio voti.'

(*promissio*). In the early modern period, this became a popular way to analyze not only promises to God, but also promises between men.

The debate on the distinction between *deliberatio*, *propositum* and *promissio* truly began with Tommaso da Vio Cajetan. Unfortunately, Cajetan's commentaries often made Thomas' thoughts more complex than they were. A point in case is his explanation of the meaning of *deliberatio*. What one might wish to retain from his lengthy exposition is that deliberation does not simply signify voluntariness in this context[618]. Deliberation presupposes an intellectual act, namely the assessment and comparison (*collatio*) of a large set of different courses of action, and an act of will, namely the determination (*determinatio*) to pursue one chosen course of action[619]. In Cajetan's view, this element of determination constitutes true *deliberatio*. It is different from *propositum*, because a plan always regards the future whereas the determination of the will to follow one particular course of action after careful rational analysis is irrespective of time[620]. Also of interest is the conclusion that the words 'I will do' should not necessarily be interpreted as constituting a binding promise. Unless the promisor is motivated by a true *animus promittendi*, 'I will do' can also express the intent to do something in the future (*enuntiatio propositi*) or the impending, factual realisation of an act (*enuntiatio eventus*)[621].

For many generations, moral theologians struggled with the distinction between *propositum* and *promissio*. Molina insisted that a *propositum* is entirely different from a *promissio*. More precisely, it is different to have the firm and deliberate will and purpose (*propositum*) to do somebody a favor, expressing this will and purpose linguistically through the use of a future verb, and to constrain oneself (*astringere seipsum*) out of liberality and through one's own will to do something in favor of somebody, also expressing this through the use of a future verb[622]. In other words, what preoccupied the theologians was whether a statement such as 'tomorrow I will give you a horse' automatically produced obligation or not. As is frequently the case, not until Pedro de Oñate was a more or less clear, systematic, and persuasive linguistic analysis of statements such as these finally brought forward. Oñate holds that the proposition 'I will give you a horse tomorrow' can have no less than five meanings (*quincuplex sensus*). Only two of them involve obligation of some kind.

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[618] Tommaso de Vio Cajetanus, *Commentaria ad Secundam Secundae divi Thomae*, in: *Sancti Thomae Aquinatis opera omnia iussu impensaque Leonis XIII edita*, tom. 9: *Secunda secundae Summae Theologiae a quaestione LVII ad quaestionem CXXII*, Romae 1897 [hereafter: Cajetanus, *Commentaria ad Secundam Secundae divi Thomae* (Ed. Leonina, tom. 9)], ad quaest. 88, art. 1, p. 235, num. 3.

[619] Cajetanus, *Commentaria ad Secundam Secundae divi Thomae* (Ed. Leonina, tom. 9), ad quaest. 88, art. 1, p. 236, num. 4.

[620] Cajetanus, *Commentaria ad Secundam Secundae divi Thomae* (Ed. Leonina, tom. 9), ad quaest. 88, art. 1, p. 236, num. 4 (in fine).

[621] Cajetanus, *Commentaria ad Secundam Secundae divi Thomae* (Ed. Leonina, tom. 9), ad quaest. 88, art. 1, p. 235, num. 1.

[622] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 262, cols. 36-37, num. 1 : 'Illud ante omnia est observandum, longe diversa esse, aliquem habere propositum voluntatemve deliberatam ac firmam quippiam in gratiam alicuius faciendi, idque verbo futuri temporis exprimere, dicendo faciam hoc, vel dabo tibi hoc, aut illud ; et aliquem ex sua liberalitate seipsum propria voluntate astringere ad quippiam faciendum, idque verbo futuri temporis exprimere, dicendo, promitto me facturum vel daturum tibi hoc, aut tali die dabo tibi hoc, aut in gratiam tui faciam hoc, aut illud.'

The first meaning of statements such as 'I will give you a horse tomorrow' or 'I will give you a hundred' is a mere affirmation of what is going to happen in the future. It is neither a plan nor a promise, but an objective statement of a future event[623]. The speaker merely intends to make a proposition (*propositio*). In its second meaning, 'I will give you a horse tomorrow' involves a certain *propositum*, but it is not a *propositum* in the proper sense of the word and it is not binding. It is a mere affirmation of a present intention which can still be altered. The speaker does not intend to bind himself irrevocably. At the very moment he makes this statement, he can already be aware of the fact that he probably is not going to give the horse because of the 'fragility of human nature'...[624] The element of mutability distinguishes the second from the third meaning of, 'I will give you a horse tomorrow'. If there is an intention of permanence, then there is a *propositum* in the proper sense, and a promise in an improper sense[625].

What distinguishes the three aforementioned *propositiones* from true promises is the element of obligation. Yet, obligatory statements, in turn, subdivide into two categories[626]. On the one hand, there are propositions such as 'I will give you a horse tomorrow', which involve the intent of producing obligation as a matter of justice in exchange (*cum animo se obligandi ex iustitia commutativa*). These propositions are contracts in the proper sense of the word. On the other hand, there are agreements between two persons in which the promisor merely binds himself as a matter of – what we would now consider to be – morality (*cum animo se obligandi ex aliis virtutibus, ut ex gratitudine, pietate, misericordia, liberalitate vel ex honestate*). These agreements are truly agreements if they are accepted by the promisee, but they are not contracts properly speaking, according to Oñate's definition of contract as an agreement which is binding as a matter of commutative justice (*pactum obligans ex iustitia commutativa*).

To conclude, no matter how sophisticated or unsophisticated their respective linguistic and psychological accounts of promisory statements were, the moral theologians insisted that

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[623] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 1, num. 4, p. 85 : 'Primo ut solum affirmet quod futurum est vel ipse credit futurum, sicut posset affirmare quamcumaue aliam veritatem, quia hae propositiones etiam si sint de futuro contingenti determinatam habent veritatem in se ipsis, licet non habeant determinatam in causis.'

[624] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 1, num. 4, p. 85-6 : 'Secundo modo potest esse intentio illam propositionem proferentis non affirmare eam veritatem futuram, scilicet se daturum centum Petro, sed praesentem suam intentionem dandi, sive postea sit impleturus sive non. (...) Sicut qui confitetur vel sacerdos qui audit confessionem, potest valide et licite asserere se habere de praesenti intentionem et simul credere se propositum illud ex fragilitate humana, irruentibus occasionibus et tentationibus non esse impleturum. Et ipse hoc credens licite confitetur et sacerdos confessionem excipiens et idem credens licite eum absolvit.'

[625] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 1, num. 4, p. 86 : 'Tertio potest proferre illa verba dabo tibi centum ita ut non solum asserat se habere de praesenti intentionem dandi sed etiam asseveret se in ea intentione permansuram, quam conceperit in utilitatem et gaudium eius cum quo agit et ut sciat eam et certam habens disponat quod sibi magis expediat, quia ipse acturus est et curaturus ut in effectum deducatur, ita tamen ut neque velit se obligare ex iustitia nec saltem ex honestate, neque secutum reddere illum de illius intentionis effectu, quia non tenetur ex veracitate illam propositionem veram facere sed veram dicere et hoc est propositum, scilicet actus voluntatis efficax faciendi aliquid quod includit etiam intentionem perdurandi et permanendi in eadem voluntate (...).

[626] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 1, num. 4, p. 86, col. 2.

the primary condition for any binding promise in the technical sense of an offer to contract required *animus obligandi*.

3.3.2.2 Second requirement : *promissio externa*

If the will is the measure of all things contractual, then it would seem that the production of obligation is not dependent on any externalization through signs of communication. As Francisco de Vitoria notes in regard to gratuitous promises, the declaration of promise does not add any obligation to the obligation which already exists by virtue of the will. The outward statement of promise is merely declarative. The roots of a promise lie in the will (*radix promissionis in voluntate*)[627]. Consequently, Vitoria takes the view that the mere interior intent to bind yourself is sufficient, at least in simple promises[628]. He acknowledges that in 'contracts', namely onerous contracts, external communication is required for the promisor to be bound. Perhaps confused by Vitoria's argumentation, Domingo de Soto concludes that one could argue either way, namely that external signs are required or that they are not. Moreover, he points out that this is primarily a problem from the point of view of conscience (*hoc forte problema est stando in iure mero naturae et in conscientia*)[629]. In practise, external signs are always required.

Through making the distinction between simple promises and contracts, which roughly corresponds to the distinction between gratuitous contracts and onerous contracts, Vitoria was able to go around a particularly authoritative argument for the contrary opinion. This contrary opinion, which was to become the clear majority opinion by the end of the sixteenth century, held that exteriorization was absolutely required for contractual obligation to arise. It can be traced back to Thomas Aquinas' discussion on vows. In articulating the difference between vows and human promises, Thomas stressed that obligations between men require that the will of the promisor to bind himself be expressed through words or other signs (*per verba vel quaecumque exteriora signa*)[630]. There is an outward declaration needed for the promise to become binding toward another human being. Conversely, God or the angels can

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[627] See Francisco de Vitoria, *Commentarii in IIamIIae*, quaest. 88, art. 1, num. 5, in: *Comentarios a la Secunda secundae de Santo Tomás*, edición preparada por V. Beltrán de Heredia, tom. 4: *De justitia* (qq. 67-88), [Biblioteca de Teólogos Españoles, 5], Salamanca 1934, p. 329 (hereafter: ed. Beltrán de Heredia, tom. 4).

[628] Vitoria, *Commentarii in IIamIIae* (ed. Beltrán de Heredía, tom. 4), quaest. 88, art. 1, num. 5, p. 329: 'Sed ego puto quod bene posset quis per solum actum interiorem obligari alteri, quia videtur mihi quod argumentum illud convincat, scilicet quia verba exteriora non obligant nec inducunt aliquam obligationem. (...) Et ad verba sancti Thomae, dico quod vult dicere quod homo non potest pacisci, id est facere pactum cum homine altero nec potest facere contractum obligatorium nisi per verba exteriora. Et haec sunt de obligatione simplicis promissionis et assertionis.'

[629] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 4), lib. 7, quaest. 2, p. 613: 'Aliquantulo autem difficilius dubium est an promissio quam apud te sola mente homini facias, sit obligatoria. Visus est sanctus Thomas, artic. 1, id negare. (…) Hoc forte problema est, stando in iure mero naturae et in conscientia. Nam in foro exteriori manifestum est mentalem obligationem, imo neque omnem quae fit absenti, ligare. Sed in conscientia de utraque forte parte opinari quisque potest.'

[630] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 9), IIaIIae, quaest. 88, art. 1, concl., p. 234: 'Sed promissio quae ab homine fit homini, non potest fieri nisi per verba vel quaecumque exteriora signa. Deo autem potest fieri promissio per solam interiorem cogitationem, quia ut dicitur I Reg. XVI, *homines vident ea quae parent, sed Deus intuetur cor*.'

see inside man, so that vows, which are basically promises to God, need not be communicated in order to become binding.

As has been explained before, the Jesuit moral theologians did not adhere to the distinction between gratuitous promises and contracts anymore, so that they would have to find other arguments than Vitoria if they wished to counter Aquinas' standpoint. As will be illustrated in the next paragraphs, the only Jesuit who seemed willing to go against the common opinion was Luís de Molina. In practice, he argued, external signs are always needed, since they are required by positive law, and a promise can be revoked as long as it has not been accepted by the promisee[631]. Yet the crux of the matter is, and in sorting out this crux Molina deviated from the common opinion, whether outward expression of a promise is also needed as a matter of natural law – the will being the foundation of contractual obligation according to natural law. It may well be that civil law added a further condition to make promises binding besides the *animus obligandi*, namely exteriorization, but should we infer from this that external communication of the promise is also needed for the promisor to be bound in conscience ? In other words, does the requirement to express a promise through external signs merely pertain to civil law or also to natural law[632]?

In Molina's view, the requirement to signify the promise to the promisee is merely civil in nature. Adducing paragraph *Per traditionem* (Inst. 2,1), he argues that nothing is as naturally equitable as to observe the will of the owner. The will is both a necessary and a sufficient source of contractual obligation. Words or other external signs cannot add anything to this obligation, which is founded on the will. They do not contribute to the formation of contractual obligation[633]. Signs are merely vehicles to express the will (*significatio solum instrumentum*)[634]. In Molina's view, exteriorization of the promise has been laid down by statute law for the sake of the common good, because promises need to be accepted in order to become binding as a matter of civil law. However, Molina denies that acceptance is necessary as a matter of natural law in the first place[635]. This is precisely the other point on

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631 Molina, *De iustitia et iure*, tom. 2, tract. 2, disp. 266, col. 63, num. 7 : 'Sane ea quaestio parum utilitatis habet ad praxim, cum enim iure civili, in commune reipublicae bonum, facta sit potestas revocandi promissiones et donationes antequam acceptentur, etiam si verbo aut scripto factae sint, atque adeo, etiam si exterius sint manifestatae (…).'

632 Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 266, col. 63, num. 8 : 'Quod ergo hoc loco potissimum disputare intendimus est, utrum seclusa dispositione iuris civilis, standoque solum intra limites iuris naturalis, donatio mere interna, qua quis diceret secum, dono talem rem meam Petro, aut promitto Petro me daturum illi hanc rem, obliget in foro conscientiae sic donantem aut promittentem (…).'

633 Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 266, col. 64, num. 9: 'Primo, quoniam voces et scripta sunt signa conceptuum, neque vim habent obligandi nisi ex interiori actu quem exprimunt, atque ex voluntatis intentione se obligandi et promittendi (…); ac plane, si ab externa promissione aut donatione auferas voluntatem et intentionem internam se obligandi, tollis in foro conscientiae illius obligationem. Ergo donatio aut promissio mere interna, quantum est ex se, vim habet obligandi in foro conscientiae, non solum si Deo fiat, sed etiam si fiat homini.'

634 Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 266, col. 64, num. 11.

635 Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 266, col. 64, num. 10: 'Secundo, acceptatio, stando in solo iure naturali, necessaria non est ut promissio aut donatio sit valida et irrevocabilis, sed iure positivo in commune bonum introductum est, ut regulariter sit conditio ad id requisita.'

which his view radically differs from the common opinion of the moral theologians. We will come back to it below.

Another argument which Molina brings forward to argue against the necessity of exteriorizing the promise is taken from the Roman law of property (e.g. D. 41,2,3,8). Possession of a thing can be lost if only one does not will to possess it anymore (*possessio sola voluntate non possidendi amittitur*)[636]. Even ownership of a thing can be lost, if one does not will to own that thing anymore and possession of it is lost. It is then considered to be abandoned and becomes the property of the first person who occupies it. Molina illustrates this through the example of boatsmen who do not take the pain to lift the anchors of their ships out of the water when they set out to leave the harbour. They wittingly part with their property and leave it behind. These anchors then become the property of the first person who takes them[637]. By the same token, the right to claim the gift is transferred to the promisee by the mere inner will of the promisor.

Molina acknowledged that his view ran counter to the majority opinion. Moreover, he provided his adversaries with the arguments to rebutt his view. In regard to the argument from property law, for instance, he suggested that the analogy did not hold water, since transferring a right is more difficult than parting with it[638]. Lessius gratefully accepts Molina's suggestion[639]: 'even though possession and ownership can be lost through an internal act, as when a thing is considered to be abandoned, they cannot be transferred to another person, since that requires many things.' One of the decisive elements in Lessius' rebuttal of Molina is the idea that inner acts of the will are not capable of conveying rights by themselves. External signs are not merely instruments of the will. In a remarkabe piece of pragmatic linguistics, Lessius argues that external signs have the effect of making the inner volition effective and real. Language does not passively convey the act of will, it actively creates the very reality it signifies (*sunt signa quaedam practica efficientia id ipsum quod significant*)[640].

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[636] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 266, col. 64, num. 12.

[637] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 266, col. 65, num. 12: '(…) anchoras a propriis dominis relictas in portubus, quia recedunt nolentes sumptus facere aut industriam apponere in eis extrahendis aut quaerendis dicimus haberi pro derelictis et fieri primo occupantis easque extrahentis, ergo pari ratione donatio aut promissio mere interna erit satis stando in solo iure naturali ut donatarius comparet ius a nobis supra explicatum ad rem sibi ita donatam aut promissam.'

[638] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 266, col. 66, num. 19: 'Ad quartum dicat, licet actus internus sufficiat ut, qui illum exercet, aliquid in seipso amittat, non tamen ut transferat ius in alterum, nisi accedat conditio sine qua non, hoc est, manifestatio externa eiusdem actus.'

[639] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 5, num. 32, p. 219: 'Ad secundum, etsi possessio et dominium possunt amitti actu interno, ut cum res habetur pro derelicto, non tamen transferri in alterum. Ad hoc enim plura requiruntur. Facilius enim est aliquid desinere quam incipere esse aut in altero produci. Unde nec ius alteri dari per internam promissionem potest.'

[640] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 5, num. 30-31, p. 219: 'Probabilius tamen videtur, promissionem donationemque internam iure naturae esse insufficientem et invalidam ad obligandum. (…) Ratio est, qui promissio et donatio sunt signa quaedam practica, efficientia id ipsum quod significant. Qui enim dicit, promitto tibi, do tibi, non solum significat internam cogitationem et affectum dandi, sed etiam ipsum actum donationis et promissionis, qui in hisce verbis sub tali intentione prolatis formaliter consistit, et effectum eius, scilicet obligationem, quae nascitur in promittente, et ius, quod nascitur in promissario. Quare cum actus interni non sint idonea signa ad alteri significandum, non sunt etiam instrumenta ad se alteri obligandum, nam haec aptitudo fundatur in significatione ad alterum.'

In all, Lessius epitomizes the majority opinion according to which obligation depends on the will as a necessary, but not as a sufficient condition. Or as Lugo puts it[641], 'albeit that words without inner will do not bind, neither does an inner will without external sign'. To return to Lessius, the will cannot be the cause of obligation 'immediately', that is without the medium of external signs[642]. Similarly, a judge's sentence (*iurisdictio*) is not rendered effective until it is pronounced. Rights cannot be transferred or accorded to other persons through mere inner volition of the promisor alone. Contractual exchange of rights and obligations is a social phenomenon that requires the promisee to participate in the transaction by knowing, by virtue of external communication, what is going on. This leads us to the third indispensable stage in the making of contractual obligation : acceptance by the promisee.

3.3.2.3 Third requirement : *promissio acceptata*

Although it would become standard contract doctrine in the natural law tradition that acceptance is required for an offer to be binding, the question of the status of *pollicitationes*[643], or mere unilateral, unaccepted offers, was an endless source of controversy throughout the centuries[644]. It is probably to the credit of Jesuit moral theologians such as Lessius to have insisted on acceptance as an essential stage in the formation of contractual obligation. This is not to say that all the Jesuits, or, all moral theologians subscribed to that view. On the contrary, Lessius was urged to expound and defend his views precisely in rebuking the argument to the contrary as advocated by Molina. While Lessius underlined the element of mutual consent in the definition of contract, thus requiring the acceptance of the offer by the promisee, Molina focused on the will's capacity of binding itself, regardless of what the promisee did.

The debate on the obligatory nature of a unilateral, unaccepted promise (*pollicitatio*) was particularly vivid among the decretalists. For present purposes, a brief look at Panormitanus should suffice. The inconsistency of his thought on *pollicitationes* mirrors the confusion that reigned among the canonists more generally. In his commentary on canon *Qualiter* (X 1,35,3), Panormitanus argues that *pollicitationes* – understood as promises to an absent party – are enforceable in the ecclesiastical courts[645]. Yet in commenting upon canon

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[641] Lugo, *De iustitia et iure*, tom. 2, disp. 23, sect. 2, num. 34, p. 112: 'Respondeo ex dictis [ad Molinam], verba sine voluntate interna non posse quidem obligare, sed nec voluntatem internam sine signo externo, quia non sufficit ad connexionem sensibilem ponendam, quae fundet ius praelationis ad alios, ut diximus.'

[642] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 5, num. 33, p. 219: 'Etsi tota vis obligandi sit a voluntate, tamen voluntas non potest eam immediate in homine causare absque actu externo tamquam instrumento, alioquin hoc ipso quo interius vellem, alter haberet ius in omnia bona mea, nec possem ea alteri dare vel retinere. Hinc fit, ut etiam iurisdictio sine actu externo dari nequeat, ut communiter theologi docent.'

[643] D. 50,12,3*pr*.: 'Pactum est duorum consensus atque conventio, pollicitatio vero offerentis solius promissum.' Compare Gómez, *Commentarii variaeque resolutiones*, tom. 2, cap. 9, num. 1 p. 289: 'Pollicitatio est nuda et simplex offerentis promissio, non secuta acceptatione creditoris tacite nec expresse (….)'. Gómez took the view that *pollicitatio* is not binding as a matter of civil or canon law.

[644] It still is today, see C. Cauffman, *De verbindende eenzijdige belofte*, Antwerpen 2005.

[645] Panormitanus, *Commentaria super Decretalibus*, tom. 2 (*Super secunda parte primi Decretalium libri*), ad X 1,35,3, f. 132v: 'Et sic videtur quod cum verbum promissio sit multum generale, nedum in pacto quod est

Cum inter universas (X 1,6,18) he doubts the actionability of *pollicitationes* as a matter of canon law[646]. In the mid-sixteenth century, Covarruvias attests to the ongoing nature of the controversy and adds grist to the mill of confusion. He sets out pretty straightforwardly, saying that offers are binding as a matter of canon law[647]. In the context of promises strengthened by oath, he claims that equity demands that offers should be binding without there being a mutual agreement, since the promisor's will is the measure of all things as a matter of natural law (*naturalis obligatio quantum ad meipsum attinet a meo consensu deducitur*)[648]. Yet the discussion meant to buttress the opposite view takes the lion's share of his exposition.

Covarruvias points out that, 'regularly', the canon law considers unaccepted promises as not binding (*regulariter etiam iure canonico ex pollicitatione actio non oritur*)[649]. His reasoning is fundamental: a *pollicitatio* does not produce natural obligation, because natural obligation in contracts arises out of the consent of two parties. This remained a major argument to affirm that acceptance is a necessary stage in the making of contractual obligation, for instance in Lessius (*obligatio non nascitur nisi mutuo duorum consensu*)[650]. Moreover, the requirement of acceptance was not even doubted by Molina. He endorses what he considers to be the common opinion, namely that, as a general rule, *pollicitationes* are not binding either as a matter of civil or canon law[651]. At the same time, he points out why this rule only applies in principle. There is a list of exceptions going back to Roman law (D. 50,12) which concern simple offers to support public projects (*pollicitatio civitati*)[652]. These offers are binding, indeed, from the moment of their expression.

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duorum, sed in pollicitatione, quae est unius tantum, debet habere locum iste textus, nam ex significato huius verbi promittuntur non requiritur quod intervenerit pactum, sed sufficit nuda promissio unius tantum (….).'

[646] Panormitanus, *Commentaria super Decretalibus*, tom. 1 (*Super prima parte primi Decretalium libri*), ad X 1,6,18, f. 135v, num. 13: '(…) ex simplici pollicitatione non agitur de iure civili (…) nec etiam ex pacto nudo (…). Sed de iure canonico posset dubitari et ubi intervenisset pactum recurrendum esset ad c. 1 de pactis. Sed in simplici pollicitatione esset magis dubitandum. Et pollicitatio differt a pacto quia pollicitatio est unius, cum sine pacto promitto tibi aliquid. Pactum vero est duorum (…). Verum simplici pollicitatione non credo quod possit alius agere pro interesse suo, quia c. 1 loquitur de pacto, sed peccat retrocedens, iuxta illud psalmistae, Quae procedunt de labiis meis, non faciam irrita.'

[647] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 15, p. 275: 'Quarto principaliter est hic adnotandum iure pontificio actionem oriri et dari ex pollicitatione, quae est unius promissio absenti non praesenti facta.'

[648] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 16, p. 276: 'Etenim utcumque sit de illa controversia si pollicitationi iuramentum accesserit, aequissimum erit quod ex ea obligatio oritur et actio detur, idemque iure verius videtur, si vim iuramenti diligenter consideremus. Nec enim video quid impediat me naturaliter absenti obligari adhuc nullo cum eo pacto inito, siquidem naturalis obligatio quantum ad meipsum attinet a meo consensu deducitur. Qui consensus perfectissimus est, nisi lex impediat, donec absens ille cui promisi expresse vel tacite obligationem istam remittat.'

[649] Covarruvias, *Relectio in cap. quamvis pactum*, part. 2, par. 5, num. 15, p. 275: 'Igitur regulariter etiam iure canonico ex pollicitatione actio non oritur. Et praeterea constat haec opinio ex eo, quod pollicitatio non producit naturalem obligationem, quae ex consensu duorum oritur.'

[650] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, num. 34, p. 220.

[651] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 263, col. 40, num. 1: 'Convenerunt doctores, promissionem antequam acceptetur, atque adeo antequam in pactum transeat, regulariter neque obligationem civilem, neque actionem in seculari foro parere (….).'

[652] See laws *Pactum* (D. 50, 12, 3*pr*.), which holds that if an offer is made for the sake of honor (*ob honorem*), debt is created, just as in the case where the works promised have effectively been started (*coeptum opus*);

The *pollicitationes civitati* lead us to the heart of one of the biggest points of conflict between Molina and Lessius. The dispute concerned the issue of whether the foundation of the requirement that said that offer needs to be accepted lies in civil law or in natural law. The terms of the debate are similar, then, to the one on the second requirement for promises to be binding, namely exteriorization. Although there was agreement on the practical solution, there was disagreement on the theoretical foundations of the requirement. Another parallel concerns the outcome of the controversy. Molina eventually lost against Lessius. The reason why the *pollicitationes civitati* became the bone of contention around which the debate crystallized is because their bindingness seemed to imply that there was a natural obligation ensuing from an unaccepted promise. The reason why the moral theologians thought this way requires some explanation. It was thought that positive obligation could not exist unless there was an underlying natural obligation. In addition, positive law was thought to be able to qualify or to remove natural obligation.

Molina derives from the existence of positive legal obligation in certain *pollicitationes civitati* the existence of an underlying natural obligation[653]. But given that, as a rule, offers are not binding from the point of view of positive law, he also holds that this natural obligation has in most cases been qualified by positive law. In Molina's view, simple, unilateral and unaccepted promises are binding in principle as a matter of natural law. Only afterward did positive law make this natural obligation dependent on acceptance in all offers, excluding the *pollicitationes civitati*. As a matter of principle and for the sake of the common good, positive law introduced acceptance as a *conditio sine qua non* for offers to become binding. However, citing Covarruvias, Molina claims that the true source of promissory obligation is founded on the promise itself and not on the acceptance, so that offers out of themselves produce natural obligation. This is certainly true in gratuitous promises, where the liberality of the promisor

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Propter incendium (D. 50, 12, 4), which declares an offer binding if it is made for the benefit of the republic in situations of natural disaster (*propter incendium vel terrae motum vel aliquam ruinam*); *Ob casum* (D. 50, 12, 7), which stipulates that the promisor is bound to perform whatever he promised with an eye on a certain act of God (*ob casum*), even if eventually nothing evil happens. Compare Molina, *De iustitia et iure*, tom. 2, tract. 2, disp. 263, col. 61, lit. b-d.

653 Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 263, cols. 46-47, num. 12: 'Hanc sententiam primo persuadet id, quod supra ostendimus, nempe de iure civili ex promissione facta civitati aut reipublicae concedi actionem, esto acceptata non fuerit. Si namque ea promissio, specata sola ipsius natura, vim obligandi non haberet, sane civile ius numquam supra suam naturam et vim id illi tribueret. Licet enim ius aliquando in commune bonum consueverit vim obligandi, quam ex sua natura habent, ab aliquibus contractibus aut actibus auferre, ut ab alienationibus factis a minoribus, aut ab Ecclesiis sine solemnitatibus ad id constitutis, ab alienatione fundi dotlias, a donationibus sine insinuatione factis ultra certam summa et a multis aliis, non tamen consuevit vim actibus ad alienandum supra ipsorum naturam tribuere, praesertim quando alienatio est mere gratuita, qualis ea est, de qua nunc disputamus.'

must not be thwarted by the State[654]. In all, then, the foundation of the acceptance requirement is positive law (*ius positivum*), according to Molina[655].

Although Lessius did not entirely reject Molina's opinion – which he deemed probable – he still thought the contrary opinion to be nearer to the truth: acceptance is required not merely as a matter of positive law, but primarily as a matter of natural law (*ius naturale seu ius gentium*)[656]. Also, it is worthwhile noticing that Lessius made a genuine effort at expounding the principles of a general law of contract. In Molina and Covarruvias the argument wavers somewhat confusingly in between the law of gratuitous promises and the law of promises in general. Lessius tries to harmonize the rules that govern all kinds of promises.

In Lessius' view, the common opinion holding that gratuitous promises regularly do not produce civil or natural obligation until they are accepted is equally applicable to gratuitous promises as it is to all other contracts (*idem in omnibus aliis contractibus*)[657]. Because of the right to revoke a promise before acceptance in onerous contracts, Lessius argues that the same must hold true in gratuitous contracts, as long as positive law does not decide otherwise[658]. Moreover, Lessius argues that both onerous and gratuitous contracts contain a tacit condition (*tacita conditio*), which in the case of onerous contracts can be circumscribed as, 'if the other party wants to be bound in his turn', and 'if they will be accepted' in gratuitous promises and contracts[659]. The ultimate reason, however, why he disagrees with Molina, is that he interprets D. 50,12 and its stipulations concerning *pollicitationes civitati* in a different manner. According to Lessius, law *Pactum* (D. 50,12,3*pr.*) does not attribute irrevocable obligation to a *pollicitatio civitati*[660]. What law

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[654] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 263, col. 47, num. 12: 'Quarto idem persuadet ratio cui Covarruvias loco citato nititur, nempe in gratuitis promissionibus acceptatis obligationem promittentis ex natura rei non oriri ex acceptatione sed ex promissione ipsa, quae ex liberalitate promittere vult ac se obligare donatario sine ulla recompensatione aut mutua obligatione ex parte donatarii.' On this tension between the imperatives of the State and the Christian practicing of the virtue of liberality, see Decock, *Donations, bonnes mœurs et droit naturel*, p. 195-197.

[655] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 263, col. 47, num. 12: 'Sicut autem ius positivum acceptationem donatarii introduxit tamquam conditionem sine qua promissio non obligaret, ita in aliquibus potuit illam omnino remittere, ut in promissionibus civitati factis (…).'

[656] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, num. 39, p. 220: 'Dico secundo, verius videri quod promissio et donatio non habeant vim obligandi ante acceptationem, id provenire non tantum ex iure civili sed etiam ex iura naturali vel iure gentium.'

[657] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, num. 34, p. 219-220.

[658] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, num. 39, p. 220: 'Probatur primo, quia in contractibus onerosis ante acceptationem licitum est ubique gentium poenitere et revocare suam oblationem (…), ergo idem licitum erit in promissionibus et donationibus gratuitis, nisi lex positiva adimat hanc potestatem.'

[659] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, num. 39, p. 220: 'Secundo, sicut promissio vel oblatio onerosa, qua quis se obligat, habet tacitam conditionem, nempe, *Si alter vicissim se velit obligare*, ita etiam promissio et donatio habent tacitam conditionem, *Si acceptentur*.'

[660] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, num. 40, p. 220: 'Ad primam rationem respondeo, ius civile non efficere ut pollicitatio facta civitati vim habeat absolutam ante acceptationem (nihil enim tale colligi potest ex ulla lege toto titulo de pollicitationibus) sed ne possit revocari pro libito, sicut ex natura rei posset, ut patet ex l. 3 eodem titulo. Unde fit ut talis promissio semper possit acceptari et promissum peti; quae petitio videtur necessaria ut tenearis solvere ut iisdem legibus indicatur.'

Pactum does, in Lessius' view, is to prohibit the promisor from arbitrarily revoking his promise.

Even though Lessius' exegesis might come down to the same result as Molina's in practice, it constitutes a different explanatory story with significant consequences on a doctrinal level. While Molina was pressured to assume that offer without acceptance creates a natural obligation in order to explain D. 50,12, Lessius denies that there is any kind of obligation in the special case of *pollicitationes civitati*. What makes these offers particular, in Lessius' opinion, is that they seem to be binding without acceptance, while, in fact, positive law merely denies their promisor the right to revoke his promise (*impedit ne possit revocari*)[661]. Generally speaking, an offer only creates an obligation that is dependent on the suspending or resolutory condition that the offer will be accepted or revoked (*obligatio veluti conditionata et suspensa*)[662]. Positive law does limit natural law in regard to offers, but not through making the alleged natural obligation that arises out of mere promises dependent on acceptance. Acceptance is required by nature itself. If positive law limits nature in the special case of *pollicitationes civitati*, it is through limiting the natural right to revoke an offer, so long as that offer has not been accepted.

Lessius' view that offers require acceptance as a *conditio sine qua non* for producing natural as well as civil obligation was adopted by later Jesuits such as Laymann, Lugo and Oñate. Paul Laymann (1574-1635), a professor of canon law at the University of Dillingen and a confessor to the Emperor Ferdinand II, took sides with Lessius against Molina to conclude that promises are always to be understood in relational terms (*omnis promissio suapte natura respectiva*)[663]. The consent by the promisee is of the essence for the creation of obligation. Lugo reminds us that it is impossible to convey ownership or possession of a thing without the consent of the promisee[664]. Oñate considers acceptance an essential part of all contracts (*acceptatio de essentia omnium contractuum*). Along with the offer, acceptance is the second essential juristic act which constitutes the essence of contract (*altera pars essentialis contractuum*)[665]. The view that acceptance is necessary also became an integral

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[661] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, num. 40, p. 220: 'Unde tunc ius civile non tribuit proprie pollicitationi vim quam iure naturali vel gentium non habet, sed impedit ne possit revocari.'

[662] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, num. 40, p. 220: 'Itaque ex pollicitatione omni nascitur quaedam obligatio veluti conditionata et suspensa donec acceptetur vel revocetur, quam revocationem ius positivum potest impedire.'

[663] Paul Laymann, *Theologia moralis*, Monachii 1630, lib. 3, tract. 4 (*De pactis et contractibus*), cap. 1, num. 3, p. 371: 'Sed Sotus, Gomez, Lessius loc. cit., Sanchez lib. 1 de matrim. disp. 7 num. 24 et alii plerique contrarium sentiunt, omnem promissionem suapte natura respectivam esse, cuius proinde vis et obligatio ex alterius partis consensu, tamquam a forma sua, dependeat.'

On Laymann, see R.L. Bireley, *Paul Laymann*, in : C. O'Neill – J. Domínguez (eds.), Diccionario Histórico de la Compañía de Jesús, Biográfico-Temático, Roma-Madrid 2001, vol. 3, p. 2297-2298.

[664] Lugo, *De iustitia et iure*, tom. 2, disp. 23, sect. 3, num. 39, p. 114: 'Ratio itaque petenda est ex supra dictis, quia licet aliquis possit sua sola voluntate amittere dominium vel possessionem rei suae, non tamen potest sola sua voluntate facere quod res sua ad alium pertineat. Ad hoc enim requiritur etiam consensus illius ad quem pertinere debet.'

[665] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 4, num. 45, p. 100 : 'Moveor quia acceptatio est de essentia omnium contractuum et altera pars omnium essentialis eorum, ut saepissime in hoc opere probavi.'

part of Grotius', Domat's and Pothier's natural law doctrine on the making of contractual obligation.

3.3.3 The interpretation of contractual obligation

3.3.3.1 Fictitious and doubtful promises

If contractual obligation primarily relies on the will and the intent of the promisor (*animus obligandi*), then how can the promisee's reliance on the external declaration of promise be protected if the promise turns out to lack *animus obligandi*? If the obligation of the promisor is only apparent, then what remedies are granted to the promisee ? Put more technically, what is the status of a fictitious promise (*promissio ficta*)? Not surprisingly, this is a question that was treated extensively by Tomás Sánchez in his treatise on marriage law. Fictitious marriages or marriages of convenience, in which at least one of the parties declares marriage without having the intent of truly binding him- or herself, have preoccupied theologians and jurists until the present day. Sánchez's emphasis on the presence of *animus obligandi* for the marriage contract to be binding was in line with the scholastic tradition and eventually prevailed, although, at first, it met with fierce criticism from Gabriel Vázquez.

Sánchez elaborates on the value of fictitious promises in the context of his doctrine of engagement contracts (*sponsalia*). As a preliminary remark, he excludes the possibility of doubt about the status of engagements entered into with the intent of obligation (*animus obligandi*) but without intent of fulfilling the obligation (*animus non implendi*). Indisputably, that kind of promise is binding, if only because such a morally objectionable intention (*pessima intentio non implendi*) cannot exempt one from the natural obligation that is produced by the *animus obligandi*[666]. Hence, the real crux of the matter concerns promises that have been entered into with the intention of making a promise, but without the intention of binding oneself. The question is whether those fictitious promises are binding either as a matter of contract law, or as a matter of torts law[667].

Sánchez concludes that it is nearest to the truth to hold that fictitious promises are not binding by virtue of the promise itself, since the *animus obligandi* is of the essence of promise[668]. 'Every obligation which does not ensue from a law comes into existence through

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[666] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 9, num. 2, p. 29-30 : 'Certum igitur est si promittentes animum se obligandi habeant | non tamen implendi, esse vera sponsalia, obligareque, quia pessima non implendi intentio rem promissam non eximit ab obligatione quae ex ipsa promissione animo se obligandi emissa naturaliter consurgit.'

[667] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 9, num. 2, p. 30 : 'Tota igitur difficultas est, quando promittens habuit promittendi animum et positive habuit animum se non obligandi. Et de huiusmodi promissionis fictae obligatione bifariam disputari potest : 1. an obliget ex vi promissionis et sponsalium ; 2. an saltem obliget ratione fraudis ad resarciendam iniuriam illatam.'

[668] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 9, num. 5, p. 30 : 'Secunda sententia verior affirmat nec esse sponsalia nec ex vi promissionis obligare. Probatur ex c. fin. de condit. appos. ubi conditio contraria substantiae matrimonii ipsum annullat, licet verba et intentio essent contrahendi. Ergo cum de natura promissionis et sponsalium sit animus se obligandi, ubi contrarius animus adfuerit, nulla erunt.'

the private will of man', Sánchez argues[669], 'so where the will to bind is absent, the obligation is absent.' He further adduces the metaphor of contract as a private law[670]: 'promissary obligation arises out of a private law which the promisor imposes upon himself, but no law is binding unless the legislator intends it to be binding (*nulla lex obligat nisi legislator obligare intendat*).' Consequently, the will is the measure of contractual obligation. The promisor cannot be bound by virtue of his fictitious promise. However, Sánchez proceeds to explain that he can be bound to perform his promise on account of the harm he inflicted upon the promisee through his fraudulent behavior (*ratione fraudis et iniuriae illatae*). In other words, fictitious promises can give rise to delictual liability.

There is a lot of casuistry involved in Sánchez's determining what the consequences of fictitious promises of engagement are in terms of the obligations that follow from the harm done to the promisee. By way of an illustration, imagine the typical situation of a man who promises to marry a virgin in order to have intercourse with her, only to leave her after the first night they spent together[671]. He pretends that he had not made the promise to marry her with the intention of being bound. The question raised by Sánchez is whether restitution of the harm done through this fictitious promise, namely defloration, consists in monetary compensation or in specific performance. He concludes that the man must marry her on pain of mortal sin, since justice in exchange is not observed by merely paying damages[672]. Again, this solution is subject to qualifications. For example, since the girl should have known that this man was only trying to have sex with her, because he belonged to a more noble class than she did, or because it was clear from his words, perhaps she should blame herself for her naivety[673].

The most fierce attack against Sánchez's opinion that fictitious promises cannot be binding by virtue of the promise itself was launched by one of his fellow Jesuits, Gabriel Vázquez. In his relatively thin, posthumously published treatise on the sacrament of marriage, Vázquez argued that the declaration of the promise to marry was sufficient to bring about contractual obligation, regardless of the *animus obligandi*[674]. His was definitely not to become the majority opinion[675]. Transposing the discussions on fictitious *sponsalia* on a more general

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669 Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 9, num. 5, p. 30 : 'Probatur quia omnis obligatio quae non est ex lege oritur ex privata hominis voluntate, ergo ubi deest se obligandi voluntas deficit obligatio.'

670 Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 9, num. 5, p. 30 : 'Tandem, quia obligatio promissionis consurgit ex lege privata, quam promittens sibi imponit, nulla autem lex obligat, nisi legislator obligare intendat.'

671 Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 10, num. 2, p. 33 : 'Quaestio prima. An ficte promittens matrimonium et sub ea spe deflorans virginem teneatur eam ducere.'

672 Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 10, num. 3, p. 33 : 'Omnino tamen dicendum est teneri sub culpa lethali eam ducere. Probatur quia iustitia commutativa non tantum petit reddi aequale, sed ut idemmet reddatur ex iustitia debitum, ut si equum furatus sum, nulla restituta pecunia satisfaciam, unum enim pro alio invito creditore solvi non potest, l. 2, par. Matri, ff. Si cert. petat.'

673 Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 10, num. 5-7, p. 33-34.

674 Gabriel Vázquez, *De matrimonii sacramento*, in : Commentaria ac disputationes in tertiam partem Summae Theologiae divi Thomae, Lugduni 1631, tom. 4, disp. 6, p. 348-354.

675 See the lengthy refutation of Vázquez's argumentation in Lugo, *De iustitia et iure*, tom. 2, disp. 23, sect. 1, num. 6-10, p. 104-106.

level and applying Sánchez's conclusion to all contracts, Leonardus Lessius argued that a promise without serious intent to be bound could not be enforced by virtue of the promise itself. On the other hand, he acknowledged that the promisee's reliance on the promisor's declaration should be protected through the law of torts, so that the fictitious promisor could still be bound by virtue of the harm he inflicted upon the promisee[676]. 'Faith in contractual affairs (*fides contractuum*) would crumble,' Lessius warned[677], 'if promisors could free themselves of their obligation simply by saying that they had made a fictitious promise.'

An issue that was often raised in conjunction with fictitious promises concerned the interpretation of a doubtful promise (*promissio dubia*). While fictitious promises create confusion because of the disparity between the promisor's intention and the promisee's perception of the promise, the status of doubtful promises is not even clear to the promisor himself. Basically, the promisor is in doubt whether he has promised with the intention of truly binding himself or not. This is probably a typically moral theological rather than a juridical question, but the solutions that were forged to deal with are another testimony to the juridical manner in which theologians resolved what we now consider to be moral problems. As can easily be expected from what has been discussed before, the solution to the issue of doubtful promises turned on probabilism. More specifically, a crucial role was to be played by the probabilistic maxim – borrowed from the law of property and procedure – that if in doubt, the condition of the possessor is stronger (*in dubiis melior est conditio possidentis*).

From the propositions that a promisor is in doubt about his *animus obligandi*, and, that if in doubt, the condition of the possessor is the stronger, one might be tempted to infer that doubtful promises are not binding. However, the debate about the bindingness of doubtful vows and doubtful contractual promises runs into casuistical analysis, which would need much more attention than can be afforded in this chapter[678]. Interesting discussions that witness the central role played in this debate of the conceptions of liberty, possession and probabilism can be found in Sánchez and Lugo[679]. Let it suffice here to quote Lessius' intermediary standpoint. On the one hand, he sets out by confirming the principle that in both courts no obligation should be imposed if there is doubt about the promisor's intention. Yet he goes on to state that a doubtful promise should be interpreted so as to be binding (*in dubio in utroque foro interpretandum valere*)[680].

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[676] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub, 8 num. 59, p. 225 : 'Si tamen promissarius putaret alterum serio promisisse et inde postea contingeret illum damno affici (ut quia non potest solvere ad diem condictum) promissor tenetur implere sub peccato mortalie, quia illo modo promittendi illum decepit, eaque deceptio est causa sine qua non damni secuti, quod ut evitetur, debet promissum praestare.'

[677] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub, 8 num. 60, p. 225 : 'Adde, nullam fore fidem contractuum inter homines, si hac ratione se possent expedire, dicendo se ficte promisisse.'

[678] Soto's allegedly trail-blazing application of the *possidentis*-principle to doubtful vows is discussed by R. Schüßler, *Moral self-ownership and* ius possessionis *in scholastics*, in: V. Mäkinen – P. Korkman, Transformations in medieval and early modern rights discourse, [The new synthese historical library, 59], Dordrecht 2006, p. 156-159.

[679] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 9, num. 11-14, p. 31-33 ; and Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 5, num. 65-66, p. 17-18.

[680] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub. 1, num. 7, p. 216-217 : 'Dices, quid si promissor sit dubius quo animo verbis promissoriis usus sit ? Respondeo, in utroque foro inclinandum esse in eius favorem, quia in dubio

Lessius' position on doubtful promises is motivated by the concern to find a balance between the will of the promisor and the protection of the promisee's reliance on the verbal expression of the promise. In fact, Lessius argues that there is no *paritas conditionis*, since there is certainty about the promissory declaration, which is in favor of the promisee, while there is uncertainty about the intention of the promisor[681]. Only if it can be established in an equally certain way that the promisor had no *animus obligandi* – which is hardly the case in practice – does the probabilistic maxim apply.

3.3.3.2 Legally *vs* morally binding promises

One of the reasons why the early modern, Catholic moral theologians' engagement with contract law has proven to be elusive is the difference between the modern and the early modern understanding of the relationship between law and morality. As highlighted above, the modern, Protestant way of distinguishing law from morality, which becomes evident in thinkers such as Pufendorf, limits the task of the moral theologians to the study of duties as they derive from divine Revelation, reserving the study of *ius naturale* to natural lawyers and the knowledge of *ius positivum* to civil jurists. Yet the Catholic moral theologians in the early modern period failed to make these distinctions. As highlighted above, all bodies of law (*iura*) were considered to be relevant sources of norms guiding man on his earthly pilgrimage to God. Therefore, the theologians had to know all of those sources of norms. Morality was thought of in legal terms, and law could not escape from its embeddedness in a moral universe. This is where a short digression into question 80 of Thomas Aquinas' *Secunda Secundae* may prove helpful.

In fact, theologians did make the distinction between morality and law. Yet they did so on another level, namely inside the system of virtues – a concept that nowadays is commonly associated with the realm of morality. As Thomas explains, there is a difference between moral debt (*debitum morale*) and legal debt (*debitum legale*). Legal debt is ruled by the virtue of justice itself, while moral debt is governed by virtues connected to justice[682]. Thomas explains that some types of human exchange cannot fall within the scope of the virtue of justice, strictly understood, because they fall short of perfect equality[683]. In principle, the

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non est imponendum onus, quod, nisi sponte, non suscipitur. Ita multi doctores. Verius tamen puto, si verba expressam promissionem prae se ferunt, in dubio in utroque foro interpretandum valere et obligationem induci, maxime in voto.'

[681] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub. 1, num. 7, p. 217 : 'Confirmatur quia hic non est par conditio promissoris et promissarii. Nam constat de verbis promissionis, quae favent promissario, ergo haec servanda, nisi aliunde constet defuisse animum.'

[682] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 9), IIaIIae, quaest. 80, art. 1, concl., p. 174: 'A ratione vero debiti iustitiae defectus potest attendi secundum quod est duplex debitum, scilicet morale et legale, unde et philosophus, in VIII Ethic., secundum hoc duplex iustum assignat. Debitum quidem legale est ad quod reddendum aliquis lege adstringitur, et tale debitum proprie attendit iustitia quae est principalis virtus. Debitum autem morale est quod aliquis debet ex honestate virtutis.'

[683] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 9), IIaIIae, quaest. 80, art. 1, concl., p. 174: 'Ratio vero iustitiae consistit in hoc quod alteri reddatur quod ei debetur secundum aequalitatem, ut ex supradictis patet. Dupliciter igitur aliqua virtus ad alterum existens a ratione iustitiae deficit, uno quidem modo, inquantum deficit

virtue of justice is geared towards giving another person his due so that equality in between these persons is maintained. Borrowing from Aristotle, Thomas argues that it will not always be possible to render the exact counter-value in human relationships. For example, a child can never make up for the gift of life and the education it received from its parents. Therefore, this type of relation will be governed by virtues connected to justice, e.g. piety (*pietas*).

The first conclusion to be drawn from Thomas is that legal debt is owed by virtue of justice (*iustitia*), while moral debt is owed by the related virtue of honesty (*honestas*). Thomas goes on to explain that not all moral debt must necessarily be rendered for the virtue of honesty to be observed. He distinguishes between moral debt that must be rendered lest honesty be violated, and moral due that does not break honesty, even if it is not rendered. Examples of the former include moral debt owed as a matter of truthfulness in speaking to others (*veritas*), gratefulness in compensating another person for a benefit (*gratia*), and vindication in 'compensating' another person for an evil act (*vindicatio*). Performing this type of moral debt is absolutely required if moral honesty is to be preserved (*sine eo honestas morum conservari non potest*)[684]. Examples of the latter type of moral debt, which is conducive to virtue but not absolutely necessary, include what is due by virtue of liberality (*liberalitas*), affability (*affabilitas*), or friendship (*amicitia*). These types of debt are much less coercive. Moral rectitude can be attained without practicing liberality or friendship (*sine quo honestas conservari potest*)[685]. It will merely make life less complete from a moral point of view.

The early modern scholastics developed Thomas' taxonomy of debt and virtue further while respecting the main lines of his argument. Of principal concern in this context is how the distinction between moral and legal debt was brought to bear on contractual obligation. In a controversial piece of commentary on question 113 of Thomas' *Secunda Secundae*, Cardinal Cajetan claimed that promises were enforceable merely as a matter of moral debt. Moreover, he opined that promises were only binding on pain of venial sin[686]. Cajetan's standpoint

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a ratione aequalis; alio modo, inquantum deficit a ratione debiti. Sunt enim quaedam virtutes quae debitum quidem alteri reddunt, sed non possunt reddere aequale.'

[684] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 9), IIaIIae, quaest. 80, art. 1, concl., p. 174-175: 'Debitum autem morale est quod aliquis debet ex honestate virtutis. Et quia debitum necessitatem importat, ideo tale debitum habet duplicem gradum. Quoddam enim est sic necessarium ut sine eo honestas morum conservari non possit, et hoc habet plus de ratione debiti. Et potest hoc debitum attendi ex parte ipsius debentis. Et sic ad hoc debitum pertinet quod homo talem se exhibeat alteri in verbis et factis qualis est. Et ita adiungitur iustitiae veritas, per quam, ut Tullius dicit, *immutata ea quae sunt aut fuerunt aut futura sunt, dicuntur*. Potest etiam attendi ex parte eius cui debetur, prout scilicet aliquis recompensat alicui secundum ea quae fecit. Quandoque quidem in bonis. Et sic adiungitur iustitiae gratia, in qua, ut Tullius dicit, *amicitiarum et officiorum alterius memoria, remunerandi voluntas continetur alterius*. Quandoque vero in malis. Et sic adiungitur iustitiae vindicatio, per quam, ut Tullius dicit, *vis aut iniuria, et omnino quidquid obscurum est, defendendo aut ulciscendo propulsatur*.'

[685] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 9), quaest. 80, art. 1, concl., p. 175: 'Aliud vero debitum est necessarium sicut conferens ad maiorem honestatem, sine quo tamen honestas conservari potest. Quod quidem debitum attendit liberalitas, affabilitas sive amicitia, et alia huiusmodi. Quae Tullius praetermittit in praedicta enumeratione, quia parum habent de ratione debiti.'

[686] If the secondary literature is reliable, then it does not seem easy to give a short answer to the question of what differentiates venial sin (*peccatum veniale*) from mortal sin (*peccatum mortale*). From the almost five hundred columns devoted to the distinction in the *Dictionnaire de Théologie Catholique*, the following sentence may be

produced a storm of critique for more than a century. Although theologians remained divided on the question of how to determine the extent of promissory obligation exactly, the early modern scholastics universally agreed that what distinguishes contracts properly speaking from social agreements is the creation of juridically enforceable rights and obligations.

Cajetanus argues that the promisor is merely bound to perform by virtue of honesty (*honestas*) and not by justice, since fulfilling promises is a matter of fidelity (*fidelitas*) and truth (*veritas*)[687]. He infers from this that promises are to be fulfilled on pain of venal sin, since the virtues of fidelity and truth are merely binding on pain of venial sin[688]. The only situation in which he can imagine the promisor to be bound on pain of mortal sin is in the case that the non-fulfillment seriously harms the promisee, thus going against charity. Cajetan's analysis drew a scathing critique from Soto[689]: 'promising is not simply a matter of truth, but of commutative justice'. Soto's critique was amplified by Lessius. The Antwerp Jesuit insists that promising does not merely come down to a factual affirmation of what the promisor is going to do or give in the future. Promising is about the creation of obligation (*obligatio*) and, hence, the conveyance of a right (*ius*), so that the promisee can enforce the promise. Promise is debt, namely legal debt. To say that promises are merely binding by virtue of *veritas* is to confound promises and declarations about the future[690].

Importantly, Lessius maintains that all contractual obligations are binding as a matter of justice (*omnis obligatio contractuum est obligatio iustitiae*), regardless of whether they are produced by onerous or gratuitous contracts[691]. This point is stressed by all his successors. As mentioned before, Oñate eventually defined contract as an agreement that is binding as a matter of commutative justice (*contractus est pactum obligans ex iustitia commutativa*)[692].

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retained: 'Le péché est mortel qui fait contracter au coupable la dette d'une peine éternelle, véniel qui n'emporte l'obligation que d'une peine temporelle.' Cf. M. Jugie, s.v. *Péché*, in : Dictionnaire de Théologie Catholique, Paris 1933, tom. 12, 1, col. 227. Alternatively, the following elucidation may be cited for what it is worth: 'By mortal sin, a created good is preferred to God Himself, in fact, the sinner places his last end in the creature and turns away from God as his natural and supernatural destiny'; cf. W.A. Huesman, *The doctrine of Leonard Lessius on mortal sin*, Excerpta ex dissertatione ad lauream in Facultate Theologiae Pontificae Universitatis Gregorianae, Romae 1947, p. 34. Turning to the primary sources does not bring much relief. See, for instance, the seemingly unending and overly subtle discussion in Francisco Suárez, *Tractatus de vitiis et peccatis*, disp. 2, in: Opera omnia, editio nova a D.M. André, canonico Rupellensi, Parisiis 1856, tom. 4, p. 519-542.

[687] Birocchi, *Causa e categoria generale del contratto*, p. 120, n. 69.

[688] Cajetanus, *Commentaria ad Secundam Secundae divi Thomae* (Ed. Leonina, tom. 9), ad quaest. 113, art. 2, p. 440, num. 8: 'Nam ex sola ratione promissionis violatae, licet ratio peccati habetur, quia est contra rationis naturalis rectitudinem, non tamen habetur ratio peccati mortalis, nisi ad aliquid contra caritatem Dei aut proximi descendatur.'

[689] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 4), lib. 7, quaest. 2, art. 1, p. 630: 'Enimvero promittere non pertinet simpliciter ad virtutem veritatis, sed reducitur ad commutativam iustitiam. Non enim est utcumque verum asserere, sed obstringendo alteri fidem.'

[690] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub. 8, num. 52, p. 223-224 : '(...) hoc fundamentum Cajetani non est verum. Primo, quia promittere non tantum est affirmare se daturum vel facturum, sed ulterius est se obligare | alteri et consequenter ius illi tribuere ad exigendum. Unde dici solet, *promissionem parere debitum*. Secundo, quia inde sequeretur, eum qui promittit non magis obligari quam eum qui absque promissione affirmat se facturum, quod constat esse falsum communi hominum usu et sensu.'

[691] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub. 8, num. 55, p. 224 : 'Omnis obligatio contractuum est obligatio iustitiae, et non oritur nisi promissione. Ergo promissio inducit obligationem iustitiae.'

[692] Oñate, *De contractibus*, tom. 1, tract. 1, disp. 1, sect. 3, num. 26, p. 7.

We have also seen him expressly distinguishing promises binding by virtue of moral debt (*ex aliis virtutibus, ut ex gratitudine, pietate, misericordia, liberalitate vel ex honestate*) and truly contractual promises binding by virtue of justice (*ex iustitia commutativa*)[693]. The criterion he used for distinguishing these legally binding promises from morally binding promises was the foundation of obligation, namely the will. However, this was something the moral theologians were not entirely unanimous about. Whether the ultimate criterion to decide whether a promise is legally or morally binding must be entirely subjective or rather take into account objective circumstances led to lengthy argumentation on both sides.

Apart from the almost general rejection of Cajetanus' quite monolithic statement that promises are binding as a matter of truth or fidelity, two opinions circulated on the extent to which promises are binding. Lessius defended the view that not only subjective, but also objective factors should play a role in determining whether a promise produces moral or legal debt. The motivation behind this balanced view recalls Lessius' concern for the rights of the promise, which we have seen in his interpretation of dubious promises. In notable matters (*materia notabilis*), he holds that serious gratuitous promises (*promissio serio facta*) are binding on pain of mortal sin, amongst other reasons, because it is common opinion that onerous promises, once accepted, must be performed on pain of mortal sin[694]. A matter is 'notable' if the thing exchanged is notable, that is, if it is considered notable in theft[695].

Lessius also holds that the fiction of promise created by the apparent meaning of a declaration can create true contractual obligation[696]. Assume that a person suffers damage from relying on a statement that he mistakenly considers to be a promise. The perceived promisor is then bound to perform the apparent promise on pain of mortal sin, even though he was not serious about making a promise (*non animo serio*). This standpoint would have been much more difficult to defend by Molina, Lugo, and Oñate, who insisted that the sole criterion to determine the extent of promissory obligation was the subjective intention of the promisor (*ex intentione*) – an opinion that Lessius also found probable but less convincing than his own point of view[697]. In the case of dubious promises, Molina argues that the will of the perceived promisor is decisive for interpreting whether there is an obligation as a matter of

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[693] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 1, num. 4, p. 86, col. 2.

[694] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub. 8, num. 55, p. 224 : 'Tertia sententia est communior doctorum, promissio si materia notabilis est, obligare sub peccato mortali. Pro qua dico primo, omnis promissio serio facta animo promittendi in re magni momenti, ubi acceptata fuerit, obligat sub peccato mortali ad sui impletionem. (...) Probant secundo, promissio onerosa acceptata obligat lege iustitiae, ut omnes fatentur, ergo etiam gratuita.'

[695] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub. 8, num. 56, p. 225.

[696] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub. 8, num. 58, p. 225 : 'Dico secundo, si quis utatur verbis promissoriis non quidem animo serio promittendi sed tantum ad significandum firmum propositum vel ad firmius asseverandum, ut ei credatur, non obligabitur sub peccato mortali ad implendum quod ita promisit, nisi ratione damni inde secuti. (...) Si tamen promissarius putaret alterum serio promisisse et inde postea contingeret illum damno affici (ut quia non potest solvere ad diem condictum) promissor tenetur implere sub peccato mortali, quia illo modo promittendi illum decepit, eaque deceptio est causa sine qua non damni secuti.'

[697] Lessius, *De iustitia et iure*, lib 2, cap. 18, dub. 8, num. 54, p. 224 : 'Secunda sententia est, obligationem promissionis pendere ex intentione promittentis. Si enim promissor intendat se solum obligare ex honeste morali, solum tenebitur sub peccato veniali. Si vero intendat se obligare stricte et ex iustitia, tunc tenebitur sub peccato mortali. Ita Molina supra, estque probabilis, sed non satis explicat vim promissionis, quantum ipsa per se, praecisa intentione extrinseca, obliget.'

justice or merely as a matter of honesty (*ad proferentis animum recurrendum*)[698]. Lugo endorses Molina's opinion : if you promise with the intent of binding yourself legally, then you are bound on pain of mortal sin, while promises made with the intent of producing moral debt bind on pain of venal sin. The will is the measure of everything (*pendet ex animo promittentis*)[699].

3.3.3.3 Implied conditions and changed circumstances

If the will is the measure of all things contractual from the perspective of natural law, then what impact do changed circumstances have on contractual obligation ? The short and straightforward answer to this question is implicit in the Portuguese Jesuit Manuel de Sá's (1528-1596) successful booklet of aphorisms: 'In a general obligation, even if strengthened by an oath, those things which you did not intend are not included. Those things seem to be all the things to which you would not have bound yourself if you had then thought about them[700].' The implication is clear : changed circumstances that negatively affect the position of the promisor do not fall within the scope of contractual obligation. An even more concise formulation of this idea is contained in the common expression that nothing is willed if it has not been foreseen (*nil volitum quin praecognitum*)[701]. Following an alternative formulation of this common dictum (*voluntas non fertur in incognitum*), Lessius maintains that the will does not cover what is unknown[702]. Hence[703],

> Every dissoluble contract contains the following tacit condition (*tacita conditio*) as a matter of the law of nations, namely that the contracting party will remain loyal to the contract unless he finds out that he has been gravely mistaken, namely through such mistake (*error*) which is the cause of the contract (*causa contractus*).

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[698] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 262, col. 37, num. 2. Incidentally, Molina expressly associated debt pertaining to the virtue of honesty, as opposed to debt deriving from justice, with morality and politics. Telling, in this respect, is his employing the fixed expression 'moral or political honesty' (*honestas politica ac moralis*); e.g. *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 262, col. 39, num. 10 : 'Illud postremo observa circa promissionem, qua quis solum *ex honestate politica ac morali* intendit se obligare, quod cum obligatio, quae ex ea resultat, et sit ad alterum, et non sit ex iustitia, sed ex morali solum honestate, consequens est, ut fidei virtus, qua quis ex ea promissione tenetur, et sit virtus iustitiae annexa, quatenus est ad alterum, et nihilominus deficiat a perfecta ratione iustitiae, quatenus, quod ex ea est debitum, est solum debitum *ex honestate morali*.' [italics are ours]

[699] Lugo, *De iustitia et iure*, tom. 2, disp. 23, sect. 6, num. 90, p. 127-128.

[700] Manuel de Sá, *Aphorismi confessariorum ex doctorum sententiis collecti*, Antverpiae 1599, s.v. *obligatio*, num. 2, p. 239-240: 'In obligatione generali, etiam cum iuramento, non veniunt ea quae non intendebas. Talia autem videntur esse quae si tunc cogitasses ad ea te non obligasses.' For biographical details on Sá, who taught theology at Alcalà and at the Collegio Romano, see A. Leite, *Sá, Manuel de*, in : C. O'Neill – J. Domínguez (eds.), Diccionario histórico de la Compañía de Jesús biográfico-temático, Roma-Madrid 2001, vol. 4, p. 34-54.

[701] *Pro ceteris*, Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 2, lib. 7, disp. 18, num. 1, p. 69.

[702] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 11, num. 74, p. 214.

[703] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 29, p. 199: 'Unde omnis contractus solubilis iure gentium videtur habere hanc tacitam conditionem, quod contrahens stabit contractu nisi deprehenderit se graviter deceptum, id est, tali errore qui sit causa contractus.'

In other words, the quite classical idea that contracts do no longer bind if circumstances change considerably now becomes part of the doctrine of the vices of the will. Changed circumstances and mistake are two sides of the same coin. In both cases, the decisive reason for entering into a contract is lack of sufficient knowledge. Whether the legitimate ground to annul the contract exists before you enter into the contract (*causa praecedens*), as in the case of what we now call error, or only supervenes once you have concluded the contract (*causa superveniens*), as in the case of changed circumstances, the promisor's will turns out to have chosen a course of action which it would not have taken under full knowledge. In both cases, the will turns out to be deceived. Therefore, all contractual obligation is entered into under the tacit or implied condition (*tacita conditio*) that the will is not mistaken in regard to past, present or future circumstances. As Reinhard Zimmermann has sharply noted, once the foundation of contractual obligation came to rest on the will, the frustration of contractual obligations also had to be formulated in terms of the will[704]. This is exactly what we see happening in the moral theologians' doctrine of contract.

As Tomás Sánchez remarks, prenuptial agreements include the following implied condition: 'if things will have remained in the same state' (*si res in eodem statu permanserint*), or, put differently, 'if no cause supervenes, or a preceding cause comes fresh to light which is legitimate to dissolve the contract of engagement (*causa legitima ad ea dissolvenda*)'[705]. Lessius defends the voidability ensuing from mistake in the modern sense of the word by making reference to changed circumstances[706]: 'If such happened after the conclusion of contract, he would not be bound to perform any more, since the state of the things have notably changed (*status rerum notabiliter mutatus*). Consequently, he will also not be bound to perform anymore if that which was hidden at the outset comes to light during the contract.' The reason for the analogy is obvious: 'To supervene afresh (*supervenire de novo*), to be brought to light (*proferri in lucem*), or to begin to be known (*incipere cognosci*) are the same.'[707]

The incorporation of the teachings on changed circumstances into the doctrine of mistake did not happen immediately. For example, Soto contents himself to repeat the traditional view without more, namely that promises are no longer binding if performance has become unuseful, noxious, impossible or pernicious[708]. This idea reaches back at least to

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[704] R. Zimmermann, '*Heard melodies are sweet, but those unheard are sweeter' – Conditio tacita, implied condition und die Fortbildung des Europäischen Vertragsrechts*, Archiv für die civilistische Praxis, 193 (1993), p. 167.

[705] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 67, num. 2, p. 112 : 'Sponsalia autem habent tacitam conditionem, si res in eodem statu permanserint, id est, si causa non superveniat aut praecedens nove cognoscatur legitima ad ea dissolvenda'.

[706] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 33, p. 200: 'Quia si tale quid post contractum eveniret, non teneretur illum implere, eo quod status rerum sit notabiliter mutatus, ergo etiam non tenebitur, si id quod ab initio latebat, postea se aperiat. Nam paria sunt, supervenire de novo, et proferri in lucem seu incipere cognosci.'

[707] Curiously, Lessius rejects precisely this analogy (used as an argument by Juan de Medina) in solving the case of the Merchant of Rhodes; cf. Lessius, *De iustitia et iure*, lib. 2, cap. 21, dubit. 5, num. 41-42.

[708] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 4), lib. 7, quaest. 2, art. 1, p. 631: 'Ut si quid tibi promisi tibi postea sit inutile aut nocuum, ut si gladium tibi promisi quo postea video te velle

Cicero and Seneca. Cicero reasoned that the reason why promises were to be kept was that, under normal circumstances, this principle contributed to the achievement of two principles that were even more important, namely the no-harm principle and the principle that the common good must be served[709]. However, if the achievement of these principles gets frustrated through keeping a promise, then it is better not to observe the promise in the first place. The rule that one ought to keep one's promises is subordinate to other rules of justice. Hence, it is appropriate in certain cases to deviate from the principle that promises are binding, otherwise justice would turn into injustice (*summum ius, summa iniuria*)[710]. Cicero narrates the story of a lawyer who promised to litigate but whose son suddenly fell ill, needing the care of his father[711]. In a utilitarian manner, it is concluded that since the utility in staying at home with his son is greater than the utility in going to court, the lawyer can break his promise. By the same token, he thinks it is a duty to refuse to return a sword to a depositor who has gone mad by the end of the deposit contract[712]. Cicero thus laid the foundations of a general principle of frustration of contract by virtue of changed circumstances[713]. Seneca confirmed this. He claimed that promises always come on condition that circumstances remain unchanged (*si nihil inciderit quod inpediat*)[714].

Another important step toward a general application of the doctrine of frustration, particularly under the guise of the *tacita conditio*, came with Thomas Aquinas. He firmly adhered to Seneca's principle that promises are binding on condition that circumstances remain the same. In this manner, Thomas is able to excuse Saint Paul's not fulfilling his promise to travel to Corinth. If the conditions of persons and the business in general change (*mutatae conditiones personarum et negotiorum*), then a promisor can be excused from not fulfilling his promise[715]. A promisor binds himself under the implicit assumption of the due

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abuti, aut si promittenti factum est impossibile aut perniciosum, ut si promisi pecuniam quam postea ob infortunium reddere non possum, aut si mihi ingratitudinis signa exhibuisti.'

[709] Cicero, *De officiis*, 1, 10, 31, in : *Cicéron, Les devoirs, Livres 1*, Texte établi et traduit par Maurice Testard, [Collection des Universités de France], Paris 1965, vol. 1 (hereafter : Ed. Testard, vol. 1) , p. 119 : 'Referri enim decet ad ea, quae posui principio, fundamenta iustitiae, primum ut ne cui noceatur, deinde ut communi utilitati serviatur. Ea cum tempore commutantur, commutatur officium et non semper est idem.'

[710] Cicero, *De officiis* (Ed. Testard, vol. 1), 1, 10, 33, p. 120.

[711] Cicero, *De officiis* (Ed. Testard, vol. 1), 1, 10, 32, p. 119-120.

[712] Cicero, *De officiis*, 3, 25, 95, in: *Cicéron, Les devoirs, Livres 2-3*, Texte établi et traduit par Maurice Testard, [Collection des Universités de France], Paris 1970, vol. 2 (hereafter : Ed. Testard, vol. 2), p. 122.

[713] Cicero, *De officiis* (Ed. Testard, vol. 1), 1, 10, 32, p. 119: 'Nec promissa igitur servanda sunt ea quae sint iis quibus promiseris, inutilia, nec, si plus tibi ea noceant quam illi prosint cui promiseris, contra officium est maius anteponi minori.'

[714] Seneca, *De beneficiis*, 4, 34, 4, in: *Séneque, Des bienfaits*, [Collection des Universités de France], Paris 1961, vol. 1, p. 134: 'Non mutat sapiens consilium omnibus his manentibus, quae erant, cum sumeret; ideo numquam illum paenitentia subit, quia nihil melius illo tempore fieri potuit, quam quod factum est, nihil melius constitui quam constitutum est; ceterum ad omnia cum exceptione venit: 'si nihil inciderit, quod inpediat'.

[715] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 9), IIaIIae, quaest. 110, art. 3, ad 5, p. 425-426: 'Ad quintum dicendum quod ille qui aliquid promittit, si habeat animum faciendi quod promittit, non mentitur, quia non loquitur contra id quod gerit in mente. Si vero non faciat quod promisit, tunc videtur infideliter agere per hoc quod animum mutat. Potest tamen excusari ex duobus. Uno modo, si promisit id quod est manifeste illicitum, quia promittendo peccavit, mutando autem propositum bene facit. Alio modo, si sint mutatae conditiones personarum et negotiorum. Ut enim Seneca dicit, in libro de Benefic., ad hoc quod homo teneatur facere quod promisit, requiritur quod omnia immutata permaneant, alioquin nec fuit mendax in promittendo, quia promisit

conditions (*subintellectis debitis conditionibus*). If these conditions are frustrated, he is no longer bound. Cleverly generalizing the teachings of his master, Cajetan summarizes them as follows : 'all things must remain unchanged if agreements are to be binding' (*omnia debent esse immutata si pacta servanda sunt*) [716]. He concludes that it is necessary for right reason (*recta ratio*) to take into consideration the circumstances of place, time, persons and business in general and weigh them against the initial promise[717].

The role of right reason in deciding whether a contract could be avoided on account of changed circumstances returns in Lessius' exposition under the guise of the prudent man. This recalls the canon law tradition, expressed for instance in Dr. Navarrus, according to which it pertained to the office of the judge to decide if a contract could be avoided by virtue of changed circumstances[718]. Moreover, Lessius connects the debate on changed circumstances to the metaphor of contracts as private legislation. Since an accepted promise is like a binding law, the principle applies that says that the law is not binding in those cases that have expressly or tacitly been excluded from the scope of the law by the legislator[719]: 'a promise is a particular kind of law (*lex quaedam particularis*) that someone spontaneously imposes on himself, so it will not bind in those cases that the promisor is considered, according to the interpretation of prudent men (*ex prudentum interpretatione*), to have excluded explicitly or implicitly.'

The analogy from the legislator can be traced back to Molina and attained its climax in Oñate. In addition, Oñate declared the principle of changed circumstances a universal principle of contract law (*regula semper universalis*)[720]. He based it on equity and the idea of contractual obligation as a private law[721] : 'Just as under those changing circumstances *epikeia* is to be applied to the laws and constitutions of the princes, so will it be equitable to apply *epikeia* to the promises made by private persons. For promises are like laws which

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quod habebat in mente, subintellectis debitis conditionibus; nec etiam est infidelis non implendo quod promisit, quia eaedem conditiones non extant. Unde et apostolus non est mentitus, qui non ivit Corinthum, quo se iturum esse promiserat, ut dicitur II Cor. I, et hoc propter impedimenta quae supervenerant.'

[716] Cajetanus, *Commentaria ad Secundam Secundae divi Thomae* (Ed. Leonina, tom. 9), ad quaest. 113, art. 2, p. 440, num. 8: 'Auctor autem, sequens Senecam, unum universalem casum posuit in qu. 110, scilicet mutationem, dum dixit quod omnia debent esse immutata si pacta servanda sunt.'

[717] Cajetanus, *Commentaria ad Secundam Secundae divi Thomae* (Ed. Leonina, tom. 9), ad quaest. 113, art. 2, p. 440, num. 8: 'Oportet ergo considerare impedimenta supervenientia et conferre cum re promissa, et, collatione facta, quod recta tunc ratio suadet, pensatis conditionibus locorum, personarum, temporum et negotiorum, honestum exequi.

[718] For Dr. Navarrus, see *Enchiridion sive manuale confessariorum et poenitentium*, cap. 18, num. 7, p. 408: '(…) Quae non sunt intelligenda de qualibet mutatione, sed de illa qua si promittens praecogitasset, non promisisset, cui fides habenda est in foro conscientiae (…) et etiam exteriori si iudicio prudentis viri consideratis negotii circumstantiis, nequaquam promisisset si illud praecogitasset (…).'

[719] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 10, num. 71, p. 227: 'Confirmatur quia lex quae absolute lata est, non obligat in illis casibus, quos legislator expresse vel interpretative voluit exceptos. Atqui promissio est lex quaedam particularis, quam sibi quis sponte imponit, ergo non obligabit in illis casibus, quos expresse vel tacite ex prudentum interpretatione censetur excepisse.'

[720] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 11, num. 153, p. 128.

[721] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 11, num. 152, p. 128: '(…) sicut in simili in legibus et constitutionibus principum *epikeia* locum habet, ita eam in promissionibus privatorum locum habere aequum est, cum promissiones sint quaedam leges, quas sibi ipsis privati imponunt'.

private persons impose upon themselves.' Luis de Molina had expressed rougly the same view before, also arguing that nobody could be considered a better interpreter of the obligation than the promisor himself[722]. Oñate insists that it could never be considered the intent of the promisor to bind himself in the event of changed circumstances. Hence, every promise must be interpreted as being quasi-conditional, namely 'unless a notable change affects the promise' (*nisi notabilis mutatio accidit circa promissionem*)[723].

However, not all moral theologians were willing to give the principle of changed circumstances such a universal application. Many authors were quite inconsistent in their views of frustration of contract, as for instance Tomás Sánchez[724]. Even though the doctrine of changed circumstanced reached unknown heights in the writings of the scholastics, some argued that changed circumstances should not be allowed as a universal principle. Their principal argument was legal certainty and security of business. Juan de Lugo considered a general application of the tacit condition highly problematic (*regula illa generalis difficillima*)[725]. He feared that all contractual exchange would become unstable (*sequeretur nullum in rebus humanis contractum firmum manere*). Generally speaking, Lugo pleaded for a very restricted use of changed circumstances as a remedy. The detailed casuistry he developed on the basis of this restrictive principle falls outside the scope of this dissertation[726].

3.4 Grotius

'If the positive laws and natural law are not to be confounded,' Grotius briefly notes at the end of his chapter on promises[727], 'it should also not be omitted that, no more than gifts, promises which lack an expressed cause (*causa expressa*) are not void as a matter of natural law.' As opposed to canon law, natural law does not require that the parties expressly mention the cause behind the promise in order for that promise to become enforceable. This is standard scholastic doctrine. In just one single, dense and almost cryptic phrase, Grotius divulges the same idea. In doing so, the jurist and theologian from Delft does not make any explicit reference to the moral theologians or to the literature on the *forum internum*. Yet it seems unlikely that the meaning of his remark can be fully grasped if not read against the

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[722] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 272, col. 84, num. 2: 'Etenim quemadmodum in legibus locum habet epicheia ad excipiendos eventus de quibus dubitandum non est, si legislatori occurrerent, illos excepisset, qui proinde eiusmodi legibus non censentur comprehensi, esto legislator nihil de eis, quando legem tulit, cogitaverit, sic etiam in promissione, quae est velut lex quaedam quam sibi promittens imponit, non censentur comprehensi eventus quos tunc promittens excepisset, si ipsi occurrerent aut propenerentur. Neque alius potest esse melior interpres suae propriae promissionis quam promittens ipse, esto absolute promiserit, neque quicquam de eventibus tunc inopinatis cogitaverit.'

[723] Oñate, *De contractibus*, tom. 2, tract. 9, disp. 29, sect. 11, num. 151, p. 128.

[724] For a critical assesment of Sánchez's confusing teachings on the subject, see Lugo, *Disputationes de iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 87, p. 23.

[725] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 87, p. 23.

[726] For a detailed account, see Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 88-95, p. 23-25.

[727] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 21 (*promissiones sine causa, naturaliter non esse irritas*), p. 339: 'Hoc quoque omittendum non est, ne iura civilia cum naturali iure confundantur, neque promissiones quae causam expressam non habent naturaliter esse irritas, non magis quam rerum donationes.'

background of the observations on *causa* by the medieval canonists and the early modern jurists and theologians.

What this citation means to suggest is not that Grotius' legal doctrine could be reduced to the teachings of the scholastics. While reductionist visions appear to be naive in the first place, they more sadly threaten to kill the very poetry behind the changing faces of legal history. A restless traveller and an intellectual polymath, Grotius was exposed to many different strands of thought. If scholasticism and legal humanism undoubtedly count among the more powerful catalysts of his legal thinking, Grotius transformed those traditions into a unique product of his own. His larger ambition of fostering peace among the divided nations of Europe may also not have been wholly identical with the moral theologians' chief concern, namely to prepare the soul for the day of Last Judgment. Still, the fact that Grotius was not afraid of being inspired by his scholastic sources seems almost undeniable.

Regarding the essence and the formation of contract, there is clear evidence that reading the *De iure belli ac pacis* against a scholastic background can shed fresh light on Grotius' argumentation. On a macro-level, it is probably no coincidence that Grotius first opens with a chapter on promises before dedicating a chapter to contracts. After all, the scholastics structured their new views on the creation of contractual obligation around the notion of promise, thereby superseding the old *ius commune* discussions on naked and clothed pacts, nominate and innominate contracts, etc. Moreover, Grotius' attempt to distinguish between three different scales of obligation (*veritas* / *debitum constantiae sive fidelitatis* / *iustitia*) depending on the kind of enunciation (*assertio* / *pollicitatio* / *perfecta promissio*) bears striking similarities to the strenuous efforts made by the scholastics to differentiate between, roughly speaking, mere indicative statements about future action, morally binding statements of intention, and juridically binding promises[728].

Importantly, Grotius follows the majority opinion of the scholastics that acceptance of a promise is required for the promisor's legal obligation and the promisee's enforceable right to come into existence[729]. The promisor is under no obligation to perform unless the promisee has accepted his promise. Interestingly enough, Grotius rejects Molina's interpretation of the binding force of the *pollicitatio civitati* in Roman law. It may be recalled that, in Molina's view, an unaccepted promise must be binding as a matter of natural law since civil obligation presupposes natural obligation. According to Grotius, Molina is mistaken in his view that D. 50,12 imposed a civil obligation on the *pollicitator civitati*. Grotius refutes Molina's

[728] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 2-4, p. 328-329. Grotius does not use the expression 'debitum iustitiae' explicitly, as some of the scholastics did, but it is implicit in his description of perfect promises; see below. Grotius indebtedness to the scholastics for his three-stage theory of promise has already been pointed out, *inter alia*, in F. Wieacker, *Die vertragliche Obligation bei den Klassikern des Vernunftrechts*, in: G. Stratenwerth et al. (eds.), Festschrift für Hans Welzel zum 70. Geburtstag, Berlin – New York 1974, p. 16-17.

[729] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 14, p. 335: 'Ut autem promissio ius transferat, acceptatio hic non minus quam in dominii translatione requiritur (…).'

argument by saying that Roman law simply forbade the promisor to revoke his promise[730]. This is precisely the argument that Lessius had employed to counter the view of Molina[731]. There is little doubt, then, that Grotius draws directly on Lessius here.

The fact that Grotius does not explicitly cite Lessius regarding his opinion of the non-binding nature of the *pollicitatio civitati* probably adds weight to the suspicion that Grotius was inspired by Lessius' *De iustitia et iure* also in other places where he does not cite him, rather than the view that Grotius ignored Lessius' teachings on promises altogether. For example, Grotius is rightly famous for having conceived of the perfect promise (*perfecta promissio*) in terms of the transfer of rights (*ius proprium alteri conferre*) and, in regard to promises to do something, in terms of the alienation of a part of the promisor's liberty (*alienatio particulae cuiusdam nostrae libertatis*)[732]. The charming simplicity of this enunciation is nothing short of stunning. However, Grotius' 'juridical' conception of promising did not come out of the blue. It is sufficient to recall Lessius' standpoint that the promisor deliberately binds himself to the promisee in order to give or to do something, thereby conferring a right upon the promisee to enforce the promise[733]. Grotius, then, was not an innovator, let alone the pioneer, in analyzing promises in terms of juridical debt[734]. He played a vital role, however, in handing down Lessius 'horizontal' analysis of the binding nature of accepted promises to luminaries such as Robert Joseph Pothier, who made explicit reference to Grotius when espousing the view that unilateral promises without acceptance cannot create contractual obligation[735].

As indicated before, the scholastic legacy in *De iure belli ac pacis* by no means subtracts from Grotius' creative genius. For one thing, the literary casting of Grotius'

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[730] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 14, p. 336: 'Nec obstat quod de pollicitationibus factis civitati iure civile est proditum: quae ratio quosdam induxit, ut iure naturae solum promittentis actum sufficere iudicarent: nam lex Romana non hoc dicit, ante acceptationem pollicitationis plenam esse vim, sed revocari vetat, ut acceptari semper possit: qui effectus non est naturalis, sed mere legitimus.' The opinion according to which 'Molina' should not be connected with 'quosdam' despite the fact that Grotius himself linked it to Molina, seems to complicate matters unnecessarily; see additional note 336a on page 980 of the revised Grotius-edition by De Kanter-Van Hettinga Tromp – Feenstra – Persenaire.

[731] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, num. 40, p. 220.

[732] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 4, p. 329: 'Tertius gradus est ubi ad determinationem talem accedit signum volendi ius proprium alteri conferre: quae perfecta promissio est, similem habens effectum qualem alienatio dominii. Est enim aut via ad alienationem rei, aut alienatio particulae cuiusdam nostrae libertatis. Illuc pertinent promissa dandi, huc promissa faciendi.'

[733] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 8, num. 52, p. 223-224: 'Quia promittere non tantum est affirmare se daturum vel facturum, sed ulterius est se obligare alteri, et consequenter ius illi tribuere ad exigendum. Unde dici solet, *promissionem parere debitum*.' Cf. supra.

[734] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 8, num. 55, p. 224 (*omnis obligatio contractuum est obligatio iustitiae*). Cf. supra.

[735] Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, part. 1, sec. 1, chap. 1, art. 1 par. 2 (En quoi le contrat differe-t-il de la pollicitation), p. 7: 'La pollicitation est la promesse qui n'est pas encore acceptée par celui à qui elle est faite. […] La pollicitation aux termes de pur droit naturel ne produit aucune obligation proprement dite, et celui qui a fait cette promesse peut s'en dédire, tant que cette promesse n'a pas été acceptée par celui à qui elle a été faite; car il ne peut y avoir d'obligation, sans un droit qu'acquiert la personne envers qui elle est contractée contre la personne obligée (…)'.

exposition on promises creates an atmosphere that is distant from the scholastic universe. Grotius' universe is agreeable to the reader on account of its brevity, its elegance, and its manifold references to both classical and scriptural texts. To the best of our knowledge, there is also no scholastic precedent to Grotius presenting his views on the binding nature of bare agreements in the form of a refutation of the French humanist François Connan[736]. Also, Grotius' conclusions are not all of a piece with scholastic doctrine. A case in point is the doctrine of changed circumstances. Grotius, like the scholastics, conceives of it in terms of a tacit condition (*tacita conditio*) implied in the promise[737]. Yet Grotius seems to have advocated a stricter application of the tacit condition than the majority of the scholastics, or, for that matter, Cicero and Seneca[738]. It is perhaps no coincidence, then, that the doctrine of changed circumstances seems to have disappeared in the work of natural lawyers such as Pothier. However, there is also evidence to the contrary, namely that to a certain extent, notably in the case of informal contracts, Pothier did accept a kind of theory of changed circumstances[739].

3.5 Conclusion

There is probably no better way of illustrating the turn towards a voluntaristic, consensualist and open law of contact in the early modern period than by recalling Oñate's remarkable praise of 'freedom of contract'. Freedom has wisely been restored to the contracting parties, since they can make any deal that they want and be certain that the court of their choice will universally enforce that contract. Despite the persistence of a pluralility of legal traditions, Oñate joyfully observed that in the Spanish empire, canon law, Roman law, statute law and natural law universally agreed on this principle. We have seen Molina expressing the desire that all countries imitate the Spanish model. He wished so for the sake of the salvation of souls. He also believed that the bindingness of all agreements would eventually foster peace

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[736] For Connan's strict adherance to Labeo's, synallagmatic conception of contract, see Birocchi, *Causa e categoria generale del contratto*, p. 95-136.

[737] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 16, par. 25, p. 421-422: 'Solet et hoc disputari, an promissa in se habeant tacitam conditionem | si res maneant quo sunt loco: quod negandum est, nisi apertissime pateat, statum rerum praesentem in unica illa quam diximus ratione inclusum esse.'

[738] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 16, par. 27, p. 423-424. One should keep in mind, though, that scholastic views on this topic widely differed, with Juan de Lugo being even more reluctant to grant relief by virtue of changed circumstances than Grotius. It may be worthwhile noting that Lugo's *De iustitia et iure* (1642) was published after the first edition of Grotius' *De iure belli ac pacis* (1625), so maybe Lugo could have become more wary of the tacit condition precisely on account of his familiarity with Grotius' views. However, the final answer to this question remains within the realm of speculation.

[739] Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, part.1, sec. 1, chap. 1, art. 1, par. 1 : 'Par exemple, lorsqu'un pere promet à son fils, qui étudie en droit, de lui donner de quoi faire dans les vacances un voyage de récréation, en cas qu'il emploie bien son tems: il est évident que le pere, en faisant cette promesse, n'entend pas contracter evers son fils un engagement proprement dit. Ces promesses produisent bien une obligation imparfaite de les accomplir, *pourvu qu'il ne soit survenu aucune cause*, laquelle, si elle eût été prévue, eût empêché de faire la promesse: mais elles ne forment pas d'engagement, ni par conséquent de contrat.' (Italics are mine). It might be noted that in this context 'cause', just as the Latin word 'causa' means 'circumstance'.

in society, even though the rationale for the closed system of contracts in Roman times was thought to be the avoidance of overburdened courts and, hence, the concern for the tranquillity of the republic.

As has been described in the first part of this chapter, the canon law was seminal in attracting the other legal traditions toward the principle that all agreements, however naked, are binding. It might be worthwhile remembering, however, that the canon law itself was basically giving in to the moral weight of natural law and equity. It remained a matter of dispute, therefore, whether contracts had to be enforced through an ordinary remedy or, rather, as Pope Innocent IV argued, through the extraordinary remedy of evangelical denunciation. Moreover, the freedom inherent in the canon law principle that all agreements are binding was based on moral considerations regarding the salvation of souls. It is therefore not to be confounded with nineteenth century, purely secular accounts of 'freedom of contract', which were chiefly motivated by economic arguments. As Gordley sharply noticed, even though the vocabulary of the canonists and the scholastics may have lived on through the natural lawyers of the seventeenth century, the underlying philosophies changed[740].

Although deeply rooted in the religious universe of sin and salvation, it has been shown in the second part of this chapter that the moral theologians, particularly the Jesuits, came close to one of the clearest formulations of 'freedom of contract'. It would be no lie to claim that the doctrine of offer and acceptance appears in its fully-developed form in the writings of theologians such as Lessius, Lugo and Oñate. In addition, they based the principle of 'freedom of contract' on a liberal, albeit religious view of man as the owner of his will, thus laying the anthropological foundations of freedom to contract. Contract becomes the instrument of a self-conscious *dominus* who can decide to do whatever he wants with his private property. Through the juridical device of contract, owners can exchange goods *ad libitum*, as if they were private legislators. Importantly, the promisee can enforce a contract because an accepted offer conveys a right to the promisee and imposes an obligation on the promisor. In other words, the moral theologians, specifically the Jesuits, insisted that contractual obligation is of a distinctively juridical nature.

Having laid down 'freedom of contract' as a principle, and having formulated a general category of contract as promise and acceptance, the question to be answered in the following chapters, is whether the moral theologians adhered to 'contractual freedom' unqualifiedly. The next chapter will explore the limitations to 'freedom of contract' that are inherent in the voluntaristic definition of contract. If the entire force of obligation derives from the will, then it would seem that the vices of the will must 'naturally' impede freedom to contract. Individuals' intentions may also be hampered by limitations imposed by the civil authorities, mainly through formality requirements. Hence, the fifth chapter will be devoted to the formal limitations on 'freedom of contract'. 'Freedom of contract' can also be impinged upon by moral objections to the substance of the contract. Accordingly, the sixth chapter will analyze the vivid debate on the validity of contracts for sex. Different from those types of

[740] Gordley, *The philosophical origins of modern contract doctrine*, p. 112.

moral considerations are concerns about substantive fairness. The subject of the penultimate chapter is whether ‘freedom of contract’ can be restricted if there is no equilibrium between the values in an exchange.

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4 NATURAL LIMITATIONS ON 'FREEDOM OF CONTRACT'

4.1 Introduction

The early modern theologians firmly established the concept of contract as a mutually accepted promise that takes the place of law for the contracting parties involved. As a matter of natural law, the essence of a contract consists of mutual consent. Hence, the first, 'natural' obstacle to 'freedom of contract' is the vitiation of consent. The theologians devoted ample space, then, to discussions about the impact of duress (*metus*) and mistake (*error/dolus*) on the validity of contracts[741]. Lack of contractual capacity was also a topic of intensive debates, certainly in regard to minors. In fact, the superabundance of textual material on these subjects largely exceeds the limits that a book chapter on the natural limitations on 'contractual freedom' is bound to observe. Moreover, the complexity of the scholastic treatment of the vices of the will drove Hugo Grotius and Juan de Lugo into despair.

For the sake of clarity a twofold restriction imposed itself upon the following investigation. From a material perspective, duress and mistake are the only vices of the will that have been retained[742]. In respect to the writings of the scholastics themselves, most authority has been given to the Jesuit scholastics at the threshold of the seventeenth century[743]. From a formal perspective, much attention is paid to the question of what kind of nullity the scholastics attached to a contract influenced by either duress or mistake: does coerced or erroneous consent make a contract automatically void (*irritus*) or voidable at the option of the wronged party (*irritandus*)? In the case of mistake, this question goes with an analysis of how the distinction between *contractus bonae fidei* and *stricti iuris* persisted until it was dissolved definitively by Lessius. In the case of duress, it implies a focus on the way Tomás Sánchez treated duress in the context of his law of marriage.

While an attempt has been made to exemplify the casuistry surrounding the issue of duress, no such effort has been made in the examination of mistake. This means that a study of the detailed casuistry on, for instance, the influence of defects in the goods on the validity of sale contracts, has been excluded from this text[744]. Mistake-related issues such as the doctrine of changed circumstances and *laesio enormis* have been ignored, since they are treated in other chapters. In an ideal world it would be interesting to compare the doctrines on duress and mistake in contracts with similar problems in the laws of marriage, oaths, and

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[741] We chose to translate *metus* alternatively by fear, duress, and compulsion, since all of these terms seem to be present in *metus*. Rendering the concepts of *error* and *dolus* into English is more tricky. For one thing, *dolus* and *error* seem to be used as synonyms in the scholastic tradition. Moreover, the concept of *dolus* does not necessarily presuppose evil intentions; cf. Feenstra, *De oorsprong van Hugo de Groot's leer over de dwaling*, 87-88.

[742] It seems more appropriate to include the scholastics' doctrine of legal capacity and minors in a monograph on their law of persons.

[743] As pointed out before, they seem to have been the moral theologians who provided us with the most systematic treatments of contract law in general and the vices of the will in particular. Apart from this, the general selection principle as outlined in the chapter on methodology applies.

[744] For this we refer to Decock – Hallebeek, *Pre-contractual duties to inform in early modern scholasticism*.

vows. Such an investigation demands a separate study, however. Moreover, it is to the credit of the early modern scholastics that they neatly distinguished in their treatises between these traditional problematic fields, which were dealt with extensively in the manuals for confessors, and vices of consent in contracts.

4.2 Duress (*metus*)

4.2.1 Foundations

4.2.1.1 Romano-canon law

The theologians of the early modern period are noted for their abundant and ecclectic use of Roman and canon law. The following paragraphs do not mean to be exhaustive when describing the law of duress (*metus*) in Romano-canon law[745]. What we intend to do here is to flag a couple of juridical texts that turned out to be of great importance to the scholastics as they developed their views on duress. The casuistry and rules from Digest title 4,2 (*Quod metus causa gestum erit*) provided the scholastics with fundamental working materials. Certainly, when it came to defining duress and determining the extent to which relief can be granted for duress, Digest title 4,2 turned out to be crucial. The canon law provided the scholastics with important texts to assess the effect of duress on contractual validity, in particular the canons included in title 1,40 of the Decretales (*De his quae vi metusve causa fiunt*) and the cases on marital consent in title 4,1 (*De sponsalibus et matrimoniis*).

Emperor Hadrian had laid down as a general rule that he would not enforce what was based on duress (*quod metus causa gestum erit, ratum non habebo*). Mentioning this rule, law *Ait praetor* (D. 4,2,1) specified that duress is the perturbation of the mind because of an imminent or future threat (*instans vel futurum periculum*)[746]. This threat must concern a major evil (*major malitas*)[747]. Law *Metum autem* (D. 4,2,6) further restricted the availability of a remedy against duress by pointing out that only duress that could throw off balance even the most constant man (*homo constantissimus*) could be considered relevant[748]. Every single

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[745] The late medieval conception of duress has already formed the subject of thorough analysis in Kuttner, *Kanonistische Schuldlehre*, p. 299-314.

[746] D. 4,2,1: 'Ait praetor : « Quod metus causa gestum erit, ratum non habebo ». Olim ita edicebatur « quod vi metusve causa » : vis enim fiebat mentio propter necessitatem impositam contrariam voluntati : metus instantis vel futuri periculi causa mentis trepidatio. Sed postea detrata est vis mentio ideo, quia quodcumque vi atroci fit, id metu quoque fieri videtur.'

[747] D. 4,2,5 : 'Metum accipiendum Labeo dicit non quemlibet timorem, sed maioris malitatis.'

[748] D. 4,2,6: 'Metum autem non vani hominis, sed qui merito et in homine constantissimo cadat, ad hoc edictum pertinere dicemus.'

Some scholars have suggested that the criterion of the 'most constant man' (*homo constantissimus*) is a reflection of the Roman attitude towards the central virtue of constancy (*constantia*) ; cf. Zimmermann, *The law of obligations*, p. 653.

Although philosophers like Seneca had elaborated on this virtue before the *Corpus iuris civilis* was edited, we doubt, however, that the Roman legal text originally intended to evoke this moral philosophical background. If so, it would have been sufficient to mention the 'constant man' (*homo constans*), without making use of the superlative. Moreover, as will become clear as we deal with Domingo de Soto, the conjunction of the virtue of constancy with the Roman legal text takes place explicitly with the early modern scholastics. At the same time

Latin word in these definitions would become subject to intense and divergent interpretations by the scholastics. The same holds true for the casuistry that was meant to determine which kind of evil could be deemed to intimidate a man of a steadfast character[749] : fear of death, imprisonment, rape, etc.

The objective and delictual approach to duress in Roman law also left its marks on the scholastic discussion. As is commonly known, the Roman remedy against duress (*actio quod metus causa*) had the characteristics of a real action (*actio in rem scripta*)[750]. Hence, the defendant could be either the other party to the contract or any other person who had acquired the object in question. What mattered was the restoration of the wrong done to the intimidated party[751]. Even if evidence to the contrary exists[752], it is likely, then, that Roman law did not consider duress to be a vice of the will. As the jurist Paul put it[753]: 'I agreed despite the fact that I had been coerced' (*coactus volui*). This phrase turned out to be very influential in the scholastic tradition, no doubt because it fitted very well into the Aristotelian-Thomistic tradition[754].

Canon law dealt with duress in the context of contractual consent, and, particularly, in relation to the validity of coerced consent in marriage contracts. One of the major, albeit indirect contributions of the canon law to the law of contract was its insistence on the absolute liberty with which spouses must enter into a marriage contract. The rule from canon *Gemma* (X 4,1,29) stating that marriages should be free was recognized as a fundamental principle of Church law. The gloss to canon *Gemma* clearly stated that this liberty was to be understood in terms of the absence of coercion (*ab omni coactione*)[755]. Moreover, marriage contracts were thought to require an even higher degree of liberty than other contracts. There were two reasons for that. The first is a theological one. Marriage is a sacrament representing the faithful covenant between Christ and his bride[756]. The second reason is of a more general nature. Freedom of marriage is considered to be the only guarantee that marriage lasts for a

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(and therefore), they argued that not the 'most constant man' (*homo constantissimus*), but the 'constant man' (*homo constans*) constituted the standard of reference : virtue is virtue.

[749] See D. 4, 2, 3, 1; D. 4, 2, 7, 1; D. 4, 2, 8, 2. It should be noted that infamy did not fall into this category, cf. D. 4, 2, 7.

[750] Cf. D. 4, 2, 9, 8. Compare D. 4, 2, 9, 1: 'Animadvertendum autem, quod praetor hoc edicto generaliter et in rem loquitur nec adicit a quo gestum.'

[751] For further details on the Roman law of duress, see Deroussin, *Histoire du droit des obligations*, p. 513-517.

[752] D. 50, 17, 116: 'Nihil consensui tam contrarium est (…) quam vis atque metus.'

[753] D. 4, 2, 21, 5: 'Si metu coactus adii hereditatem, puto me heredem effici, quia quamvis si liberum esset noluissem, tamen coactus volui; sed per praetorem restituendus sum, ut abstinendi mihi potestas tribuatur.'

[754] One might rightly wonder whether the Roman law had not been influenced by Aristotelian thought on duress and (in)voluntary consent in the first place. Cf. A.S. Hartkamp, *Der Zwang im römischen Privatrecht*, Amsterdam 1971, p. 84 and p. 124.

[755] Cf. Glossa *Libera debeant* ad X 4,1,29 in: *Corpus juris canonici* (ed. Gregoriana), part. 2, col. 1442, l. 73-74.

[756] E.g. Pedro de Aragón, *In secundam secundae commentaria de iustitia et iure*, Salmanticae 1590, quaest. 89, art. 7, p. 1079: 'Divus Bonaventura atque Durandus dicunt, quod, quia matrimonium Christianorum significant unionem Christi et Ecclesiae, quae est perpetua, perpetuum etiam et indissolubile debet vinculum habere ad quod non solum consensus, verum et liber consensus requiritur, cum nullum violentum possit esse perpetuum.'

life time, which in turn is the best guarantee for the good upbringing of the children (*ad procreationem prolis*)[757].

Other important passages from the Decretales included canon *Abbas* in X 1,40,2 (*quae metu et vi fiunt, de iure debent in irritum revocari*) and canon *Quum dilectus filius* (X 1,40,6). Canon *Quum dilectus filius* constituted a canonical formulation of the Roman criterion of the constant man. Theologians adduced canon *Abbas* to argue that duress resulted in voidability at the option of the intimidated party rather than that the contract was avoided automatically. In 1602, canon *Abbas* would form one of the most authoritative arguments for Tomás Sánchez to defend a general regime of voidability in all contracts affected by duress except marriage.

4.2.1.2 The Aristotelian-Thomistic tradition

While the fundamental contribution of Roman and canon law to the development of modern contract law has been widely acknowledged, the philosophical origins of modern contract doctrine have rather been ignored until fairly recently[758]. An elementary understanding of Aristotle's conception of free human agency, certainly in its Thomistic interpretation, nonetheless turns out to be indispensable to anyone trying to explain the concepts of mistake and duress in the modern law of contract. Also, the Aristotelian account of duress might help to explain the Roman approach to duress in the first place: Aristotle did not consider coerced actions to be entirely involuntary.

At the outset of the third book of the *Nichomachean Ethics*, Aristotle points out that man is responsible for his actions only to the extent that he acts freely and in the absence of ignorance or compulsion[759]. Accordingly, a person can be blamed or praised only for actions that he performs voluntarily. Aristotle indicates that this is an insight for legislators to remember well as they distribute honour and punishment. The question is, however, whether ignorance and compulsion have the same effect upon the voluntariness of an action. Ignorance prevents you from choosing the right course of action since your rational insight into the circumstances of the action is hampered. Put differently, you are mistaken. Compulsion, on the other hand, does not seem to result in involuntary choices automatically.

Take the example of a captain who throws his goods overboard in a storm in order to save the crew. At the moment of action, he definitely wishes to jettison cargo, but he would definitely not have wished to do so in the abstract. Aristotle concludes that there is apparently a category of actions that are mixed, in the sense that they are constituted both by voluntary

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[757] This is explained very clearly in Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 4), lib. 8, quaest. 1, art. 7, p. 733: 'Quandoquidem et coniugium etiam sub lege quoque naturae liberum requirebat consensum. Dicendum ergo, quod matrimonium ob id a natura ad procreationem prolis constitutum est, ex sua ipsius natura perpetuitatem habet annexam. Alias non esset satis liberis educandis consultum. Perpetuitas autem ex natura rei liberum exigit animi consensum. Nam quae violenta sunt, secundum Aristotelem, nequeunt esse perpetua.'

[758] James Gordley's book on the *Philosophical origins of modern contract doctrine* is a notable exception.

[759] Aristotle, *Ethica Nicomachea*, 3, 1, 1109b30-34. We used the following edition: *Aristotelis Ethica Nicomachea*, recognovit brevique adnotatione critica instruxit I. Bywater, [Scriptorum classicorum bibliotheca Oxoniensis], Oxonii 1970[15] [=1894] (hereafter: Ed. Bywater), p. 40.

and involuntary elements[760]. In the end, Aristotle thinks that such mixed acts are more voluntary than involuntary. His explanation runs as follows. True compulsion occurs when the cause of your action is external to you, as when you are carried away by a hurricane. In the case of the captain, however, the cause of his action comes from within himself. True, if circumstances had not been as they were, the captain would have chosen a different course of action. Yet in the circumstances as they occurred to him, he would not have wished to choose any other course of action than to jettison cargo[761].

Thomas Aquinas carries Aristotle's exposition further. The *Prima Secundae* of his *Summa Theologiae* is entirely dedicated to the philosophy of human action, including fascinating accounts of man's last end, human passions and habits, vice and sin, law and grace. Of particular importance for our present purpose, is question 6 of the *Prima Secundae*, which treats the voluntary and the involuntary in human agency. Aquinas constructs his definition of voluntary action in terms of knowledge of the final end of that action – mistake resulting in involuntariness because of that lack of knowledge. Equally important, however, is the emphasis he puts, in line with Aristotle, on the origins of the action in the person himself for it to be voluntary. This is the point where the discussion on violence and duress enters.

If an action of the will proceeds from an exterior principle, then it falls short of voluntariness. A clear case is violence[762]. But, again, the difficulty concerns the mixed nature of duress. Actions done through fear are partly voluntary and partly involuntary. Thomas recalls the case of the captain who jettisons cargo in order to save his life and that of his crew[763]. Since the principle of action comes from within the captain himself, his action cannot be considered involuntary. The action does not proceed from an external cause. Still there are external circumstances which triggered the internal motivation of the captain. Therefore Thomas says that the captain acted voluntarily simply (*simpliciter*), that is, here and now, and

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[760] See Aristotle, *Ethica Nicomachea* (Ed. Bywater), 3, 1, 1110a4-19, p. 40-41.

[761] Aristotle, *Ethica Nicomachea* (Ed. Bywater), 3, 1, 1110b5-9, p. 42.

[762] Thomas Aquinas, *Summa Theologiae*, IaIIae, quaest. 6, art. 5 (*Utrum violentia causet involuntarium*), concl., in: *Opera omnia iussu impensaque Leonis XIII edita*, tom. 6: *Prima Secundae Summae Theologiae a quaestione 1 ad quaestionem 70*, Romae 1891 [hereafter: Ed. Leonina, tom. 6], p. 60..

[763] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 6), IaIIae, quaest. 6, art. 6 (*Utrum metus causet involuntarium simpliciter*), concl., p. 61: 'Unumquodque enim simpliciter esse dicitur secundum quod est in actu: secundum autem quod est in sola apprehensione, non est simpliciter, sed secundum quid. Hoc autem quod per metum agitur, secundum hoc est in actu, secundum quod fit: cum enim actus in singularibus sint, singulare autem, inquantum huiusmodi, est hic et nunc; secundum hoc id quod fit est in actu, secundum quod est hic et nunc et sub aliis conditionibus individualibus. Sic autem hoc quod fit per metum, est voluntarium, inquantum scilicet est hic et nunc, prout scilicet in hoc casu est impedimentum maioris mali quod timebatur: sicut proiectio mercium in mare fit voluntarium tempore tempestatis, propter timorem periculi. Unde manifestum est quod simpliciter voluntarium est. Unde et competit ei ratio voluntarii: quia principium eius est intra. Sed quod accipiatur id quod per metum fit, ut extra hunc casum existens, prout repugnat voluntati, hoc non est nisi secundum considerationem tantum. Et ideo est involuntarium secundum quid, idest prout consideratur extra hunc casum existens.'

This original definition of involuntariness in a comparative sense (*involuntarium secundum quid*) is quite limpid, which cannot necessarily be said of its reception in the later canon law tradition; cf. P. Fedele, *Appunti sui vizii del consenso matrimoniale, Metus ab extrinseco iniuste incussus consulto illatus*, [Biblioteca de 'Il diritto ecclesiastico'], Roma 1934, p. 1-2.

involuntarily in a comparative sense (*secundum quid*), that is, outside the actual circumstances of the case and in comparison with a normal situation.

The impact of this Aristotelian-Thomistic account of human action on the subsequent philosophical and juridical tradition has been massive. As has been pointed out by James Gordley, even though the anthropological and moral philosophical account of human agency changed with the advent of empiricist and rationalist philosophies in the modern period, the juridical concepts formed on the basis of Aristotelian-Thomistic philosophy lived on[764]. There should be no surprise about this.

The very scholastic coryphaei who developed modern contract doctrine in their commentaries on the *Secunda Secundae* of Thomas (better known as the treatises *De iustitia et iure* or *De contractibus*) simultaneously wrote extensive commentaries on Thomas' *Prima Secundae*. As is sufficiently well-known, the *Prima Secundae* contained Thomas' ideas on mistake and duress. Limitations of space and time prevent us from a thorough examination of the relationship between the philosophy of the will and the development of contract law in the early modern scholastic period. Yet a brief look at Leonard Lessius' re-working of the Aristotelian-Thomistic teachings on duress should suffice to demonstrate how profoundly aware of this tradition the early modern scholastics were when they dealt with contract law.

In his posthumously published commentary on the *Prima Secundae*, Lessius adopts the conclusion of Aristotle and Thomas : things done under duress are a mix of voluntary and involuntary elements, so that they are voluntary simply (*simpliciter*), but involuntary in a comparative sense (*secundum quid*). Referring to the case of the jettisoned cargo, Lessius concludes that actions under compulsion are to be deemed absolutely voluntary under the circumstances at hand (*circumstantiis*), but unpleasing to the will if considered in the abstract (*nude*)[765]. The difference between violence and duress consists in the fact that violence (*violentia*) brutally imposes its effect upon the will, whereas duress inclines the will into wishing, out of its own, what it actually dislikes[766].

Lessius gives a brilliant psychological account of the process of 'seduction' to which the will is exposed as it is confronted with a fearful event. The psychological process of compulsed assent consists of four stages, illustrated by the example of the jettisoned cargo[767]. Lessius argues that none of them is characterized by involuntariness, while the last stage is

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[764] Gordley, *The philosophical origins of modern contract doctrine*, p. 121.

[765] Lessius, *In I.II D. Thomae de beatitudine et actibus humanis*, quaest. 6, art. 6, num. 37, in: *De beatitudine, de actibus humanis, de incarnatione Verbi, de sacramentis et censuris praelectiones theologicae posthumae. Acceserunt variorum casuum conscientiae resolutiones*, Lovanii 1645, p. 45: 'Sensus est, utrum id quod metu facimus, alias non facturi, censeatur absolute involuntarium. Conclusio, id quod metu fit, esse mixtum ex voluntario et involuntario, sic tamen ut sit voluntarium simpliciter, involuntarium secundum quid. Ratio est, quia id quod metu fit, acceptum cum circumstantiis quibus fit, est absolute volitum. Cuius signum est, quod ex vi illius voluntatis homo se applicet ad externam operationem, ut patet, cum quis metu naufragii in tempestate proijcit merces. Haec proiecto tali tempore et loco est absolute volita, tamen secundum quid est involuntaria, quia considerata nude extra tale periculum, plane displicet voluntati.'

[766] Lessius, *In I.II D. Thomae de beatitudine et actibus humanis*, p. 45 : 'Violentia non inclinet voluntatem, sed illa omnino repugnante, suum effectum ponat. Metus vero inclinet voluntatem, ut ipsamet aliquid velit et faciat quod per se consideratum illi displicet, idque ad vitandum maius malum.'

[767] Lessius, *In I.II D. Thomae de beatitudine et actibus humanis*, quaest. 6, art. 6, num. 37, p. 45-46.

entirely voluntary. Firstly, there is the fear of the greater evil (*timor maioris mali*): shipwreck. This fear is not wholly involuntary, since fearing an imminent evil is the opposite of desiring a good. Both proceed from the inclination of the will. Secondly, there is the will to pursue a certain course of action (*volitio alicuius operationis*): throwing off cargo. This is definitely not an involuntary action, since it is willed as such. The third stage consists in a negative experience towards that same course of action considered on its own, because it is unpleasant and damaging (*displicentia illius operationis secundum se consideratae*). Displeasure, however, does not displease the will, so it is not involuntary. Finally, the operation is externalized and effectively takes place (*ipsa externa operatio*). This is a voluntary course of action, since the operation pleases the will under the present circumstances.

Last, in Lessius, we find an explicit testimony to the fact that the scholastics were very well aware of the connection between the more speculative philosophical account of the will and the regulation of practical matters through contract law. From his theoretical account of compulsion and the will, Lessius infers expressly that contracts affected by coerced consent are not void *ab initio*[768]. They do not suffer from lack of consent, since from an absolute point of view, the intimidated party assents voluntarily to the contract. The remedy against duress, then, must be based on the injury from which the intimidated party suffered.

4.2.1.3 Soto : the virtues of constancy and courage

Soto developed a quite original approach to the question of which kind of duress meets the constant man test of coercion. In his commentary on the *Sentences* Soto considerably enlarges the number of events (*mala*) the fear of which could result in legitimate fear (*iustus metus*). Also, he formulates an interesting, virtue-based rule of thumb to know which fear can impress a constant man. Through the following general rule, Soto fits the Romano-canon tradition on duress into a moral philosophical framework[769]:

> Fear satisfies the constant man test, if it is compatible with the virtue of constancy and courage (*constantia et fortitudo*), and if everybody would feel constrained by it; therefore, this kind of fear is an excuse for fault (*a tota excusat culpa*).

By redefining the constant man criterion of duress, Soto actually makes it possible for fear to excuse away fault and sin. For it also pertains to the virtue of courage to have fear when fear is needed (*una pars fortitudinis est, timere ubi oportet*)[770].

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[768] Lessius, *In I.II D. Thomae de beatitudine et actibus humanis*, quaest. 6, art. 6, num. 38, p. 46: 'Secundo sequitur, contractum metu initum non esse irritum defectu voluntarii, ut multi docent, quia est absolute voluntarius: absoluta autem voluntas sufficiet ad efficiendum validum contractum, modo debita materia interveniat.' For a more extended quote, see below.

[769] Domingo de Soto, *In quartum sententiarum librum commentarii*, Lovanii 1573, dist. 29, quaest. 1, art. 2, p. 711 : 'Metum ergo cadere in constantem virum est, virtuti constantiae et fortitudinis non repugnare, metu illo quempiam vinci et cogi. Atque hanc ob rem talis metus a tota excusat culpa.'

[770] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 4), lib. 7, quaest. 2, art. 1, p. 633: 'Metus enim ille est cadens in constantem virum, quem viri constantia secum patitur, scilicet quem stat virum constantem sine suae fortitudinis vituperatione habere, ita ut non repugnet esse

When law meets virtue, many questions arise. For example, whether legitimate fear of an evil can justify fault (*culpa*), certainly when this fault amounts to sin (*peccatum*). Contrary to the common scholastic opinion, Soto thought that duress stemming from the fear of an evil could sometimes justify sin, indeed, particularly when sin constituted but the infringement of human law, and not the commitment of an intrinsically evil act[771]. It would be absurd, Soto says, to think that observing feast days or Lent is more important than being murdered. If you can only escape death through sinning against the duty to abstain from working or drinking, then you cannot be deemed to have become inconstant. Hence, duress excuses your (venial) sin. Soto would elicit heavy criticism for this audacious opinion in Dr. Navarrus' *Manual for confessors*[772]. And we will see Covarruvias invoking the rigorist Augustinian tradition in order to rebuke the standpoint that duress can justify sin.

The key question, however, concerns the effect of duress on the validity of a contract. In his *Commentary on the fourth book of the Sentences*, Soto refutes the late medieval teachings of Duns Scotus and argues that as a matter of natural law marriage contracts affected by duress are voidable (*irritandus*) and not void *ipso facto* (*irritus*). Following the canon *Abbas* (X 1,40,2), Soto holds that, as a matter of natural law, contracts always remain valid even when they are affected by duress[773]. They are voidable, however, at the option of the intimidated party. He concludes from this that the rule that marriage contracts are automatically void when affected by duress must have been introduced by positive, ecclesiastical law. Sánchez and Lessius would make the same point.

4.2.1.4 Covarruvias at the confluence of scholasticism and humanism

Diego de Covarruvias y Leyva is undoubtedly the single most distinguished Spanish canonist of the sixteenth century. It is impossible to avoid him when dealing with a concept of general contract law. It is no different this time, as he is commenting on the fourth book of the *Decretales*, dealing with marriage (*connubium*). His commentary on duress would provide the basic elements for the teachings of Sánchez and Lessius, although Covarruvias does not

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virum constantem et sic metuere. Nam una pars fortitudinis est, timere ubi oportet. Sed est apprime animadvertendum, quod nullus metus quantumvis in virum constantissimum incidere solitus, a culpa transgressionis excusat divinae legis et nauralis.'

[771] Soto, *In quartum sententiarum librum commentarii*, dist. 29, quaest. 1, art. 2, p. 712 : 'Sed alia posterioris generis, quia non sunt intrinsece mala, possunt quidem bona fieri quando sunt media cavendi gravioris mali. Ecclesia namque observationem festorum aut ieiuniorum praecipiens non tam stricto rigore voluit nos obligare, ut pro eorum observatione mortem deberemus obire. Quare qui metu mortis ieiunium vel festum frangit, non desinit esse constans atque adeo excusatur a culpa.'

[772] Azpilcueta, *Enchiridion sive manuale confessariorum et poenitentium*, cap. 22, num. 51, p. 494.

[773] Soto, *In quartum sententiarum librum commentarii*, dist. 29, quaest. 1, art. 3, p. 714 : 'Ad secundum simili modo respondetur, quod neque alii contractus, locationis aut venditionis, etc. per metum celebrati, sunt ipso iure nulli, sed debent in irritum revocari, ut cap. Abbas de his quae vi metusve causa fiunt : quia restitutionem expostulant. Et hoc facit pro nobis, quia secundum merum ius naturae etiam matrimonium deberet tenere. At quia rescindi nequit, statutum per ecclesiam est, ut non sit validum.'

Interestingly, in the marginal notes to canon *Abbas* the *correctores Romani* referred several times to Domingo de Soto for its correct interpretation; cf. notae ad glossam *Coactus* ad X 1,40,2 in: *Corpus juris canonici* (ed. Gregoriana), part. 2, cols. 479-480.

contain a general theory of duress related to a general doctrine of contract. His exposition is a good illustration, however, of the large extent to which humanist jurisprudence became intermingled with the canon law tradition.

He begins with a long meditation on the definition of duress. Covarruvias is careful to stress that the object of fear must be imminent. The 'futurity' of the fearful event mentioned in the definition of duress in D. 4,2,1 (*metus instantis vel futuri periculi causa mentis trepidatio*) must be interpreted as the very near future. For the most fearful event of life, namely death, lies in the future, and still it does not throw anyone off balance. He quotes Aristotle, amongst others, to support this interpretation[774], and he eventually defines duress as a 'perturbance of the mind, the mind being perturbed by imagining a future and imminent calamity'[775].

Book four of the *Decretales* is dedicated to marriage, and in commenting upon in it, Covarruvias underlines the principle of liberty required by the Church in marital consent. Canons *Veniens* (X 4,1,13) and *Cum locum* (X 4,1,14) are indicative in this respect. Marriage contracts must be free of the slightest form of coercion. The reason being that freedom of marriage is the best safeguard against irresponsible education of the children. The distinctly consensual nature of marriage was promoted by the law of the Church, but Covarruvias is anxious to quote a Roman rule of law (D. 50,17,30) in order to prove that there was also Roman support for the consensual definition of marriage[776]. It did not prevent him, though, from suggesting that the Roman law considered duress as resulting in a delictual action, since damage had to be proven in order for the praetor to grant relief.

If freedom is of paramount importance to the validity of marriage contracts, then it is equally important to know whether all kinds of duress are capable of invalidating a contract. In light of law *Metum autem* (D. 4,2,6) and canon *Quum dilectus filius* (X 1,40,6), this question was traditionally answered in the negative. Law *Metum autem* and canon *Quum dilectus filius* were considered to provide the jurists and theologians with a standard to distinguish juridically relevant from juridically irrelevant forms of duress: the criterion of the constant man (*vir constans*). Relying on Thomas Aquinas' commentary on the *Sentences*, Covarruvias defines the constant man as 'the prudent man who knows how to choose a minor evil in order to escape the risk of a greater evil'[777].

Covarruvias acknowledges in line with the gloss on C. 2,4,13 that in concrete cirumstances it is up to judicial discretion (*arbitrium iudicis*) to decide whether fear for a

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[774] Aristotle, *Ars rhetorica*, 2, 5, 1382a22-27, in: *Aristotelis Ars rhetorica*, recognovit brevique adnotatione critica instruxit W.D. Ross, [Scriptorum classicorum bibliotheca Oxoniensis], Oxonii 1959, p. 82: '(…) οὐ γὰρ πάντα τὰ κακὰ φοβοῦνται, οἷον εἰ ἔσται ἄδικος ἢ βραδύς, ἀλλ᾽ὅσα λύπας μεγάλας ἢ φθορὰς δύναται,καὶ ταῦτα ἐὰν μὴ πόρρω ἀλλὰ σύνεγγυς φαίνηται ὥστε μέλλειν. τὰ γὰρ πόρρω σφόδρα οὐ φοβοῦνται: ἴσασι γὰρ πάντες ὅτι ἀποθανοῦνται, ἀλλ᾽ὅτι οὐκ ἐγγύς, οὐδὲν φροντίζουσιν.'

[775] Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 4, num. 1, in : Opera omnia, Augustae Taurinorum 1594, tom. 2, p. 131: 'Est enim metus trepidatio mentis, quia ex imaginatione futuri et propter imminentis mali perturbatur mens.'

[776] D. 50, 17, 30: 'nuptias non concubitus, sed consensus facit'.

[777] Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 4, num. 1, p. 131: 'Constantem virum interpretor prudentem, qui sciat eligere minus malum ob maioris mali periculum evitandum.'

particular evil satisfies the constant man criterion or not[778]. Since sin is always the greater evil, however, it is beyond doubt that no one is allowed to sin in order to escape an evil. In saying so, Covarruvias presumably distances himself from Soto's contrasting opinion. Quoting Augustine and canon *Ita ne* (C.32, q.5, c.3), Covarruvias holds that it is better to suffer all evil than to assent to a sinful act. By the same token, it is not allowed to commit a crime in order to escape an evil. Therefore, Covarruvias rebukes the mythic figure Alcmeon in the lost play of the same name by Euripides for having killed his mother for fear of disappointing his father[779].

A major question addressed by Covarruvias concerned the impact of duress on women. Drawing on the gloss *Metus* to canon *Cum locum*, our canonist clearly thought that the constant man test had to be specified in the case of women[780]. A judge must allow for a woman's natural weakness of mind and body in comparison to a man's fortitude[781]. After all, prudence and fortitude are not virtues which strive for an objective golden mean. Contrary to justice, the golden mean of fortitude and prudence is determined by the qualities of the subject who is expected to practice these virtues. Hence the 'natural' prudence of a woman (*naturalis foeminarum prudentia*) is different from the 'natural' prudence of a man.

The issue of women and duress saw Covarruvias ostentatiously distancing himself from Ippolito Marsigli (1450-ca.1529), a former student of Felinus Sandaeus, legal practitioner, judge and professor of law at the university of Bologna who is mostly remembered for his *Practica causarum criminalium*[782]. One might wonder, however, if this dispute was more than a pretext, again, for Covarruvias to display his humanist erudition. Marsigli had argued that torture must always be applied to men first, because women endure torture far longer than men[783]. Yet Covarruvias draws upon the classics to refute this erratic

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[778] Glossa *Cruciatum* ad C. 2,4,13 in *Corporis Iustinianaei Codex* (ed. Gothofredi), tom. 5, col. 322.

[779] Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 4, num. 7, p. 132. Covarruvias was well acquainted with Aristotle, of course, who had expressed the same critique in the *Nichomachean Ethics*, 3, 1, 1110a25-30. His philological criticism of a pseudo-commentary on the third book of Aristotle's *Nichomachean Ethics* – ascribed to Eustratius or Aspasius – is another testimony to his familiarity with Aristotelian thought; cf. *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 4, num. 5, p. 131-132.

[780] Glossa *Metus* ad X 4,1,14 in *Corpus juris canonici* (ed. Gregoriana), part. 2, col. 1429: 'Minor tamen metus magis excusat foeminam quam virum.'

[781] Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 4, num. 8, p. 132: 'Hinc etiam iudex arbitrio proprio decernere debet, non ita anxie atque stricte hanc eligendi prudentiam exigendam esse in foeminis, quibus a natura inest minior animi vigor corporisque fortitudo, sed considerandum esse, quid foemina constans eligeret pensata naturali foeminarum prudentia.'

[782] For more biographical details, see L. Pallotti, s.v. *Ippolito Marsi(g)li*, in: Dizionario biografico degli Italiani, 70 (2008), p. 764-767.

[783] Ippolito Marsigli, *Tractatus de quaestionibus in quo materiae maleficiorum pertractantur*, s.l. 1542, ad l. 1, num. 73, f. 8r: 'Item quantum ad illud quod dicunt praedicti doctores quod incipiendum est potius a femina quam a masculo, quia ipsa est debilior viro et citius iudex habebit veritatem ab ea quam a masculo. Ego in hoc dubito, quia dicit glossa notabiliter in l. nihil interest, ff. de adult., quod mulier patitur maiora vulnera quam masculus, ergo maius tormentum patietur et erit constantior in tortura (…).'; Marsigli, *Repetitio rubricae C. de probationibus*, Lugduni 1531, num. 417, f. 51v: 'Sed ego incidenter dico tibi unum, quod si mulier et vir simul pereant, praesumitur ut supra quod mulier prius decesserit, tamen si moriantur ambo ex vulneribus vir praesumitur prius decessisse quia mulier patitur maiora vulnera quam vir, ita notabiliter dicit glossa in l. nihil interest, ff. de adult.'

opinion[784]. Did not Tacitus mention that Nero started torturing women because their bodies are less supportive of pain? Had not Plinius, Tertullian, and Pausanias praised a woman for not having told a secret in spite of long torture, precisely because women cannot be expected to resist torture in the first place? Covarruvias concludes that men are braver than women in tolerating pain and torture, and he quotes the French humanist André Tiraqueau (1488-1558) to give authoratitive support to this view. In fact, Tiraqueau argued that in criminal investigation, women had to be submitted to torture before the men, because women were more likely to capitulate faster than the man, thus allowing the judge to discover the truth more rapidly[785].

A similarly humanist spirit – at least from the point of view of his passion for showing off his classical erudition – runs through Covarruvias' plea for recognizing the fear of losing material goods as duress which meets the constant man test. He quotes Hesiodos' verse to the effect that 'money is the soul of miserable man' (*pecunia est anima miseris mortalibus*)[786]. This was a popular proverb in the early modern period, just as the saying that money is the sinews of affairs (*pecunia nervus rerum*), which can be traced back at least to Plutarch[787]. From Erasmus' *Adages*[788], which drew on Hesiodos and Plutarch, Covarruvias picks the idea that money is 'life and soul' (*anima et vita*)[789]. Moreover, by combining Plutarch and the gospel of Luke, he pretends that in Greek only one word is used to denote both the concept of life and wealth. Unfortunately, he does not mention that magic Greek word[790]. Yet, importantly, from this argument Covarruvias infers that even the loss of only one precious good (*amissio magnae rei*) can constitute a legitimate cause for just fear, let alone the loss of a major part of one's belongings (*amissio maioris partis bonorum*), or the loss of one's entire fortune (*amissio bonorum omnium*).

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[784] For extended references, see Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 4, num. 11, p. 132.

[785] André Tiraqueau, *De legibus connubialibus et iure maritali*, Parisiis 1546, l. 9, num. 99, f. 79r: '(…) cum ii primum sint quaestioni subijciendi, a quibus veritas facilius eruitur; (…) ideo prius sunt foeminae quam mares torquendae, ut quae celerius fatebuntur, cum habeant cor momentaneum et instabile (…).' Tiraqueau was known for his misogyny, cf. J.-M. Augustin, s.v. *André Tiraqueau*, in: P. Arabeyre - J.-L. Halpérin - J. Krynen (eds.), Dictionnaire historique des juristes français, XIIe-XXe siècle, Paris 2007, p. 742-743.

[786] Hesiodos, *Works and days*, v. 686, in: *Hesiod, Theogony, Works and days, Testimonia*, edited and translated by G.W. Most, [Loeb Classical Library, 57], Cambridge Mass. – London 2006, vol. 1, p. 142: 'χρήματα γὰρ ψυχὴ πέλεται δειλοῖσι βροτοῖσιν'.

[787] Plutarch, *Kleomenes*, 27,1, in: *Plutarch, Lives*, with an English translation by Bernadotte Perrin, [Loeb Classical Library, 102], Cambridge Mass. – London 1968, vol. 10, p. 110: 'τὰ χρήματα νεῦρα τῶν πραγμάτων'. For further discussion, see M. Stolleis, *Pecunia nervus rerum, Zur Staatsfinanzierung der frühen Neuzeit*, Frankfurt am Main 1983, p. 63-64.

[788] Desiderius Erasmus, *Adagiorum opus*, Basileae 1526, chiliad. 2, cent. 3, adag. 89, p. 428.

[789] If Covarruvias thus stresses the importance of money for the individual, the early modern period also saw the frequent use of the same and similar expressions to insist on the vital character of money for the survival of the State; cf. Stolleis, *Pecunia nervus rerum, Zur Staatsfinanzierung der frühen Neuzeit*, p. 63-68.

[790] Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 4, num. 18, p. 133: 'Pecunia extat etiam apud Plutarchum in libello an adolescenti liceat audire poemata. Carmen illud pergun alii mihi rodere vitam, quo in loco Plutarchus opes intelligit. Sic apud Graecos una et eadem dictio vitam significat et facultates, quibus vivitur, quod constat ex evangelio Lucae c. 15 ubi id Erasmus adnotavit.'

When it comes to minor fear (*metus levis*), Covarruvias defends the opinion that will later be adopted by Lessius and Grotius. Even if minor fear cannot be considered a sufficient ground for the civil law to grant relief, everything that has been acquired by minor duress must be restored before the court of conscience. In his famous *relectio* on *Regula 'peccatum'*, Covarruvias points out the usual rationale behind the civil law regulation[791]. The law of the land does not intend to go against the law of conscience[792]. It merely abstains from reinforcing the law of conscience by means of state power for the sake of the civil good. The civil law presumes that minor fear does not affect 'freedom of contract', even if the truth can be different. For if the civil law was to grant relief on the basis of minor fear, the courts would suffer from over-extension and business would be continually interrupted by law suits.

Of great interest in view of Sánchez's transformation of Covarruvias' ideas are his opinions on reverential fear (*metus reverentialis*). Reverential fear stems from the respect that an inferior person must have toward a superior[793]. Covarruvias claims that reverential fear can become relevant fear only when it is accompanied by lesion beyond moiety (*laesio enormis*)[794]. Moreover, he states that this rule holds true both in the case of marriage and other contracts[795]. For example, if in reverence to her father a girl agrees to marry a man who is of a far lower status, she can claim rescission. Similarly, a vendor can reclaim rescission if he sold his estate for less than half of its fair market price. Covarruvias, then, does not yet fully distinguish between marriage contracts and other contracts. That contribution to the development of modern doctrines of duress would later be made by Sánchez and Lessius.

Sánchez and Lessius later developed the idea that marriage contracts are not automatically avoided by duress as a matter of natural law, but as a matter of ecclesiastical

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[791] This extremely rich *relectio* is investigated in O. Condorelli, *Norma giuridica e norma morale, giustizia e salus animarum secondo Diego de Covarrubias, Riflessioni a margine della Relectio super regula 'Peccatum'*, Rivista internazionale di diritto comune, 19 (2008), p. 163-201.

[792] Diego de Covarruvias y Leyva, *In regulam peccatum, De regulis iuris lib. 6 Relectio*, part. 2, par. 3, num. 7, in: Opera omnia, Augustae Taurinorum 1594, tom. 2, p. 485: 'Non oberunt huic sententiae leges civiles negantes rescissiones contractus metus causa quoties metus levis est nec cadit in constantem virum, quia licet leges civiles non dent in hoc casu ob metum levem repetitionem, nec rescissionem contractus, non tamen approbant eam receptionem, nec eam iustam esse censent, praesumit etenim lex contractum metu levi gestum consensum habuisse liberum et sufficientem ad hoc ut validus is iudicetur. Atque haec praesumptio iuris est et de iure, nam etsi constet de metu, qui tamen levis sit, non permittit lex huius contractus rescissionem ex ea quidem causa, ne passim commercia humana impediantur et ne tot lites ad contractuum rescissiones in republica constituantur.'

[793] For an introduction to reverential fear, see J. du Plessis – R. Zimmermann, *The relevance of reverence, Undue influence civilian style*, Maastricht Journal of European and Comparative Law, 10 (2003), p. 345-379; and Jansen, *'Tief ist der Brunnen der Vergangenheit'*, p. 218-220.

[794] We use this translation because it is used in the Louisiana Civil Code, art. 2589 for denoting the same case that in the civilian tradition has become known as 'laesio enormis'. It is ultimately based on an extensive interpretation by the scholastic jurists and theologians of the Roman constitution C. 4, 44, 2. It holds that the sale of an immovable can be rescinded when the price is less than one half of the just price. In the common law, this concept might also be seen as coming close to 'unconscionability'.

[795] Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 6, num. 4, p. 136: 'Cum in matrimonio maior sit exigenda libertas quam io [sic] caeteris contractibus, notandum est, caeteros contratus non esse rescindendos ex solo metu reverentiali, nisi praecedentibus minis illatis ab eo qui solet quod minatur exequi. (…) Hi vero omnes quos dixi fateri hanc opinionem esse communem, eandem intelligunt, nisi enormis laesio in contractu contingat cum metu obsequii et reverentiae. Hoc enim solum etiam minus [sic] non probatis sufficiet ad rescindendum contractum. (…) Quae omnia nec temere adduximus, sed ut matrimonii contractus nullus omnino sit, eo casu, quo caeteri contractus ex hoc metu sint rescindendi (…).'

law. Covarruvias, however, held that marriage contracts falling short of free consent were void from the outset by natural law[796]. Precisely because they wanted to develop a general contract doctrine, while at the same time distinguishing marriage from other contracts, Sánchez and Lessius could no longer say so. As a general principle, Sánchez and Lessius held that duress can only make contracts voidable, not void *ipso facto*. Therefore, they were bound to explain at the same time that the absolute nullity affecting marriage contracts must have been imposed through positive, ecclesiastical law. Covarruvias had not yet reached that level of systematic reflection.

4.2.1.5 Molina : duress makes contracts void *ab initio*

When it comes to duress as a vice of the will, Molina's ideas are scattered. He does not dedicate an autonomous chapter to duress. This is rather remarkable, since Molina is generally known for his vital contribution to the development of a systematic law of contract. The Jesuit from Cuenca deals with duress in the margin of his discussion of two particular contracts, a liberal promise and a loan for consumption. He insists that nullity ensues automatically from coerced consent. In doing so, he defends a view that will eventually be refuted quite radically by Sánchez and Lessius. Looking at the subsequent Jesuit tradition, Molina's brief remarks on duress seem to be the proverbial calm before the storm.

Molina takes it for granted that any form of involuntariness is an impediment to the conveyance of property rights, certainly if liberality is the ultimate cause of the contract[797]. A promise must be deliberate if it is to be considered valid. People who lack full rational capacities can therefore not conclude valid contracts. He believes that there is no reason to elaborate on this, since it speaks for itself[798]. By the same token, promises should not be tainted by deceit, violence or duress. Still, he makes an exception to this rule for contracts that are entered into by legitimate duress (*iuste*), for example because of fear of a just punishment[799]. Another qualification concerns contracts that are not the direct result of duress, for instance when you promise to enter into a contract with somebody so that he helps you out of the difficulty you are in, or when you make a vow to escape assassination. Duress is not the

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[796] Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 5, num. 6, p. 134: 'Constat matrimonium metu contractum nullum esse ipso iure ex propria actus natura, non tantum ex constitutione ecclesiae, quod probatur, consensus liber est praecise necessarius ad hunc contractum cap. cum locum de sponsalibus [X 4,1,14]. Hic autem consensus liber non est, ubi metus cadens in constantem virum concurrit. Igitur ex natura sua matrimonium metu contractum est nullum.'

[797] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 267, col. 67-68, num. 2 : 'Tale autem voluntarium mixte satis non ext, ut quis dominium vel ius rei suae in alterum transferat, maxime ex mera liberalitate, ut de se est notissimum.'

[798] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 267, col. 67, num. 1 : 'Ut promissio aut stipulatio valida sit (idemque est de donatione completa), necesse in primis est, ut sit actus humanus plene deliberatus. Qua ratione promissiones et stipulationes eorum, qui rationis usum non habent, invalidae omnino sunt (…) atque ex se est notissimum.'

[799] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 267, col. 68, num. 3 : 'Quando item iuste metus incuteretur, valida esset promissio, quae ex tali metu oriretur, etiamsi fieret ei, a quo metus provenit. Ut si quis aliquid alicui promitteret, ut iustam poenam ipsi aut alteri condonaret, potestatem haberet ad illam, pro eo pretio aut praemio relaxandam.'

cause (*causa*) but the occasion (*occasio*) to such a contract[800]. Lessius would further develop these ideas.

In respect to the question of reverential fear, Molina is inspired by Sylvester Prierias and Dr. Navarrus. He holds that reverential fear amounts to duress accompanied by threats (*reverentialis metus aequiparatur metui per minas incusso*)[801]. Hence, it has the potential of voiding a contract. By the same token, he considers minor duress (*metus levis*) – duress which would not throw a constant man off balance – as having a voiding effect on contracts as far as the court of conscience is concerned. He nevertheless admits that minor fear cannot be relevant before the external courts, since no presumption can lie that a contract affected by minor fear was entered into through mixed involuntary consent[802]. Indeed, as Sylvester and Dr. Navarrus had pointed out, nobody can be presumed to be wasting his money for nothing, unless he is affected by just fear. However, this presumption does not lie in the court of conscience, where the truth must prevail[803].

In treating of usury, Molina expressly attacks the traditional interpretation of canon *Abbas* in X 1,40,2 (*quae metu et vi fiunt, de iure debent irritum revocari*). Usually, canon *Abbas* was thought to imply that duress results in voidability, since, allegedly, it stated that the judge had to intervene to avoid the contract. Molina denies that this is the right interpretation of canon *Abbas*, since he does not think that it says that, if the authority of the judge had not intervened, the contract would have remained valid[804]. According to Molina, contracts affected by duress are void *ipso iure* (*irritus*) and not simply voidable. Although Molina does not mention him, he might have drawn his inspiration from Fortunius Garcia as he defended the nullity *ab initio* resulting from duress[805]. He thinks that the judge is not there to avoid the contract, but merely to express the finding that the contract is already void, and to admonish the illegitimate possessor to make restitution. Molina believes that coerced consent

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[800] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 267, col. 68, num. 3 : 'Si autem voluntarium mixte, quo aliquid uni promitteretur, solum sumeret occasionem ex nequitia alterius, minime eum effectum intendentis tunc sufficeret, ut valida esset promissio. Verbi gratia, si quis dum iniuste mors sibi imminet ab aliquo, aliquid Deo voveat, ut ab eo periculo ipsum eripiat, valida est promissio, quoniam licet metu voveat, voluntarium tamen, quod in voto cernitur, solum habuit occasionem ex morte iniusta, qua sibi imminebat.'

[801] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 267, col. 68, num. 4 : '(…) etiam reverentialem metum, qualis est, quem filius aut filia interdum habet patri, uxor marito, famulus aut vasallus domino, clericus episcopo, et libertus patrono, si involuntariam mixte efficiat promissionem aut stipulationem, reddere illam nullam (...), quoniam reverentialis metus aequiparatur ea in parte metui per minas incusso.'

[802] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 267, col. 68, num. 5 : '(…) in foro conscientiae, etiamsi metus non sit cadens in constantem virum, si tamen promissione revera involuntariam mixte efficiat, reddere illam nullam. (…) In foro autem exteriori, id est, quando metus esset levis, qui in virum constantem, habita qualitate personae, non cadit, non subvenietur ei, qui ex eiusmodi metu promitteret, quod non praesumeretur tam levem metum effecisse promissionem involuntariam mixte.'

[803] Sylvester Prierias, *Summa Sylvestrina*, part. 2, s.v. *restitutio 2*, dict. 7, f. 263r. Compare Azpilcueta, *Enchiridion sive manuale confessariorum et poenitentium*, cap. 17, num. 15, p. 280.

[804] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 267, col. 308, num. 14 : 'Ad cap. vero *Abbas* dicendum est, verba illius sic habere, *quae metu et vi fiunt de iure debent irritum* (expone, id est, tanquam in se irrita), *revocari*, non quidem invalidum reddendo contractum, quasi seclusa iudicis authoritate esset validus, sed irrita illa pronunciando, praecipiendoque possidenti, ut statim illa restituat, ut continuo in eodem textu subiungitur, quo fit, ut ex illo textu non colligatur, dominium in eo eventu fuisse translatum.'

[805] Fortunius Garcia, *De ultimo fine iuris civilis et canonici*, num. 396, p. 264sqq.

cannot possibly convey property rights[806]. He claims support, in this respect, from Domingo de Soto's alleged view of the automatic nullity of coerced contracts as defended in his *On justice and right*[807].

4.2.2 Tomás Sánchez's doctrine of duress

4.2.2.1 Duress and the law of marriage

The enduring influence of classical canon law on the present-day law of marriage in both civil and common law countries is a well-established fact. Less remembered, however, is the fundamental role which the ecclesiastical law of marriage played as a source of inspiration for the establishment of a general law of contract with the scholastics of the early modern period. Indeed, marriage was conceived of as a contract for the exchange of rights over the bodies (*ius in corpus*) of the spouses[808]. Yet this contractual view of marriage in the medieval tradition should not be confounded with the modern conception of marriage as depending solely on the continuing free consent of both parties in the marital relationship[809]. If marital debt (*debitum conjugale*) and the rights over the body of the spouse were a matter of concern to the canonists, then this ensued to a large extent from the unquestioned assumption that marriage entailed an unwavering commitment to the procreation and upbringing of children.

At any rate, the canonists and the scholastics could reason from marriage to other contracts because marriage was essentially thought of in these juristic and contractarian – in the sense of consensualist – terms besides being considered a sacrament[810]. This occurred very clearly in a treatise on marriage law that has probably remained unsurpassed up to this day in its detailed and systematic exposition : the *Disputationes de sancto matrimonii sacramento* by Tomás Sánchez, the great Jesuit theologian from Cordoba[811]. Sánchez's merit consists not only in having stimulated the cross-fertilization between matrimonial law and

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[806] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 267, col. 309, num. 14: 'Ex natura ergo rei atque in conscientiae foro, quin et in exteriori de iure praetorio, non censetur translatum dominium, quando aliquid per vim aut metum sufficientem, donatum, traditumque est, sed solum iuris civilis fictione, quondam censebatur translatum.'

[807] This claim is a little bit exaggerated, although it is true that in solving 'that old question on whether usurious giving transfers property' (*vetus illa quaestio utrum per usurariam dationem trasferatur dominium*), Soto concludes that it does not; cf. *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 3), lib. 6, quaest. 1, art. 4, p. 526-528.

[808] For the origins of the language of rights to describe marriage from the twelfth century up until and including the first Code of Canon law (1917), see, amongst others, M. Madero, *La nature du droit au corps dans le mariage selon la casuistique des XIIe et XIIIe siècles*, Annales, Histoire, Sciences Sociales, 65 (2010), p. 1323-1348 ; M. Madero, *Sobre el ius in corpus, En torno a una obra de Filippo Vassalli y al debate Francesco Carnelutti-Pio Fedele*, in: E. Conte – M. Madero (eds.), Entre hecho y derecho, Hacer, poseer, usar en perspectiva histórica, Buenos Aires 2010, p. 119-134; and Alfieri, *Nella camera degli sposi, Tomás Sánchez, il matrimonio, la sessualità*, p. 143-147.

[809] Ch. Reid, Jr., *Power over the body, equality in the family, Rights and domestic relations in medieval canon law*, Grand Rapids – Cambridge 2004, p. 4-5.

[810] The tension between the contractual and the sacramental character of marriage is highlighted in A. Esmein, *Le mariage en droit canonique*, tom. 1, Paris 1929[2] [=1891], p. 83-89, and tom. 2, Paris 1935[2] [=1891], p. 443-445.

[811] On Sánchez, cf. supra, p. 62.

general contract doctrine, but also in his neatly distinguishing marriage from other contracts when necessary – a disjunction which turns out to be vital precisely in regard to the doctrines of duress.

One of the closest parallels between the law of marriage and other contracts is the huge importance of freedom – in the sense of the absence of coercion – when entering into a marriage. The rules that no one should be compelled to marry (C.31, q.2, c.1) and that marriages should be free (X 4,1,29) were recognized as fundamental principles of Church law. According to the classical canon law of marriage, the exchange of present consent between the spouses or the future consent followed by sexual intercourse was sufficient for the conclusion of a valid marriage[812]. The absence of paternal assent did not invalidate the marriage contract. This case for marital freedom and the irrelevance of parental consent was not made successfully until the advent of Gratian[813]. Before that, the Christian tradition remained faithful to the proposition, which it borrowed from Roman law, that fatherly consent was decisive in the making of marriage. It is no secret that the renewed canonical doctrine remained under pressure from practice. Apart from the well-known tendencies in France to introduce paternal assent as a requirement for the valid conclusion of a marriage contract, official Church doctrine also met with continuous resistence from Spain where secular legislation and family custom often required parental assent[814].

It is important to consider the reasons behind the endorsement of freedom of choice in the classical marriage law of the Church. The reason was basically that freedom of marriage was the only guarantee that marriage would last for a life time, which in turn was the best guarantee for the good upbringing of the children (*ad procreationem prolis*)[815]. The idea of 'freedom of contract' as applied to marital relationships, then, ultimately stems from the concern to assure the good upbringing of future generations. It has hardly anything to do with the modern viewpoint that marriage is a fluid relationship based on voluntary association for the sake of the benefit of the individual parties. As a matter of fact, marriage contracts were thought to require an even higher degree of liberty than other contracts, precisely because once they were concluded, they were indissoluble. Since coercion formed a massive obstacle to freedom of matrimonial consent, Sánchez dedicated the entire fourth book of his *Disputationes de sancto matrimonii sacramento* to the problem (*De consensu coacto*).

Interestingly, in this book on coerced consent Sánchez first systematically expounds the impact of coercion on 'contractual freedom' in general (disp. 1-11). He then proceeds to apply this general theory of coerced consent to marriage contracts in particular (disp. 12-27), while at the same time highlighting the points at which the consequences of compulsion for marriage and other contracts, respectively, diverge. In light of the attention paid in our

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[812] Ch. Donahue, Jr., *Law, marriage and society in the later Middle Ages, Arguments about marriage in five courts*, Cambridge 2007, p. 16-18.

[813] Ch. Reid, Jr., *Power over the body, equality in the family*, p. 30-50.

[814] F.R. Aznar Gil, *El consentimiento paterno o familiar para el matrimonio*, Rivista internazionale di diritto comune, 6 (1995), p. 127-151.

[815] Soto, *De iustitia et iure* (ed. fac. V. Diego Carro – M. González Ordóñez, vol. 4), lib. 8, quaest. 1, art. 7, p. 733, quoted supra, n. 757.

dissertation to the emergence of a general law of contract in early modern scholasticism, in what comes next we will focus on Sánchez's discussion of *metus* in contracts in general. His elaborate discussion of the impact of coercion on marriage contracts in particular falls outside of our scope.

4.2.2.2 The constant man test of coercion

4.2.2.2.1 Promoting virtue, protecting the weak

A major concern of the canonists and theologians was of course to limit the scope of coercion (*metus*) as a ground for annulment of a contract. If fear of the slightest kind were considered a relevant ground for frustration of contract, contract would lose its function as an instrument guaranteeing stable relationships altogether. Moreover, as we have seen very clearly in Soto's discussion, accepting simple fear as legitimate fear would have run counter to the Church's more general project of promoting the virtuous life, requiring an attitude of constancy (*constantia*) and courage (*fortitudo*) in the face of danger and adversity. On the other hand, the medieval canonists were not undiscriminately willing to accept, particularly in regard to marriage contracts, the rule of Roman law – reminiscent of Aristotle – that coerced consent is still consent (D. 4,2,21,5).

Drawing on law *Metum autem* (D. 4,2,6)[816] and on canon *Quum dilectus filius* (X 1,40,6) they did find a standard, however, to sort out the juridically relevant forms of coercion : the criterion of the constant man (*vir constans*). Yet the 'constant man' test of coercion only transposed the problem on another level. It is one thing to know that if fear is so serious as to throw even a constant man off balance, it can be considered as a legitimate ground for annulment. But what kind of fear, then, throws a constant man off balance? Accordingly, which fear belongs to the constant man and is justified (*justus*) and probable (*probabilis*)? The perplexity of this question is indicated by the sheer volume of text that is dedicated to its solution (disp. 1-5).

Borrowing from an impressive number of civilians, canonists and theologians, Sánchez gives a decisive impetus to the discussion on the influence of duress on the voluntary consent of the constant man[817]. He lists five conditions for coercion not to fail the 'constant man test'. First of all, the evil feared must be grave in an absolute sense (*malum magnum*). Soto had already insisted on this. He had deemed an ambushed merchant's fear of losing his horse not sufficient grounds for demanding the ransom he had eventually payed to the robbers. Even though from a subjective point of view the merchant might well have considered the loss of his horse as a greater evil (*malum maior*) than the loss of his money,

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[816] In fact, D. 4,2,6 (Metum autem non vani hominis, sed qui merito et in homine constantissimo cadat, ad hoc edictum pertinere dicemus) speaks of a 'vir constantissimus', thus using the superlative degree of the adjective instead of the positive. Following Philippus Decius (1454-1535), Sánchez nevertheless insists that the right interpretation and sense of 'constantissimus' must be 'constans'; cf. *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 1, num. 9, p. 325.

[817] Sánchez's doctrine of the constant man test of coercion and its reception in the canon law tradition is subject to a brief treatment in P. Fedele, *Sull'espressione 'metus cadens in virum constantem', Sulla violenza come vizio del consenso matrimoniale, Note e discussioni*, [Biblioteca de 'Il diritto ecclesiastico'], Roma 1935, p. 1-8.

the loss of a horse can never be deemed a grave evil in itself from an objective point of view[818].

Sánchez calls this opinion of Soto excellent, since freedom of consent (*libertas consensus*) is not hampered by an evil which is feared by a particular person, but minimal from an intrinsic point of view. In order to pass the constancy test, fear must concern grave evil taken on its own (*debere esse timorem gravis mali in se considerati*)[819]. Sánchez thus rejects the view of Sylvester Prierias, which had been based on the idea that constancy is the art of choosing the lesser of two evils, thus leaving room for a purely comparative notion of evil[820]. This idea of Sylvester was often based on a literal interpretation of law *Metum* (D. 4,2,5)[821]. Sánchez, however, reiterates time and again that there are objective criteria for determining when a contract is null on account of coercion[822].

The second condition necessary to meet the 'constant man test' is less problematic. The estimation of the evil that is feared must be strong (*aestimatio fortis*). It must be based on right reason and probability, not on vain grounds and levity. In addition to that, the fear must concern an imminent danger (*instans periculum*). This had already been pointed out by Soto and Covarruvias in line with law *Ait praetor* (D. 4,2,1)[823]. A danger or damage that lies too far ahead cannot form the object of legitimate fear, according to Sánchez. For future challenges can still be prepared for in many ways (*multis viis occurri potest periculis futuris, longe distantibus*)[824]. Still, if entering into the contract in question is the only way left to stave off the future evil, then that fear should be considered to be grave.

There are three further conditions that must be satisfied for fear to be considered as capable of voiding an agreement. All three have to do with the actual danger that must stem from threats and the object of fear. First of all, the extortioner must be capable of putting his threats into practice (*potens minas executioni mandare*)[825]. Explicitly relying on Soto, Aragón and Henríquez, our canonist therefore requires the judge to carefully examine the rank and power of the extortioner. Secondly, it does not suffice to show that the extortioner is potentially capable of putting his power into practice. There must be evidence of the extortioner really and regularly having carried through on his threats (*minas exequi solitus sit*)[826]. In stating this condition, Sánchez particularly relies on the law *Metum non* (C. 2,19,9)

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[818] Soto, *In quartum sententiarum librum commentarii*, dist. 29, quaest. 1, art. 2, s.v. *secundo per accidens*, p. 711.

[819] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 1, num. 12, p. 325.

[820] Sylvester Prierias, *Summa Sylvestrina*, part. 2, s.v. *metus*, quaest. 1, f. 161r-161v: '(…) generaliter omne maius malum | respectu minoris, quia vir constans seu virtuosus semper consentit in minus malum, ut vitet maius.'

[821] D. 4,2,5 (Metum accipiendum Labeo dicit non quemlibet timorem, sed maioris malitatis) uses the comparative degree 'maior' instead of the positive degree of the adjective 'magnus'.

[822] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 2, num. 3, p. 328.

[823] Soto, *In quartum sententiarum librum commentarii*, dist. 29, quaest. 1, art. 2, s.v. *alterum vero*, p. 711; Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 4, num. 1, p. 131.

[824] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 1, num. 16, p. 326.

[825] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 1, num. 19, p. 326-327.

[826] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 1, num. 19, p. 326-327.

and the common opinion of the jurists in the *ius commune* tradition. Thirdly, the intimidated party must not have had an easy chance of evading the danger (*ne possit timens facile occurrere malis*) by other means save by entering into the contract[827].

Taking up the old discussion on the respective constancy and strength of men and women, Sánchez does not fail to mention that the 'constant man test' of coercion needs to account for gender. Although there is ample evidence for this in the learned legal and theological tradition, as with Covarruvias, André Tiraqueau once more turns out to be the most reliable authority that can be cited for this slightly problematic claim, more specifically a passage in which Tiraquaeu describes women's idle tastes for clothes and jewelry, ascribing that to their softness (*mollities*) and weakness (*imbecillitas*)[828]. Sánchez asserts on this basis that 'no matter how capable a woman is of practicing the virtue of constancy, the natural constituency of her sex's body does not allow her to resist coercion as bravely as a man.' 'Women are soft and weak,' Sánchez concludes[829], 'by their very nature'. Accordingly, women need protection. The criterion of the 'constant man' needs to be applied to women in a particularly mild way.

What is more, the criterion of the 'constant man' must never be applied in an absolute way (*absolute*). The peculiar qualities (*qualitas/conditio*) of the intimidated party involved always matter. The concept of the 'constant man' needs to be specified (*respective*) so as to allow for a different treatment of weaker parties such as children, women and old men. Conversely, in the special case of the military, the 'constant man test' requires an even higher level of constancy and resoluteness. For troops can lawfully be expected to have particularly courageous and dauntless spirits (*affectus*)[830].

4.2.2.2.2 The constant man, his relatives, and his friends

As a rule of thumb, compulsion can be a legitimate ground for avoiding a contract, if it is sufficient to sway the will of a constant man or woman (*metus cadens in virum constantem*). Legal practice turns out to be too complex, however, for the 'constant man test' always to be able to provide a clear answer to the question whether or not the intimidated party can claim that the contract was null on account of *metus*. Therefore the doctors unanimously recognized on the basis of law *Metus autem* (D. 4,6,3) that the question should be left to judicial discretion in actual cases (*huius rei disquisitio iudicis est*). To be more precise, in the external court the judge was expected to do so, in the court of conscience a prudent man or confessor could do so[831].

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[827] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 1, num. 23, p. 327.

[828] Tiraqueau, *De legibus connubialibus et iure maritali*, l. 3, num. 17, f. 28v.

[829] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 3, num. 2, p. 328: 'Et ratio est, quia licet femina habeat virtutem constantiae, propter constitutionem tamen corporis illi sexui naturalem, minus potest resistere metui quam vir. Ergo minor metus sufficiet, ut opprimat cogatque feminam constantem succumbere, quam virum eadem constantia praeditum. Item, quia feminae suapte natura sunt valde imbecilles, ut late Tiraquellus, l. 3, connub., num. 71 [sic] et seqq.'

[830] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 3, num. 4, p. 329.

[831] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 5, num. 1, p. 331-332: 'Primo concors doctorum sententia est, id [sc. quae sint mala gravia et sufficientia metus cadentis in virum constantem]

Still the jurists and theologians tried to formulate an objective doctrine of which types of evil could be considered as satisfying the 'constant man test' of compulsion. What is more, they even tried to figure out if coercion on the part of other persons than the contracting party herself could be considered as fear relevant to the validity of a contract. Sánchez's exposition is both representative and innovative in this respect. Now we will see how he extended the concept of *vir constans* so as to make it include not only the contracting party himself, but also his relatives and friends. In the next paragraph, his list of imminent evils sufficient to throw a constant man off balance reveals the engagement in wordly affairs and the amazing economic insight typical of many of the Jesuits at the turn of the seventeenth century.

In paragraph *Haec* (D. 4,2,8,3) a principle is contained that states that it does not matter for the legal pertinence of an evil feared whether that evil is going to occur to the parents or to their children. Parental affection induces the parents to be more anxious about their children than about themselves anyway (*pro affectu parentes magis in liberis terreantur*). This statement would form the textual basis of the idea that evil events swaying the will of a constant man need not concern the contracting party herself (*in propria persona*). The incumbent evil can also concern people who are close to her. Just how close that tie needed to be was a matter of dispute over the ages of course. But there is no doubting Sánchez's extremely extensive interpretation of this Roman rule.

Sánchez sets out his exposition by repeating the common opinion that the fear of a constant man can also occur to his children or spouse. For as Genesis says, husband and wife are one flesh (*vir et uxor una caro*), and there is a Roman constitution (C. 6,26,11,1) expressly stating that father and son are one person (*pater et filius eadem persona*). Though Sánchez points out that there is further authoritative support for this extension in Thomas, Sylvester, and Angelus, he recognizes that these authors remain vague about extending the fear of a constant man to evil occurring to blood relatives in general (*consanguinei*). Henríquez had expressly included all relatives of the first grade among the persons on account of whom a contracting party might have suffered fear that meets the 'constant man test'[832].

Yet Sánchez goes further[833] : 'Through love, nature reforges all blood relatives into one flesh composed of the same blood.' A flood of citations are adduced to strengthen the view that evil occurring to blood relatives in general is relevant. Some deal with the annulment of elections because of pressure exerted on blood relatives of the elector, as canon *Sciant cuncti* (VI 1,6,12). Other passages, such as the gloss *Suorum* on canon *Quicumque* (VI 5,11,11) show that blood relatives are legally connected amongst each other since excommunication not only hits the excommunicated person himself but also his blood

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iudicis arbitrio definiendum esse. (…) Et sicut in foro externo relinquitur hoc iudicis arbitrio, ita in foro interno prudentis arbitrio.'

[832] Enrique Henríquez, *Summa theologiae moralis tomus primus*, Venetiis 1600, lib. 11 (*de matrimonii sacramento*), cap. 9, num. 5, p. 666: 'Deinde metus gravis dicitur non tantum quando imminet periculum damni in propria persona, sed in persona coniuncta 1. gradu, ut si resultat contra parentes, liberos, et uxorem.'

[833] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 4, num. 8, p. 330: 'Quinto dico, idem esse respectu aliorum consanguineorum. Probatur, quia natura ipsa amore conciliat consanguineos tanquam unam carnem, ex eodemque sanguine derivatos.'

relatives[834]. Sánchez also adduced the verse, taken from Scripture (Ephesians 5:29) and cited in Gratian's *Decretum* (C.13, q.2, c.19), stating that nobody ever hated his flesh. Antonio Padilla y Meneses' (d. 1598) commentary on law *Interpositas* (C. 2,4,13) is quoted regarding the annulment of a renunciation on account of the fact that pressure was exerted on one of the blood relatives of the renouncing beneficee[835]. Sánchez wrongly claims that Padilla's opinion is directly based on a decision of the Rota, the supreme ecclesiastical tribunal.

Sánchez is clearly at pains, then, to find direct canonical support for his claim that evil events scaring *consanguinei* are tantamount to imminent dangers experienced by the contracting party himself. Yet there is even less authoritative support for his claim that paragraph *Haec* (D. 4,2,8,3) must also be extended to in-laws (*affines*) and friends (*amici*). Sánchez holds that through marriage blood relatives of the spouse become like blood relatives of the own family, and hence part of the same flesh (*una caro*). So if you enter into a contract for fear of a grave evil that will otherwise occur to your grandmother-in-law, there is a ground for rescission of the contract. Curiously, Sánchez feels obliged to specify that relatives of a mistress do not become blood relatives of a fornicator, since fornication does not bring about real love[836].

Last, close friends suffering from pressure can also satisfy the 'constant man test' of coercion, according to Sánchez. 'A friend is an alter ego', our Jesuit argues, quoting Aristotle's *Nicomachean Ethics* (9) and Saint Augustine's *Confessions* (4,6); 'A friend is the other half of his friend's soul', he goes on citing a famous verse of Horace's *Odes* (1,3,8) ; 'With a friend you share one soul living in two bodies', he finishes his enthusiastic plea by quoting from Aristotle's *Rhetoric* (2,4). Coercion applied to a close friend (*in arctissima amicitia*) sways the will of a constant man or woman. What is more, a friend must reasonably be expected to suffer from his fear that a serious evil will occur to his friend unless he enters into a contract[837].

4.2.2.2.3 The constant man, his property, and his profits

As noted above, there was a consensus among the jurists and theologians that the assessment of coercion in actual cases must depend on the judge's discretion. At the same

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[834] For further discussion, see Maihold, *Strafe für fremde Schuld ? Die Systematisierung des Strafbegriffs in der Spanischen Spätscholastik und Naturrechtslehre*, p. 314-336.

[835] Antonio Padilla y Meneses, *In titulum de transactionibus Codicis commentarius*, Salmanticae 1566, p. 76, num. 10: 'Non solum autem rescindetur renuntiatio beneficii si metus sit illatus ipsi renuntianti, sed et si consanguineo eius inferatur.'
For scant biographical notices on Padilla, see N. Antonio, *Bibliotheca Hispana nova, sive Hispanorum scriptorum qui ab anno MD ad MDCLXXXIV floruere notitia*, Matriti 1783, p. 148-149.

[836] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 4, num. 11, p. 331: 'Sexto dico, similiter esse metum cadentem in virum constantem, quando is incutitur affinibus. Quia sunt velut proprii consanguinei, cum sint consanguinei alterius ex coniugibus et hi sint una caro. (…). Intelligo tamen hoc, quando affinitas provenit ex matrimonio, secus quando ex fornicatione. Quia ex hac nullus amor conciliatur, nec cognoscunt se huiusmodi affines.'

[837] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 4, num. 9, p. 331: 'Facit pro hanc sententia clare Alexander de Nevo, c. cum locum, num. 12 de spons, ubi ait esse metum cadentem in constantem virum, sufficientem ad irritandum matrimonium si inferatur aliis, de quorum personis rationabiliter debet timeri ne offendantur. Quod quidem maxime procedere in arctissima amicitia coniunctis, dubitabit nemo.'

time, learned men as Sánchez did not stop from making lists containing the types of evil that could form a source of unlawful coercion. Such a list ordinarily includes the following evil events (*mala*) : death, mutilation, torture, enslavement, captivity, exile, imprisonment[838], loss of status, loss of honor, rape. Whether infamy and excommunication could count as grave evil was disputed[839]. Sánchez held that legal infamy counted as *metus viri constantis* in any event. The avoidance of factual infamy through entering into a contract could only be deemed a coerced act if there was hardly any alternative way of preventing your reputation from being sullied. The threat of being excommunicated, for its part, was deemed an evil if the excommunication lacked a legitimate ground. Sánchez did not think that fear for a lawfully imposed excommunication could satisfy the constancy test.

The source of a compelling debate concerned the loss of property (*amissio bonorum*) as an evil resulting in relevant duress. Drawing on Hesiodos, Plutarch and the Gospel, Covarruvias had pointed out that in Greek 'life' and 'goods' were one and the same concept[840]. In this manner, a traditional obstacle against the relevance of fear for the loss of material riches could be circumvented: canon *Quum dilectus filius* (X 1,40,6). This canon stated that duress could only be deemed relevant if it concerned torture or the loss of one's life (*mors*). Therefore, it had often been cited along with canon *Omnes causationes* (C.32, q.7, c.7) against fear for the loss of material goods as a legitimate ground for rescission of a contract. But in line with Hesiodos' interpretation of money and material goods as constituting the living soul of man (*pecunia est anima miseris mortalibus*), this canonical tradition could be by-passed.

As Sánchez puts it, 'fear of losing your property is tantamount to fear of losing your life' (*metus amissionis bonorum aequiparatur metui mortis*)[841]. He leaves no doubts about it that the prospect of losing all of your property unless you assent to a contract amounts to duress. Moreover, in his view, losing a substantial part of your property (*amissio maioris partis bonorum*) is sufficient to meet the 'constant man test' of coercion. Again, he thinks that losing a major part of your property amounts to dying, quoting canon *Frequens* (VI 2,5,1) and law *Propter litem* (D. 27,1,21*pr*.) to grant textual support to the view that the major part of something equals the whole. Covarruvias and Tiraqueau are cited amongst many other authors to prove that this is not a revolutionary idea[842].

What is interesting about Sánchez is the balanced view he takes. Some had stipulated, for instance, that the goods must always be of great value (*bona magna*) according to

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[838] Soto, Aragón, and Henríquez took the view that a short term of imprisonment was not sufficient to meet the 'constant man test' of coercion. See Soto, *In quartum sententiarum librum commentarii*, dist. 29, quaest. 1, art. 2, s.v. *eiusmodi*, p. 711; Aragón, *In secundam secundae commentaria de iustitia et iure*, quaest. 88, art. 3, p. 988; Henríquez, *Summa theologiae moralis*, lib. 11 (*de matrimonii sacramento*), cap. 9, num. 4, p. 666.

[839] For a detailed account of the debate, see Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 5, num. 15-18, p. 333-334.

[840] Cf. supra.

[841] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 5, num. 21, p. 334.

[842] For Covarruvias, see higher. Tiraqueau, *De nobilitate et de iure primogeniorum*, Basileae 1561, cap. 31, num. 369, p. 415.

objective standards in order for the loss of those goods to be relevant[843]. Sánchez rejects this 'objective' interpretation if it is understood too radically, because the loss of an object which, absolutely speaking, is of small value, can badly affect a poor man[844]. What is to be considered a good of great value (*bonum magnum*) somehow depends on the person in question, too. On the other hand, Sánchez does not accept the other extreme, namely that the criterion of *bona magna* should be of an entirely subjective nature. According to a radically subjective interpretation, a rich man's fear of losing a considerable amount of property would be considered unjust, if he could still sustain himself regardless. Seeking support from Sylvester, Sánchez does not share that subjective interpretation[845]. Even if, relatively speaking, they suffer only a small loss of their fortune, the prospect of losing a major part of an estate constitutes just fear[846]. Generally speaking, the criterion for just fear must be objective rather than subjective.

A further testimony to the remarkable willingness of Sánchez to grant relief in case of fear of losing material belongings is his insisting that even the threat of losing a singular precious object (*metus amissionis rei magnae et notabilis*) can sway the will of a constant man. He falsely claims support for this view from Soto, Henríquez and Aragón. There is only one canonist who could rightly be seen as having defended this position before : Covarruvias. Yet Sánchez clearly went further : he even holds that the threat of losing a legal instrument or a notarial deed (*amissio instrumentorum*) certifying the legitimate existence of part of your property meets the 'constant man test' of coercion[847]. He follows Baldus in this. Baldus said that the threat of losing a notarial deed about the entirety of your property, or at least a major part of it, could be tantamount to a threat of being killed[848].

Even Sánchez, however, tries to limit the scope of threats and fear of evil events leading to the annulment of contracts. A case in point is the loss of profits envisaged if assent

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[843] See Azpilcueta, *Enchiridion sive manuale confessariorum et poenitentium*, cap. 22, num. 51, p. 495.

[844] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 5, num. 21, p. 334: 'Hanc conclusionem temperant aliqui quando bona quorum amissio timetur, magna sunt. (…) Verum hoc ita absolute dictum displicet mihi. Quia ita gravem iacturam patitur inops ablatis sibi modicis facultatibus vel maiori earum parte ac ditissimus. Imo, multo maiorem ille patitur, quia alia dimidia bonorum parte sibi relicta vitam traducere minime potest. Hic autem potest.'

[845] Sylvester Prierias, *Summa Sylvestrina*, part. 2, s.v. *metus*, quaest. 3, f. 161v: 'Tertio quaeritur utrum metus perdendi bona temporalia vel maiorem partem eorum sit iustus, et dicit Panormitanus (…) quod sic, si non potest quis sustentari sine illis bonis quae perdere timet (…). Abbas extendit hoc non solum quando quis sine illis rebus vivere non potest sed etiam quando gravem patiuntur iacturam, et hoc rationabiliter, quia potest quis esse ita dives, quod omissa maiori parte bonorum non multum pateretur, ut dicatur iactura gravis respectu incommodi sequentis. Ita enim iactura aliquando potest esse gravior vinculis et verberibus, quae tamen excusantur.'

[846] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 5, num. 24, p. 334-335: 'Secundo limitatur eadem conclusio, quando talis est maior pars ea bonorum, ut metum passus absque illa vitam sustentare minime possit. (…) Additque Sylvester vel saltem requiri, ut attentis facultatibus metum passi, gravem patiatur iacturam, sublata maiori bonorum parte. Quia potest (inquit) tam dives esse, ut eam iacturam non faciat, ea ablatione maioris bonorum partis. Caeterum nec haec limitatio placet, sed universaliter credo esse verum, timorem amittendi maiorem bonorum partem esse iustum. Quia est gravis iactura atque ita virum constantem merito movere potest.'

[847] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 5, num. 25-26, p. 335.

[848] Baldus de Ubaldis, *In primam Digesti veteris partem commentaria*, Lugduni 1585, ad D. 4,2,8,1, f. 232v: 'Moderni dicunt quod si instrumentum continet quantitatem omnium bonorum vel maioris partis, quod idem est quod quando infertur timor mortis vel poenae capitalis (…).'

to the contract would not be given (*omissio magni lucri*). Put in economic terminology, this raises the question whether the opportunity cost of not giving in to the threats and abstaining from the contract can be a relevant ground for annulment of the contract post factum. For example, you will be appointed heir of an immensely rich testator, if only you yield to my urgent requests to marry Peter. Or you may get promotion, if only you give in to the bosses whims and offer him his favorite services.

In Sánchez's view, it is not impossible to find arguments for the view that fear of letting slip away the opportunity to make profits can set aside a contract. Take his interpretation of paragraph *Si foenerator* (D. 4,2,23,2). It recounts the story of an athlete who is brutally (*inciviliter*) impeded by a money-lender to participate in a competition unless he promises to pay usury. Sánchez takes it to mean that restitution is to be made of money obtained through exercising duress on somebody who feels coerced to assent to the delivery of the money for fear of otherwise losing his profits (*metu perdendi lucri*). He also adduces a viewpoint formulated by Pedro de Navarra, to the effect that if not yielding to urgent pleas (*preces assiduae*) and dissenting (*dissentire*) could lead to an important disadvantage (*magnum incommodum*), the fear of incurring the disadvantage could be deemed a legitimate ground for rescinding the contract.

Pedro de Navarra envisaged the following case, indeed : a pretty woman is unremittingly begged by the local lord or the prince – from whom she expects a favor or a service – to have sexual intercourse with him[849]. Since this woman cannot refuse to have intercourse with this powerful man unless she is prepared to run the risk of missing out on those future benefits (*dissentire sine incommodo non posset*), Navarra concludes that the agreement for sex is entered into by coercion. To be sure, Navarra firmly rejects the idea that importunate begging (*preces importunae*) is always a ground for annulment. In this case, however, which is exceptional because of the opportunity cost involved, Pedro de Navarra believes that the agreement must be set aside.

Sánchez concludes, however, that it is far more likely that fear of missing out on large profits is not sufficient to satisfy the 'constant man test' of coercion. For, actually, this kind of fear (*timor perdendi lucri*) does not constitute fear but rather hope (*passio spei*) and concupiscence (*concupiscentia*)[850]. Therefore there is nothing involuntary about the assent of the persons involved in the abovementioned cases, except for the athlete. The athlete could not merely hope to successfully participate in a competition. He was legally entitled to benefit from his participation. Hence he suffered injustice (*per iniuriam arcetur a lucro ad quod habebat ius*). Accordingly, the loan had to be rescinded.

The argument employed in regard to the athlete in paragraph *Si foenerator* does not apply, however, if a person feels obliged to acquit another person's debt or to give him a

[849] Pedro de Navarra, *De ablatorum restitutione in foro conscientiae*, Lugduni 1593, tom. 1, lib. 2, cap. 3, part. 4, dub. 2, par. *Ego vero*, num. 445, p. 203: 'In eo casu hanc sententiam veram putarem, quando dictae assiduae preces essent hominis, a quo illa dissentire sine incommodo non posset, ut si esset eius dominus a quo beneficia sperat, vel princeps a quo favorem et huiusmodi. Is enim metus quidam reverentialis dicitur, causatque involuntarium, ob idque dici solet, preces principum iussa sunt et vim inferunt.'

[850] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 5, num. 28, p. 335.

present in the hope that that person will some day do him a favor in return. For then, Tomás Sánchez admonishes in the wake of Juan de Medina, those donations are motivated not by fear but by the desire to reap a future benefit (*non metui sed cupiditati lucri acquirendi imputanda*)[851]. Thomas Aquinas' authority as a psychoanalyst turns out to remain untouched in this regard. As we have noted above, in his *Prima Secundae* (quaest. 6, art. 7) he famously argued that concupiscence does not cause involuntariness, but on the contrary makes something to be even more voluntary. For concupiscence inclines the will to desire the object of concupiscence. As we move on to the next paragraph, this will remain an important idea.

4.2.2.3 Pressure and flattery

Sánchez's list of evil events that meet the constancy test is quite lengthy. There is no need to conclude from this, however, that Sánchez endorsed the view that intimidated parties must be granted relief in as many events as possible. A good example of his reluctance in this regard, is the case of pressure (*preces*) and flattery (*blanditiae*). Our Jesuit was basically unwilling to grant relief to people who complained because they had entered into a contract as a way of yielding to someone's importunate pressure or flattery.

As concerns the irrelevance of flattery, Sánchez could simply paraphrase Thomas' *Prima Secundae* (quaest. 6, art. 7) : flattery and love do not diminish voluntariness ; they rather take away involuntariness. Even if a superior cajoles you into making an agreement with him, the contract remains valid afterwards in spite of the flattery. Only when the superior, say a prince, adds real threats to his endearments, can the intimidated party claim relief[852]. By the same token, a fornicator cannot claim restitution from a prostitute, despite the fact that he has been seduced by her blandishments into paying more than her ordinary salary. According to Sánchez, the temptation exercised by a prostitute cannot even result in minor fear. A prudent man does not let himself be dazzled by the fraud typical of women (*muliercula fraus*), which consists in pretending that she is crazy for love for you (*perdite deamare*)[853].

Sánchez could not simply grant relief to people who suffered from simple pressure (*preces*) either. After all, society is structured around hierarchical relationships, to the effect that pressing commands are part and parcel of a smoothly run society. Power in itself and the exercise of pressure that goes with it cannot give rise to relief (*sola potentia non sufficit*)[854]. Otherwise, leadership would be frustrated all the time. It would simply not be possible for

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[851] Medina, *De poenitentia, restitutione et contractibus*, tom. 2, cod. *De restitutione*, quaest. 3, caus. 2, par. *Si fiat remissio* 3, p. 26: 'Si fiat remissio aut donatio ex metu non acquirendi bonum aut lucrum quod remissione facta obtinere sperat, sive sit metus ad id incussus, sive non, non vitiatur remissio nec donatio, quia talis donatio non metui in casu, sed cupiditati lucri sperati videtur imputanda. Donatio autem ex cupiditate facta non ita vitiatur sicut ea, quae ex metu fit. Haec dixerim, ut occasionem curiosis darem rem particularius investigandi et inter metum et metum in variis casibus distinguendi.'

[852] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 7, num. 3, p. 342.

[853] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 11, num. 1-3, p. 354-355. This was, of course, a controversial issue. It is occasionally dealt with in the chapter after the next; cf. infra.

[854] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 7, num. 1, p. 342.

superiors to give commands any more (*alias principibus nihil petere liceret*). Sánchez quotes a maxim stating that 'it is a leader's job to exercise pressure, namely to exercise this rather vehement kind of commanding' (*est orare ducum, species violenta iubendi*). He borrows this maxim from André Tiraqueau's treatment of duress. Sánchez thinks it is right, except in the case of a tyrant. Also, while Tiraqueau employs the maxim to argue that importunate pressure by a prince constitutes a ground for legimitate fear, Sánchez quotes the maxim to the opposite effect[855].

The real crux, indeed, concerns pressure that turns out to be manifestly importunate (*preces importunae*). Should not we make a distinction between pressure that is exercised lawfully, and pressure that smacks of brutality and abuse of power? A frightening flood of textual evidence from the Bible and the law of Rome was adduced and manipulated, indeed, to argue that importunate pressure was tantamount to oppression and harassment (*oppressio et vexatio*), both being considered as inducing grave fear[856]. Sánchez nevertheless requires that the importunate pressure be accompanied by reverential fear (*una cum metu reverentiali*) for them to constitute grave fear that meets the constancy test. Only if importunate pressure is induced by a person to whom the intimidated party owes reverence, can it be considered relevant[857]. Reverential fear rightly makes the intimidated party feel weak and timid, while the importunate pressure puts him in a vexed position. Taken together, these factors can impress even a constant man[858].

In adopting this view, Sánchez follows the practical decisions of Matteo d'Afflitto (1448-1528), amongst other *consilia*. Matteo d'Afflitto had equated the combination of reverential fear for a husband and his importunate pressure with grave fear[859]. Apparently, the sacred court of Naples had set aside a legacy of a house made by a spouse to her husband on those grounds[860]. Moreover, Covarruvias had stated precisely in regard to marriage contracts

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[855] André Tiraqueau, *De poenis legum ac consuetudinum statutorumque temperandis aut etiam remittendis et id quibus quotque ex causis*, in: Opera omnia, Francoforti ad Moenum 1597, tom. 7, causa 35, num. 2 (*principum preces importunae iustam metuendi causam inducunt*), p. 63.

[856] A detailed analysis of these references would lead us astray here, but it is worthwhile having a closer look at *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 7, num. 4, p. 342-343 in order to get a glimpse of Sánchez's use of the humanist-philological method to interpret the Bible and construct his argument.

[857] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 7, num. 5, p. 343: 'Secunda sententia limitatius loquitur, asserens preces importunas una cum metu reverentiali, ut si sint personae cui debetur reverentia, incutere metum cadentem in constantem virum.'

[858] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 7, num. 7, p. 344: 'Sit conclusio. Inter has sentenias secundam reputo probabiliorem. Cum enim ex una parte importunitas, cuiuscumque sit, valde urgeat, ne dicam, vexet et opprimat (…), et ex altera parte reverentia personae petentis debita, pusillanimem ac timidum nec audentem contradicere, rogatum reddat merito; ac iure optimo utraque metuendi causa coniuncta prudentem ac constantem coget ipsiusque consensum extorquebit.'

[859] Matteo d'Afflitto, *Decisionum sacri regii Neapolitani consilii*, Francofurti 1600, ad decis. 69, num. 7, p. 103: '(…) comprobat, ut supra, importunas preces mariti et aliorum coniunctorum metui aequiparari (…)'. On Matteo d'Afflitto, see G. Vallone, *Iurisdictio domini, Introduzione a Matteo d'Afflitto ed alla cultura giuridica meridionale tra Quattro- et cinquecento*, [Collana di studi storici e giuridici, 1], Lecce 1985.

[860] Matteo d'Afflitto, *Decisionum sacri regii Neapolitani consilii*, decis. 69, num. 4, p. 102: 'Fuit visum omnibus doctoribus de sacro consilio, quod attenta fide notarii et iudicis et testium, qui subscripserunt testamentum, quod dictum testamentum sit validum, praeterquam ad legatum domus, ex quo dictum legatum fuit factum per uxorem ob nimiam reverentiam mariti stantis supra eius caput, concurrentibus eius importunis precibus et blanditiis in damnum et praeiudicium Franciscelli patris. Unde sicut actus rescinditur stante metu reverentiali, vel metu

that importunate pressure along with reverential fear had the same invalidating effect as threats added to reverential fear[861]. Sánchez personally deems it necessary that importunate pressure be extremely urgent, penetrating and without pause[862]. That, however, still leaves the question open of what constitutes reverential fear.

4.2.2.4 Reverential fear

The question about the effects of reverential fear (*metus reverentialis*) on the validity of a marriage contract was particularly thorny. On the one hand, consent, certainly to a marriage contract, had to be as free as possible. On the other hand, a due sense of hierarchy and deference to superiors and members of the family, often ending in compulsion, was the structural basis of the early modern society. The dilemma was solved early on by stating that reverential fear on its own was not sufficient to grant relief. An additional condition had to be met : reverential fear must be accompanied by threats (*minae*). Before we go on and examine how Sánchez positioned himself in the debate about the effects of reverential fear on the validity of a contract, it will be useful to know what he understood by that kind of fear in the first place.

With respect to which persons can an intimidated party experience reverential fear ? As is expressly recognized by Sánchez, the solution of this problem actually needs to be left to the discretion of a judge or a confessor. The judge is then expected to take into account the special circumstances that make up the case in order to decide on the presence or not of reverential fear. Sánchez, however, wishes to address the question by abstracting from all these particulars (*seclusis particularibus circumstantiis*)[863]. In the fashion of the moral theologians, he wants to settle the question in theory by looking at it from the perspective of the 'nature of the affair' (*ex natura ipsa rei*).

In principle, reverential fear is the fear which induces you into a contract out of reverence for anyone who is by right superior to you[864]. For example, a cleric is subjected to a bishop, a civilian to a civil servant, a woman to her husband, and a son to his father. The reason for this is simple : by nature an inferior must pay reverence to his superior and serve him. As a logical consequence, an inferior experiences shame and fear in the presence of his superior so that he is less inclined to contradict him.

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verberum vel stantibus minis (…), ita etiam rescinditur legatum metu reverentiali marito factum concurrentibus importunis precibus mariti in damnum alterius.'

[861] Covarruvias, *In librum quartum Decretalium epitome*, part. 2, cap. 3, par. 6, num. 8, p. 136.

[862] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 7, num. 8, p. 344: 'Monuerim tamen, non quascumque preces assiduas importunas dici, sed quae sunt instantissimae et saepius repetitae et inculcatae.'

[863] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 6, num. 24, p. 340.

[864] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 6, num. 25, p. 340: 'Metus reverentialis datur in eo, qui iure aliquo subiectionis alteri subest. Ut in clerico respectu episcopi, in seculari respectu magistratus cui subditur, in uxore respectu viri, in filio respectu patris. Conclusio est omnium. Et ratio est manifesta, quia cum hi superiores sint, et alii ipsis subjecti, suapte natura quandam reverentiam et obsequium eis debent, quae reverentia timorem ac pudorem incutit ut minus audeant ipsorum voluntati contradicere.'

Sánchez then extends the reverence a child owes to his parents to the in-laws, since spouses become one flesh through marriage. Since a child owes deference to his grandfather as if his grandfather were his father, Sánchez also thinks that one can suffer from reverential fear in front of ancestors in general. Furthermore, a guardian is to be held in reverence, because he takes the place of a parent. A little more difficult to argue for Sánchez but convincing, anyway, is that a child can also experience reverential fear for his or her mother. Constitution *Quisquis cum militibus* (C. 9,8,5) had stated that women are weak and anxious creatures who, accordingly, cannot easily be the object of fear. Drawing on the consiliary literature, our Jesuit argues that natural law requires a child to pay equal deference to both father and mother[865]. Within a family living in the same house, younger children owe reverence to the elder children, whether boys or girls. Among the authors quoted by Sánchez to support the last claim figures the great Spanish jurist Alfonso de Azevedo (d. 1598), who is famous for his commentary on the *Nueva Recopilación* (1567)[866].

The chances of setting aside a contract are directly proportional, of course, as the number increases of people included in the list of persons to whom reverence is owed. Perhaps it was to avoid the unwelcome consequence of this extensive interpretation, that Sánchez made the appeal to reverential fear as a ground for annulment less evident in another way. For as we will see now, he not only stipulated that reverential fear must be accompanied by threats. The person issuing the threats must also be known to be serious and to have executed his threats in the past. In this manner, the problem of reverential fear seen as a separate category of fear eventually disappeared. For whether fear was reverential or not, Sánchez always stipulated that the intimidating party be pronouncing real threats and that he be accustomed to execute his threats in practice. This was an opinion shared by most of the doctors, but certainly not by everybody.

There was a strand of thought holding that simple reverential fear without something more satisfied the 'constant man test' of coercion[867]. To this effect, the rule *Velle* (D. 50,17,4) was quoted, stating that somebody who obeys the order of his father or lord cannot be considered as expressing his will (*velle non creditur, qui obsequitur imperio patris vel domini*). Another important textual argument was based on paragraph *Quae onerandae* (D. 44,5,1,5). It stipulated that relief must be granted (an *exceptio onerandae libertatis causa*) to a freedman who out of reverence (*nimia patrono reverentia*) had assented to a penalty clause if he would ever offend his former master.

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[865] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 6, num. 30, p. 340.

[866] Alfonso de Azevedo, *Commentarii iuris civilis in Hispaniae regias consitutiones*, tom. 2 (*quartum librum Novae Recopilationis complectens*), Matritii 1595, ad lib. 4, tit. 21, l. 1, num. 193, p. 720: '(…) inter fratres sicut inter patrem et filium dictus metus reverentialis laesione interveniente attenditur.'
For biographical notes on Azevedo, see Nicolas Antonio, *Bibliotheca Hispana nova, sive Hispanorum scriptorum qui ab anno MD ad MDCLXXXIV floruere notitia*, Matriti 1783, p. 12.

[867] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 6, num. 4-6, p. 336.

The common opinion, however, clearly tried to limit the avoiding character of reverential fear[868]. It was deemed relevant only in cases in which it was compounded by threats or physical compulsion (*minae aut verbera*). Canonical support for this opinion was borrowed from canon *Ex litteris* (X 4,2,11) amongst many other texts. It avoids an engagement contract (*sponsalia*) by taking into account not merely the fear of a daughter for her father, but also the threats he issued. A host of passages from the Digest were quoted to argue that the law of Rome did not recognize simple reverential fear. Among them law *Si patre cogente* (D. 23,2,22). It provided clear evidence that reverential fear without something more was not sufficient to nullify a marriage contract. For a man who, against his own choice, had assented to a marriage for simple fear of offending his father, was not granted relief[869].

Sánchez endorses this view that had been accepted by the majority of the jurists and theologians. It does not prevent him, however, from adding some personal accents to the common opinion. For example, he points out that in some cases threats may actually be absent and reverential fear still constitute a ground for annulment. This can happen when the intimidator is known to be tremendously cruel by character (*nimis crudelis*). In that event, the threats can be considered as virtually present, while actually absent (*minae actu desint, sunt tamen virtute*)[870]. The sole terrifying face of a mighty person, even if he does not express actual threats, reasonably has an effect upon a man of constant character.

Another example of an occasion in which actual threats may be absent and reverential fear nonetheless meets the 'constant man test' is the following. A girl assents to a marriage contract because she fears that otherwise her father will feel horribly offended for the rest of his life (*diuturna indignatio*). If there is absolutely no prospect for the girl of reconciling her with her father (*spes futurae reconciliationis*) unless she assents to the marriage contract he urges her to enter into, she has suffered from real coercion. For is there any constant man, Sánchez asks rhetorically[871], who would not consider a grave evil the prospect of having to face for the rest of one's life the angry face of a father or another close person. Certainly because offended persons never stop to complain and to speak evil of the persons whom they feel offended by.

Of great interest is Sánchez's reaction to Covarruvias' claim that reverential fear can also become relevant when it is accompanied by lesion beyond moiety (*laesio enormis*)[872]. What we have seen Covarruvias stating, indeed, is that reverential fear can still be a ground for rescission, even in the absence of proven threats, provided that the contract is affected by lesion beyond moiety. Moreover, he meant this rule to apply both to marriage contracts and

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[868] Sánchez names dozens of canonists (e.g. Felinus), theologians (e.g. Henríquez), and civilians (e.g. Alciati) in *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 6, num. 7, p. 337.

[869] D. 23, 2, 22: 'Celsus libro quinto decimo digestorum. Si patre cogente ducit uxorem, quam non duceret, si sui arbitrii esset, contraxit tamen matrimonium, quod inter invitos non contrahitur: maluisse hoc videtur.'

[870] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 6, num. 12, p. 338.

[871] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 6, num. 14, p. 338: 'Quis enim vir constans aut prudens non reputabit grave malum, semper coram oculis habere infensum patrem aut virum aut alium a quo pendet et cum quo semper versaturus est, maxime cum vix invenias qui linguam moderari valeat, ne male sentiat, peiusque loquatur de eo, cui infestus est.'

[872] For the use of this translation, borrowed from the Louisiana Civil Code, art. 2589, see higher.

other contracts. For example, if in reverence to her father a girl agrees to marry a man who is of a far lower status, she can claim rescission. Similarly, a vendor can reclaim rescission if he sold his estate for less than half of its fair market price. Yet Sánchez vehemently denies that such an equal treatment of marriage contracts and other contracts is justified.

Sánchez agrees that in other contracts relief can be granted by virtue of sole reverential fear in conjunction with lesion beyond moiety, absent of threats. This is so, because grave lesion always seems to indicate the presence of deceit (*magna laesio dolum solet arguere*). Grave lesion is not tantamount to deceit, but it raises a presumption of deceit. This actually was an opinion stated by Covarruvias[873]. Sánchez, then, interprets lesion beyond moiety to constitute a mere species of deceit. In this way, he lays the foundation of the distinction between marriage and other contracts. For if it is commonly accepted in the civilian tradition that deceit causing a contract truly vitiates contracts of good faith, it is equally acknowledged that this is not the case with marriage contracts.

Deceit can only avoid marriage if it concerns the identity of the person or his status of being either a slave or a free citizen. Lesion beyond moiety is a species of deceit that is not officially counted among the specific types of deceit that avoid a marriage contract. Consequently, there is a fundamental disparity between marriage and other contracts as regards the effect of reverential fear compounded by *laesio enormis*[874].

4.2.2.5 Void *vs* voidable contracts

Marriage is also neatly distinguished from other contracts when it comes to the effect of duress on the validity of an agreement. In this respect, the dividing line between marriage and other contracts concurs with the division between nullity *ab initio* and voidability. While holding that duress results in a void marriage contract, Sánchez makes a case for considering the avoiding effect of duress on other contracts as merely relative. Put differently, duress causes a marriage contract to be automatically void (*irriti*). Other contracts are voidable (*irritandi*).

This means that in a normal contract it is up to the party affected by coercion to decide whether he wishes the contract to be rescinded or not. A marriage affected by grave fear, however, is automatically null. Sánchez thus makes an indispensable contribution to the development of one of the most fundamental distinctions in the conceptual fabric of legal

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[873] See Covarruvias, *Relectio in cap. quamvis pactum*, part. 3, par. 4, num. 7, p. 290: 'Laesio maiori vel minori contingens ultra dimidiam iustae aestimationis, simul cum metu reverentiae et obsequii paterni aut maritalis, operatur contractus rescissionem, ut ea fiat ratione metus, licet iuramentum conventioni accesserit. Haec probatur, quia dolus praesumitur in ea conventione adhibitus et oppressio quaedam; alioqui enim non est vero simile, quod tantae laesioni filia vel uxor consensisset.'.

[874] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 6, num. 15, p. 338-339 : 'Et ratio disparitatis inter matrimonium et caeteros contractus, ea est: quod caeteri contractus annullantur ex dolo dante illis causam, quando sunt contractus bonae fidei (…), matrimonium autem minime, sed ex solo errore personae aut conditionis servilis (…). Ratio autem quare magna laesio cum metu reverentiali rescindit caeteros contractus est (…) quia magna laesio dolum solet arguere (…) et dolus hic reipa interveniens ita officit actui ac si ex proposito accederet (…). Non ergo mirum est, si caeteri contractus rescindantur ex metu reverentiali cum enormi laesione, ratione doli illi adiuncti, non autem matrimonium cui dolus ille non nocet, cum non sit circa personam aut conditionem servilem.'

thought. In what follows, we will first focus on Sánchez's treatment of contracts other than marriage.

The conceptual difference between void and voidable contracts is of no small practical significance, certainly not when property related issues and contractual consent interfere. In fact, it is precisely on account of the material effects related to a contract that is void *ipso facto*, that some scholars could not think of duress as giving rise to automatic nullity in contracts. We have already seen that Molina belonged to this group. As Sánchez demonstrates, there effectively was textual argument that showed property (*dominium*) was not transmitted by means of a contract affected by duress[875].

Paragraph *Volenti* (D. 4,2,9,4), for instance, states that the intimidated party is granted a real action (*actio in rem*) as well as a personal action (*actio in personam*). From this they concluded that a contract affected by duress must be void *ab initio*. For, from a legal point of view, the existence of a real action indicated that dominion over the thing conveyed had apparently remained in the hands of the intimidated party. Therefore, the intimidated party could avail himself of a *reivindicatio* or secret compensation (*rem propria auctoritate recuperare*).

Other arguments indicating that coerced contracts are automatically void were based on the idea that duress automatically frustrates voluntary consent, since nothing is more contrary to consent than violence and fear (D. 50,17,116). Canon *Cum locum*, which states that consent cannot be found where duress or coercion intervene, was quoted to the same effect[876]. On the basis of paragraph *In hac actione* (D. 4,2,14,3) duress was said to be composed of ignorance, therefore frustrating consent. A lot of these ideas were at variance, of course, with sound Aristotelian-Thomistic philosophy of the will.

Sánchez himself, however, takes the view that coerced consent does not make contracts void, but voidable, except in the case of marriage. It is undoubtedly due to his familiarity with Aristotle and Thomas that he insisted on the veracity and validity of consent given to a contract affected by coercion (*in consensu metu extorto est verus consensus veraque voluntas*)[877]. What is more, he quotes counter-evidence from the law of Rome to support his view, e.g. paragraph *Si metu coactus* included in law *Si mulier* (D. 4,2,21,5). The fact that a future verb is used in the opening verse of D. 4,2,1 is adduced to argue that coerced consent does not avoid a contract automatically but in the future (*Quod metus causa gestum erit ratum non habebo*)[878]. Another famous reference includes constitution *Venditiones* (C. 2,19,12)[879]. Yet the more convincing quotation comes from canon *Abbas* (X 1,40,2)[880], which clearly indicates that contracts affected by coercion are valid until they are avoided.

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[875] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 8, num. 3, p. 345.

[876] Interestingly, the *correctores Romani* referred to Covarruvias and Soto for further discussion on this canon; cf. nota *Locum* ad X 4,1,14 in *Corpus juris canonici* (ed. Gregoriana), part. 2, col. 1429.

[877] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 8, num. 4, p. 345.

[878] A similar argument on the contrary was C. 4,44,1, where a verb 'praesentis temporis' is interpreted to mean that nullity is absolute (*mala fide emptio irrita*).

[879] C. 2,19,12: 'Venditiones donationes transactiones, quae per potentiam extortae sunt, praecipimus infirmari.'

[880] X 1,40,2: 'Quae metu et vi fiunt de iure debent in irritum revocari.'

Even if it is true that Sánchez could rely on short statements from other learned men, such as Alciati and Henríquez[881], that duress did not result but in voidability, the juridification and the comprehensiveness of his exposition is baffling. It should suffice here to note that Sánchez expressly inferred from his conclusion that property (*dominium*) is actually and juridically transferred to the other party to the contract – at least in contracts other than marriage[882]. In the wake of the Roman tradition – which considered the *actio quod metus causa* as an *actio in rem scripta* – he also points out that duress can be the effect of either intimidating behavior on the part of the other party to the contract or coercion exercised by a third party outside of the contract itself[883].

What remains to be examined here is the different manner in which Sánchez deals with the problem of duress in marriage contracts. And his opinion that marriage contracts entered into through coerced consent are not voidable, but void *ipso facto*. For Sánchez, if the coerced party confirms the original marriage while the other party who did not suffer from coercion has not yet revoked his consent, the marriage is confirmed without the need for a new consent by the other party. The crux of the matter lies elsewhere[884]:

> Is a marriage [tainted by coercion] so invalid as to bring about no obligation any more of ratifying it for the contracting party who did not suffer from coercion? Or is it allowed for the uncoerced party to step out of the contract before the coerced party even has the time to confirm his original consent?

As a matter of fact, Sánchez distinguishes two cases. First, it may be that the uncoerced party is free from any fault (*immunis culpae*) since he did not know about the unlawful pressure that led the other party to enter into the contract. In that case, Sánchez does not see why the uncoerced party would have no right to step out of the contract as soon as the coercion and the actual invalidity of the contract came to light. Since he did not commit fraud or deceit, and only promised his commitment provided that the other party committed himself, he should not be forced to stick to the contract[885]. Secondly, the uncoerced party may

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[881] Andrea Alciati, *Responsa*, Lugduni 1561, lib. 1, resp. 5, num. 2, f. 10v : 'Gaspardus contraxit illud matrimonium per metum, quo casu ipso iure est nullum, nam licet regulariter metus interveniens non annullet actum ipso iure, tamen istud non procedit in matrimonio, cuius substantia consistit in mero consensu.';

Henríquez, *Summa theologiae moralis*, lib. 11 (*de matrimonii sacramento*), cap. 9, num. 4, p. 666: '(…) reliquos contractus etiam iuratos metus gravis non irritat iure naturae aut humano, eo quod per iudicem et alia iuris remedia possunt facile rescindi, et in integrum restitui damnum illatum.'

[882] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 8, num. 5, p. 346.

[883] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 8, num. 6, p. 346: 'Non refert autem, ut contractus metu celebratus rescindatur, sive is in cuius favorem contractus celebratus est, metum gravem intulerit, sive alius.'

[884] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 15, num. 3, p. 365: 'Tota autem difficultas est, an matrimonium illud ita invalidum sit, ut nullam prorsus pariat obligationem denuo ratificandi illud, respectu eius qui non est passus metum? Vel an possit hic resilire antequam metum passus ratificet pristinum consensum?'

[885] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 8, num. 6, p. 346: 'Et in hoc casu non invenio cur his cogendus sit stare matrimonio et non ab illo resilire possit, eius nullitate cognita, nec

be the cause of the duress from which the other party suffers. This is the case which sparks off the most intensive debate.

Although we will see Sánchez concluding that a marriage affected by coercion of which the other party is the direct or indirect author is automatically void (*irritus*), he first develops an argument for the contrary opinion. First of all, he argues that by exercising duress, you cause harm to the coerced party (*irrogat iniuriam alteri*). This damage (*in-iuria*) can be undone by giving the right (*ius*) to the coerced party of deciding whether he wants to repair and confirm the affected contract or not. In this context, the Jesuit theologian Enrique Henríquez had talked about the coerced party's right to compell the defrauder (*ius compellendi cogentem*) so that he is forced to remain bound to the contract if the coerced party wishes[886].

The rationale behind this view can be found in the famous canon *Quum universorum* (X 3,19,8), which draws on D. 16,1,2,3, and states that the law must protect the defrauded and not the defrauders (*iura deceptis et non deceptoribus subveniant*). This canon played an important role in the theologians' treatment of the effects of mistake and deceit. Still, a theologian such as Molina did not found his conclusion on this canon but on more general principles, namely the common good and 'natural equity' (*aequitas naturalis*)[887]. As will be explained below, Molina argued that a contract affected by deceit which gave rise to the contract (*dolus causam dans*) is *ipso facto* void (*irritus*), yet enforceable in favor of the deceived party on account of this natural equity. In this way, the deceiver can be compelled by the mistaken party to perform his contractual duties, not by virtue of the contract itself, but by virtue of the external importance of equity. Because the injury done to the mistaken party directly created a right for the mistaken party to demand performance, Molina thought that he did not have to wait for a sentence by the judge compelling the deceiver to execute the contract.

Yet this is precisely the point where Sánchez disagrees. Despite the urgent demonstration in favor of the opinion holding that a coerced marriage is voidable, Sánchez concludes that the opposite opinion is more probable[888]. His reasoning is quite simple. It might be equitable, indeed, to have a defrauder stick to the marriage contract on account of his delictual behavior. If that is the case, however, the obligation to observe the contract is issued in order to punish (*in poenam*) the defrauder for the coercion he exerted, that is for the

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priori illo consensu ratificato per coactum. Quia immunis est culpae, nec se obligavit, nisi altero se illi obligante.'

[886] Henríquez, *Summa theologiae moralis*, lib. 11 (*de matrimonii sacramento*), cap. 10, num. 6, p. 669.

[887] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, col. 413, num. 4 : 'Jus humanum videri intendisse tribuere vim consensui dolosi ad eum obligandum ante latam sententiam, judicisve compulsionem, non solum in poenam doli, sed etiam ex naturali aequitate et quoniam ita bono communi erat expediens.'

[888] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 15, num. 5, p. 366: 'Secunda sententia (quam probabiliorem existimo) docet non teneri cogentem in foro conscientiae perficere illud matrimonium, donec per iudicem condemnetur, sed libere altero invito posse resilire, nisi aliud damnum secutum sit. Probatur, quia aut tenetur ratione delicti coactionis, in poenam illius, et hoc exigeret iudicis condemnationem, ante quam nullus tenetur subire poenam; aut ratione iniuriae illatae per coactionem, et hoc non.'

delict he committed. Since a punishment cannot be imposed but through condemnation by a judge, however, it will depend on the judge and not on the intimidated party whether the contract be brought to live again or not (*exigeret iudicis condemnationem*). In fact, Sánchez applies to marriage contracts affected by duress the same criticism we will see Lessius passing on Molina in the context of mistake.

To sum up, Sánchez considers ordinary contracts affected by duress to be voidable, while marriage contracts deviate from this rule because of the intervention of ecclesiastical law. A marriage contract can be confirmed again, but only by a judge as a measure of punishment. In any event, marriage contracts differ from other contracts when it comes to the effects of duress on its validity:[889]

> The logic is different. Other contracts that have been extorted through duress are legally valid. Only the coerced party is granted a right to rescind the contract. A marriage extorted through duress, however, is totally void.

4.2.3 The Jesuit moral theologians and the casuistry of duress

4.2.3.1 Duress and general contract doctrine

The impact of Sánchez on future thought about the vices of the will was massive, certainly among his Jesuit successors. This does not mean, however, that some of the most important of his colleagues did not add anything new to the now fully-grown debate about coerced consent and duress anymore. This holds true for famous Jesuits such as Lessius and Lugo, but also for lesser known figures such as the Portuguese Jesuit Fernão Rebelo (1547-1608). Rebelo received his doctorate in theology form the University of Évora, where he became a professor[890]. From his hand we have a compelling work *On the obligations of justice, religion and charity* (*Opus de obligationibus justitiae, religionis et charitatis*) of which, sadly, only the first volume on justice was effectively published in 1608. Rebelo, Lessius and Lugo did not always agree with their celebrated colleague. Nor did they agree among themselves. For another thing, they isolated the debate about vices of the will in contracts from the analysis of particular contracts. It is also worthwhile noting that Lessius further developed the general theory of duress as a vice of the will in his commentary on Thomas' *Prima Secundae*[891].

In light of the development of a general contract doctrine, it is significant to note that in their treatises *On Justice and Right* Lessius and Lugo inserted their discussion of duress into a special chapter on contract law in general (*De contractibus in genere*). This general chapter precedes the successive chapters on particular contracts – which do not even include marriage anymore. Rebelo, for his part, still deals with marriage contract in his work *On*

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[889] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 15, num. 6, p. 366: 'Dispar est ratio, nam caeteri contractus metu extorti sunt validi ipso iure, et solum metum passo datur ius ad rescindendum. At matrimonium metu extortum est prorsus nullum.'

[890] On Rebelo, see J. Vaz de Carvalho, *Fernão Rebelo*, in : C. O'Neill – J. Domínguez (eds.), Diccionario Histórico de la Compañía de Jesús, Biográfico-Temático, Roma-Madrid 2001, vol. 4, p. 3303.

[891] Lessius, *In I.II D. Thomae de beatitudine et actibus humanis*, quaest. 6, art. 5-6, p. 45.

Obligations. Yet prior to the treatment of particular contracts such as marriage and sale, he gives an exposition of contract law in general (*De contractibus in genere*), including many questions on the vices of the will.

It remained a major concern, certainly for Lessius and Lugo, to find a balance between protecting parties against undue influence, on the one hand, and avoiding excesses in granting relief for duress, on the other. They did not necessarily agree, therefore, on the answer to an important question that had already been raised by Sánchez : does illegitimate duress which is not directly aimed at enticing somebody into a contract (*non incutitur directe ad contractum*) still constitute a ground to set aside the contract in question ? Another issue that provoked some controversy concerned the effect of legitimate coercion, certainly when it came to legitimate ligitation threats (*ius accusandi*).

Last, a major concern of Sánchez's successors was to determine whether coerced contracts were automatically void or merely voidable at the option of the wronged party. Although Rebelo thought that duress made gratuitous contracts automatically void, Lessius and Lugo eventually established a general regime of voidability regardless of the type of contract and regardless of the kind of vice of the will, that is mistake or duress. Moreover, they compared the remedies for mistake and duress and pondered over the question why the *actio de dolo* was only available against the perpetrator of the deceit, while the *actio quod metus causa* could be brought even against a third party.

4.2.3.2 Contract as a means of escaping a threat

Leonardus Lessius is brief and to the point about contracts that have been concluded in order to escape a threatening event. As long as coercion is not exercised with the final objective of making somebody enter into the contract, the contract cannot be subject to annulment[892]. If you make an agreement for another purpose (*ad alium finem*) than the contract itself, e.g. in order to escape an evil event (*ad malum evadendum*), this agreement remains valid. For example, if you are taken hostage by a robber and you promise to pay a certain sum to a third party so that he comes to the rescue of you, this agreement between you and the third party is not affected by coercion. Presumably borrowing from Molina, Lessius holds that this promise cannot be regarded as extorted, since duress was not properly speaking the direct cause (*causa*) behind the contract. It only gave occasion (*occasio*) for the contract to be concluded.

[892] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 40, p. 203: 'Dixi, *si incussus fuit ad contractum eliciendum*, quia si ob alium finem incussus fuit, et ad illud malum evadendum contractus initus, non potest rescindi. Ut si captus a latrone, promittas tertio qui iniuriae non est particeps, 100 ut te liberet. Tunc enim metus non est proprie causa contractus, sed solum occasio, nec potest dici metu extortus, sed cum iam metus ob aliam causam est iniectus, adhibetur contractus tamquam medium ad illum pellendum. Itaque qui contractum tecum init non infert metum sed aliunde illatum aufert. Unde non meretur ut contractus ei rescindatur.'

Fernão Rebelo is as careful as Lessius in ruling out the possibility that indirect fear has an avoiding effect upon contracts[893]. He gives the example of a man who enters into a partnership (*societas*) in order to find shelter from an enemy. That contract can certainly not be avoided, since the duress exerted by the enemy is obviously not directed at making that man entering into a partnership with somebody else. In fact, Rebelo also introduced a distinction between two types of duress by analogy with the difference between *dolus causam dans* and *dolus incidens*. In this way he could limit the invalidating effects of duress in an alternative way. If duress had been the necessary motivating factor for the coerced party to enter into the contract (*causa sine qua non*), it was to be deemed relevant[894]. Otherwise, it was not.

Less straightforward is the exposition by Joannes de Lugo about the direct relationship that is required between the evil event and the contract for rescission to be granted. In fact, hiding away behind the authority of 'other scholars', Lugo holds that no direct relationship is required at all for the contract to be avoided[895]. As long as the threats are illegitimate, they do annihilate a contract even if they are not issued with the immediate goal of causing the contract. Lugo admits that his view is not in line with Sánchez's[896]. Lugo is not fair, however, in claiming support from Lessius for this statement. Lessius – as we have just seen – does not at all think, as Lugo does, that 'occasional' yet illegitimate threats are tantamount to threats that have been issued with the direct purpose of causing the contract.

Lugo founds his view on the Roman law *Nec timorem* (D. 4,2,7). In paragraph *Proinde si* of that law it can be read, indeed, that relief on account of duress can be granted to a burglar or an adulterer who entered into an obligation (*se obligavit*) in order to escape the death penalty imposed on his offence if he is caught in the act. Lugo takes the example of a man who deflorates a young lady and is caught (defenceless) in the act by her parents or blood relatives. For fear of vengeance, however illegitimate[897], and in order to escape death (*ut mortem evadat*), he spontaneously commits himself on the spot to marrying the girl in the

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[893] Rebelo, *Opus de obligationibus justitiae, religionis et charitatis*, Lugduni 1608, part. 2, lib. 1, quaest. 5, num. 9, p. 208 : 'Addidi *ita ut ad extorquendum contractum iniuste inferatur*, quia, si ab hoste iniusto timens pro securitate contractum societatis cum alio inires, non ea de causa contractus foret invalidus.'

[894] Rebelo, *Opus de obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 5, num. 9, p. 208 : 'Dixi si modo metus sit causa sine qua non quia si alioqui, eras eodem modo contracturus, profecto libere simpliciter, et non ex metu contraxisse dicendus eris, ac proinde non est quod minus obligeris, quam si libere omnino faceres.'

[895] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 7, dub. 9, num. 175, p. 43: 'Alii denique aliter distinguunt, et quando metus principalis iuste infertur, concedunt valere matrimonium et alios contractus eo metu factos. Quando vero metus principalis iniuste incutitur eodem modo sentiunt ac si metus ad extorquendum contractum incuteretur.'

[896] Sánchez believes that it is of no importance whether the 'occasional' threats are legitimate or illegitimate. What matters is the direct or indirect relationship between the contract and the threats. Cf. *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 12, num. 11, p. 356: 'Impertinens est an metus ille conceptus fuerit ex causa iusta necne. Solus enim metus iniuste illatus ad extorquendum matrimonium illud dirimit, ut dixi num. 3.'

[897] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 7, dub. 6, num. 156, p. 39: 'Licet posset impune occidere, non tamen sine peccato mortali iniustitiae, quare metus ille omnino iniuste incutitur et obligat ad restitutionem.'

presence of her parents[898]. According to Lugo, this marriage contract can be avoided on the grounds of coercion, even if the fear illegitimately (*injuste*) exerted by the parents is aimed at taking revenge rather than making the rapist marry their daughter.

Contrary to Sánchez, Rebelo and Lessius, Lugo does grant relief, then, even if the duress was not directed at causing the contract. He does so assuming that the duress was illegitimate. In this respect, the question that will be examined in the next section is different from the cases we have just seen. For it will concern coercion that is legitimately (*juste*) exerted on the contracting party in order to entice him into the contract. On the face of it, neither Lessius nor Lugo is willing to grant relief in that case. A contract entered into through legitimate coercion remains valid. But let us have a closer look at this discussion.

4.2.3.3 The use and abuse of litigation rights

Take the following case: a man who deflorates a young lady is caught in the act by her father. The father threatens the man with prosecution unless he enters into a marriage contract with the young lady. It is obvious to both Lessius and Lugo that a father can lawfully (*juste*) issue threats of taking the man to court, even if threatening to kill him would have been illegitimate[899]. Moreover, they agree that a marriage contract, just as any other contract, is not avoided by that kind of rightly exerted duress.

If litigation threats are legitimately issued, precisely because somebody has a right to sue the other party, then contracts entered into for fear of those threats remain valid. As Lessius puts it [900]: 'Those contracts cannot be set aside but on account of injustice. Injustice is absent, however, whenever duress can be exerted lawfully.' The problem with lawfully expressed litigation threats therefore mostly concerns the abuse thereof. For Lugo as well as Lessius the crux concerns people who pretend that they will exercise their legitimate right to litigation, thereby compelling somebody to enter into a contract, but are actually not intent to do so (*ei qui minabatur accusationem non erat animus accusandi*)[901]. Put differently, what are the effects of fictitious threats (*ficte minatus est*) ?

Lessius and Lugo faced a dilemma as they tried to come to terms with fictitious litigation threats, because their older colleagues had defended divergent positions. In dealing with gaming contracts, Molina had considered invalid the following obligation entered into by the threatened party : I oblige myself to render the money I have won through a prohibited

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[898] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 7, dub. 9, num. 174/177, p. 43/44: 'Exemplum est, si aliquis in stupro deprehensus occidendus sit a parentibus vel consanguineis puellae, et ipse nemine petente, sed sponte sua matrimonium offerat, ut mortem evadat. Quo casu parentes non intulerunt metum mortis ad extorquendum matrimonium, sed in vindictam criminis admissi et dedecoris illati, ipse tamen offert matrimonium, ut mortis periculum fugiat.' / 'Unde consequenter probatur eiusmodi metum sufficere ad irritandum matrimonium, professionem et votum, quia metus ille iniustus, qui obligat ad rescindendos alios contractus, sufficit ad haec irritanda (…).'

[899] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 41, p. 203 and Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 7, dub. 6, num. 155 and num. 158, p. 39-40.

[900] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 41, p. 203: 'Ratio est, quia hi contractus non possunt irritari, nisi ratione iniuriae, quae abest, quando metus iuste incuti poterat.'

[901] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 42, p. 203.

game in order that you stop threatening me to take me to court. A title (*causa/titulus*) can lie for this transaction, Molina admits, but only provided that the party issuing litigation threats really intends to sue the winner[902]. It is allowed to threaten with a legitime claim. However, if the loser has no real intention of suing the winner, then he has no legitimate title to recover the money. For, in that event, the extortioner feigns to be intent on claiming back his money in court (*animum repetendi finxit fallacia ac simulatione*), while he merely intends to deter the other player. This is manifestly false.

Lessius shows understanding for Molina's standpoint and explains it as follows. Deceit has been the principal cause behind the transaction (*dolus causam dans*) : the extortioner had promised to change minds provided that the other party gives or does something, but actually there had never been a mind to change (*ut deponas animum quem non habes*). At the same time, Lessius chooses not to endorse Molina's view. For he finds Sánchez's contrary standpoint much more probable. Sánchez held that if you have obtained a deal through legitimate litigation threats, this deal is valid, even if you did never have the intention of really taking the other person to court (*quamvis absque animo accusandi*)[903]. What counts is that you are entitled to take somebody to court (*ius accusandi*). Renouncing this right comes at a price for the intimidated party.

Lugo, however, takes sides with Molina. He refuses to share Sánchez's and Lessius' rigorous rights-based talk. Even if you have a right to sue somebody, you are not allowed therefore to coerce somebody into an agreement in exchange for fictitiously renouncing that right. That would definitely be too high a price to pay. It is precisely the will to exercise a right which increases its price[904]. If, in truth, you do not experience that intention, the price of your litigation right is worth much lower a price. Moreover, once deceit causes a contract (*dolus causam dans*) it is not relevant whether the threats constituting the deceit are issued legitimately or illegitimately[905]. Every deceit without which a contract would not have been concluded is to be deemed as unjust.

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[902] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 514, col. 1176, num. 4 : 'Dubium item est, num quando conceditur repetitio pecuniae ludo prohibito acquisitae, fas site i, qui ludo illo eam amisit, comminari repetitionem, ac pacisci cum lucrante, ut partem sibi restituat, ne totam in iudicio repetat. Respondendum est affirmanter. Quoniam sicut fas est repetere, ita fas est comminari iustam repetitionem et accipere totum aut partem, ut repetitionem non intentet aut ut ab intentata desistat. Qui tamen, vel ob verecundiam ac infamiam, vel quacumque alia de causa repetiturus non erat, animumque repetendi finxit, ut alius deterritus, partem lucri restitueret, credo retineri id in conscientia non posset. Quoniam, qui ita restituit, iuste illud tanquam suum retinebat, et qui animum repetendi finxit, fallacia ac simulatione iniuste id ita ab illo extraxit, neque causa suberat, ob quam unus id dedit, et ob quam alius poterat iuste illud accipere.'

[903] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 9, num. 9, p. 349: 'Hinc infertur primo potentem aliquem iuste accusare, eoque timore illato, aliquid extorquentem, ne accuset, minime teneri restituere. Quia iuste poterat accusare, privaturque actione accusandi quam habebat. (…) Et credo id esse verum, quamvis absque animo accusandi minaretur accusationem. Adhuc enim non tenetur eo metu extortum restituere. Quia adhuc privatur iure accusandi, quod pretio aestimabile est.'

[904] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 7, dub. 7, num. 168, p. 42: 'Adde, ius sine voluntate accusandi non tantum valere, quantum pro eo petitur, sed voluntas accusandi auget valorem talis iuris.'

[905] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 7, dub. 7, num. 168, p. 42: 'Gratis dicitur, quod ille dolus sit iustus. Omnis enim dolus qui dat causam contractui eo ipso est iniustus, cum ordinetur ad extorquendum consensum per fraudem et mendacia, et inferat re ipsa damnum contrahenti, cui revera inutilis est ille contractus, cum ius accusandi sine voluntate parum illi noceret.'

While Lugo argues that Sánchez's opinion is likely to leave the door wide open to contractual fraud, Lessius defends it obstinately. He admits that from an objective point view, one could maintain that a person who is compelled to do something on the basis of somebody else's right is acting in no less involuntary a way than somebody who is coerced unjustly[906]. He points out, however, that from a subjective point of view just coercion does not result in consent that is to be deemed involuntary. For the fear stemming from just coercion is considered to draw its origins not from a force external to the intimidated party, but from a force that comes from within the person himself (*ab ipsomet*). Hence the assent subsequent to this inner coercion is not deemed to be involuntary, since it is entirely voluntary as to its cause (*voluntarius in sua causa*).

Importantly, Lessius insists that 'freedom of contract' is tantamount to absence of external coercion in entering into a contract[907] : 'The doctors talk about free consent, if it has not been extorted through an external cause, namely by unjust duress, or induced through deceit. If you are coerced by a just cause, 'freedom of contract' (*libertas contractuum*) is not affected.' It turns out that for theologians as Lessius, there is simply no contradiction between acting freely and following just causes. After all, man is expected to follow right reason (*recta ratio*), and considered to attain the highest degree of freedom in observing its dictates. A man acts more freely than ever when he internalizes just causes.

What is more, Lessius indicates that fear is about psychology and appearance rather than objective truth and reality. It does not matter whether an evil event is really out there. What counts is the perception of the evil event in the mind of the intimidated party (*malum non causat metum nisi quatenus apprehensum*). This is an analytical insight of Lessius of which even Lugo approves[908]. Applied to our case, however, it means that it is of no relevance whether the litigation threats are based on an actual will to take the intimidated party to court or not. As long as the intimidating party is perceived to have the intention of actually executing his right, the same degree of (legitimate) duress affects the intimidated party.

It needs to be noted, however, that Lessius was also clear about the limits of using litigation rights as a means of pressure. The value of the obligation or the thing the intimidating party receives in exchange for renouncing his litigation right must be

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[906] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 42, p. 203: 'Si physice res consideretur, non minus involuntarie consentit qui iuste cogitur quam qui iniuste. Uterque enim consentit repugnante voluntate, tum per simplicem affectum nolitionis, tum per dolorem animi. Moraliter tamen loquendo, is qui iuste cogitur non censetur involuntarie consentire, quia voluntarie casuam metus et coactionis dedit. Unde timor ille mali non censetur extrinsecus inferre, sed ab illomet nasci, ac proinde consensus inde secutus non censetur involutarius, cum sit omnino voluntarius in sua causa. Qui vero iniuste cogitur, censetur involutarie consentire, quia causa metus non est illi voluntaria, nec ab ispo ortum habuit, sed solum a causa extrinseca.'

[907] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 43, p. 203: 'Liberum vocant, non coactum a causa extrinseca, seu per metum iniustum, et dolo non inductum. Si enim cogaris ex causa iusta, id non officit libertati contractuum.'

[908] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 7, dub. 7, num. 166, p. 41: 'metus non causatur proxime ex malo, sed ex apprehensione illius quae eadem est et aeque mover, sive animus exsequendi adsit, sive non adsit, ut notavit Lessius (…)'.

proportionate to the value of the litigation right[909]. In other words, one must not abuse his litigation rights. A certain proportionality and equality must always be observed in exercising a right (*proportio et aequalitas servanda*). If not, the intimidated party can take the law in his own hands and seek secret compensation (*occulta compensatio*) for the excess value that has been extorted from him. For instance, the litigation right is abandoned in favor of the transfer of almost all of your possessions.

To sum up, then, Lugo is as careful as Molina in avoiding contracts that are based on fictitious litigation threats. Lessius, on the other hand, further develops Sánchez's idea that it is allowed to extort an obligation in exchange for renouncing a litigation right (*ius accusandi*), even if you never seriously considered exercising that right. Lessius does not approve, however, of abuse of litigation rights.

4.2.3.4 Minor fear

In view of the lasting influence of the scholastics on Hugo Grotius, it is worthwhile drawing the attention to an important fixation by Lessius of what had hitherto been a point of constant dispute amongst the scholastics : does minor fear (*metus levis*) give rise to annulment or not ? Sole reverential fear without threats and importunate pressure without real danger of violence, for instance, were were still considered as amounting to minor fear. Yet even Sánchez had remained quite confused about whether minor fear could give rise to annulment of a contract or not – although he seems to have eventually recognized that restitution must be made[910]. Rebelo, for his part, stated that minor fear that had given cause to the contract rendered a contract automatically invalid in the court of conscience. In the external court, he thought minor fear made the contract voidable[911].

With Lessius, however, we see an unprecedently clear, firm, and well-developed recognition that minor fear has a real effect upon the validity of coerced contracts other than marriage in the court of conscience. For this he quoted Sylvester, Dr. Navarrus, and Covarruvias[912]. Building on these authors, Lessius holds that contracts affected by minor fear

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[909] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 45, p. 204: 'Adverte tamen, si nimis gravis sit obligatio vel res quam metum inferens exigit, et non habeat proportionem cum iure quo ipse cedit, malum intentatum remittens, vel cum opera quam praestat, malum aliunde impendes avertens, posse consensum revocari, quo ad illum excessum, ut contractus ad aequalitatem reducatur, ut si, ne accusem te furti vel alterius criminis, exigam maiorem partem bonorum (…). In his enim aliqua proportio et aequalitas servanda est, prout prudentia determinabit; quae si excedatur, committitur iniustitia, ac proinde tenetur alter ad restitutionem; quam si non fecerit, potest laesus uti occulta compensatione, alia via recuperandi non suppetente.'

[910] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 4, disp. 9-11, p. 348-355.

[911] Rebelo, *Opus de obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 5, num. 17, p. 211: 'Ex dictis habes contractus tam lucrosos quam onerosos extortos tam per metum gravem quam levem, si causa sine qua non sit, in foro conscientiae esse ipso iure irritos. In foro vero iudiciali similiter declarandos esse fuisse etiam irritos, si per gravem metum facti sint ; si per levem, rescindi posse si constet metum fuisse eorum causam sine qua non fierent.'

[912] Sylvester Prierias, *Summa Sylvestrina*, part. 2, s.v. *restitutio 2*, dict. 7, f. 263r : 'Sed in conscientia, ubi dicta praesumptio non habet locum contra veritatem, ubicunque constiterit de qualicunque metu, necessaria est restitutio.' Compare Azpilcueta, *Enchiridion sive manuale confessariorum et poenitentium*, cap. 17, num. 15, p. 280 ; and Covarruvias, *In regulam peccatum*, part. 2, par. 3, num. 7, p. 485.

are to be considered voidable at the option of the coerced party[913]. He points out that it is not unlikely for minor fear to throw a man off balance as much as grave fear (*non minus perturbat hominem*). Secondly, the goods extorted from the coerced party have been obtained through injury (*iniuria*). Hence, they must be restituted to the injured party. Last, the man who suffers from minor fear is nevertheless unjustly deprived of his freedom (*privatur per iniuriam sua libertate*). Therefore he must get the chance of freely rejecting or confirming the agreement.

Lessius recognizes that minor fear is deemed irrelevant in the external court, to the effect that there are no civil laws which enforce the claims of a party who suffered from *metus levis*. He even thinks that this policy before the external courts is a particularly sound and prudent one. Just as Covarruvias, he points out that, otherwise, the courts would be overextended (*ne lites in immensum excrescant*)[914]. The court of conscience, however, cannot take into account these policy related considerations. The internal forum solely attends the truth, which says that minor fear constitutes a form of injury (*iniuria*). Contrary to Sánchez, therefore, Lessius is not reluctant to grant relief to somebody who assents to a contract for simple reverential fear (*solus metus reverentialis*) or under importunate pressure (*preces importunae*)[915].

4.2.3.5 Void *vs* voidable contracts

As we have noted above, one of the most significant contributions of Sánchez to the development of modern contract law concerned his elaborately drawn out distinction between nullity *ab initio* and voidability. He thereby clearly decided to sanction duress with nullity at the option of the wronged party. It is not unlikely, however, that it is to the credit of Lessius to have guaranteed that the recognition of a general regime of voidability to duress eventually became the mainstream opinion. For there definitely was no unanimous agreement on that immediately after Sánchez had tried to settle the discussion.

Within the Jesuit order itself, opinions were divided. We have already seen that only a few years before Sánchez was going to publish his *De matrimonio*, Molina claimed that duress resulted in nullity *ab initio*. After the publication of Sánchez's *magnum opus*, too, this idea remained vivid. Fernão Rebelo claimed that contracts affected by coercion were indiscriminately void from the very outset *(ipso iure irritus*)[916]. If duress had been the necessary motivating factor for the coerced party to assent to the contract (*causa sine qua non*), the contract was automatically void. Rebelo argued that this was the case in both the external and the internal forum, provided that the coercion was considerable.

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[913] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 46, p. 204: 'Etsi ea quae per metum levem acta sunt, sint aliquo modo valida, nec in foro externo admittatur exceptio huius metus, nec detur actio ad rescindendum contractum, tamen in foro conscientiae possunt in irritum revocari et quae tradita sunt repeti, et qui ea obtinet, tenetur restituere, si metus ille per iniuriam ad illa extorquenda sit incussus.'

[914] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 49, p. 205.

[915] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 48, p. 204-205.

[916] Rebelo, *Opus de obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 5, num. 17, p. 211 (cited above).

Others treaded a third path to solve the problem. It was ascribed to the Augustinian friar Pedro de Aragón. He allegedly maintained that onerous contracts were voidable, whereas gratuitous contracts tainted by duress were null *ipso facto*[917]. Gratuitous contracts such as liberal promises and donations were thought to require an even higher degree of freedom. Hence duress was thought to have an even more pernicious effect on gratuitous contracts than on onerous contracts. In spite of his otherwise great indebtedness to Sánchez, the Augustininan friar and theologian Basilio Ponce de León (1570-1629) followed Pedro de Aragón's alleged line of thought[918]. This is rather exceptional, since Ponce de León usually followed Sánchez fairly closely. Also, he shared with Sánchez the project of giving a systematic treatment of matrimonial law which was not only useful for theologians, but also for the canonists and the civilians, as is obvious from the addition to the title of this treatise on marriage law (*opus aeque canonici et civilis iuris ac sacrae theologiae professoribus utile ac necessarium*)[919].

Lessius' plea constituted an almost indispensable support, then, in enhancing the chances of survival for Sánchez's doctrine about the annulment of contracts as a result of duress. This actually seems to have been Lessius' explicit concern, as the whole dubitatio on duress is entirely structured around the question whether duress makes contracts void or voidable. He concludes, of course, that coerced contracts are not void but voidable (*irritandi*). But in order to be able to do so, he needs to procede methodically by arguing, first, that duress does not result in automatic nullity as a matter of natural law, and, secondly, that duress does not result in automatic nullity as a matter of positive law. Quoting paragraph *Si metu coactu* from law *Si mulier* (D. 4,2,21,5), constitution *Venditiones* (C. 2,19,12) and canon *Abbas* (X 1,40,2), the latter proved to be an easy job[920]. Lessius' argumentation with respect to natural law turns out to be much more interesting.

Lessius rehearses a standard idea of the early modern scholastics in order to demonstrate that relative nullity is the natural solution to coerced consent : a contract cannot be absolutely void as a matter of natural law but for want of consent (*defectus consensus*) or its containing injustice (*iniuria*)[921]. Lessius acknowledges that a party consenting under compulsion suffers from a certain kind of unwillingness (*nolleitas*), but in line with Thomistic

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[917] This is not that clear, though, at least not from Aragón, *In secundam secundae commentaria de iustitia et iure*, quaest. 89, art. 7, p. 1007.

[918] Basilio Ponce de León, *De sacramento matrimonii tractatus*, Opus aeque canonici et civilis iuris ac sacrae theologiae professoribus utile ac necessarium, Bruxellis 1632, lib. 4, cap. 6, num. 4, p. 193.

[919] On Ponce de León, see J.F. von Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts von Gratian bis auf die Gegenwart*, Buch 3.1: *Vom Concil von Trient bis zum Jahre 1870, Das katholische Recht und die katholischen Schriftsteller*, Graz 1956 [=Stuttgart 1880], p. 740.

[920] Lugo, on the other hand, painstakingly spent much time considering every single Roman or canon law that could be adduced against or in favor of voidability, only to conclude that Sánchez and Lessius are right (*non invenio firmum fundamentum contra primam sententiam Lessii et Sanchii*). Cf. Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 7, dub. 2, num. 118-132, p. 30-33.

[921] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 36, p. 201: 'Si est omnino irritus iure naturae, id provenit vel defectu consensus, vel quia intervenit iniuria.'

psychology he refuses to accord any significance to the element of involuntariness[922]. True, a party would not have consented *if* the evil event had been absent. But it was. The condition that the evil had not been there has not been met (*conditio non extet*).

In Lessius' view, the contract cannot be declared automatically void on account of injustice either[923]. Injustice cannot be sufficient grounds to set aside a contract automatically (*non suffciens ut ipsum reddat omnino irritum*). Injustice can be sufficient grounds, however, as a matter of natural law, to revoke consent (*sufficiens causa ad revocandum consensum*). That is the way Lessius had explained that contracts affected by mistake or deceit are not void, but voidable[924]. This is the very point Lessius wants to make: even though coerced contracts are not legally void (*irriti*), they are voidable at the option of the coerced party (*irritandi*). This is also the explicit point he makes in his theoretical discussion of the voluntary and the involuntary in human agency[925].

Since marriage is a contract, Lessius concludes in his small treatise *De matrimonio* that marriage would also need to be subject to the regime of voidability as a matter of natural law. As a general rule of contract law, coerced consent does not result in the invalidity of the contract automatically, since coerced consent is consent anyway. There is a possibility of rescission at the option of the intimidated party, because in this way the injury which he suffered can be undone. Marriage is an exception to this rule, however, because the positive, ecclesiastical law took away the possibility of rescission at the option of the coerced party, since marriage is indissoluble. Therefore, marriage contracts affected by duress have come to be considered as being absolutely null[926].

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[922] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 36, p. 201: 'Non defectu consensus, quia qui metu coactus consentit, absolute consentit voluntarie: omnibus enim consideratis, vult. Nec obstat, quod illi volitioni iungatur nolitio, quia est solum nolleitas, ut ita dicam, qua nollet, si timor mali abesset; quae proinde est omnino inefficax, cum conditio non extet.'

On *nolleitas* and *velleitas* as well as Thomistic psychology in general, see A. Robiglio, *L'impossibile volere, Tommaso d'Aquino, i tomisti e la volontà*, Milano 2002, esp. p. 40.

[923] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 36, p. 202: 'Non etiam ratione iniuriae: tum quia iniuria non est immediata causa contractus, sed consensus contrahentis, tum quia etsi iniuria possit esse sufficiens causa ad revocandum consensum et contractum irritandum, non tamen est sufficiens ut ipsum reddat omnino irritum, ut patet in contractu, cui dolus causam dedit, qui, etsi iniuria interveniat, non tamen est iure naturae irritus, sed irritandus (…).'

[924] See the second part of this chapter.

[925] Lessius, *In I.II D. Thomae de beatitudine et actibus humanis*, quaest. 6, art. 6, num. 38, p. 45: 'Itaque secluso iure positivo, verius existimo, matrimonium metu gravi contractum, esse validum, modo interveniat ultro citroque idonea materia, in qua contractus versetur, nempe personarum habilitas. Idem dico de emptione, venditione, permutatione, locatione, et similibus contractibus. Possunt tamen huiusmodi contractus sic initi, excepto matrimonio, facile irritari, voluntate eius, qui iniuriam passus est, nam potest petere restitutionem in integrum, et agere de damno illato. Excipio matrimonium, quia semel initum, natura sua est insolubile, unde iure positivo ab initio debuit irritum decerni.'

[926] Lessius, *De matrimonii sacramento*, cap. 4, dub. 8, p. 359, in : *De beatitudine, de actibus humanis, de incarnatione Verbi, de sacramentis et censuris praelectiones theologicae posthumae. Acceserunt variorum casuum conscientiae resolutiones*, Lovanii 1645 : 'Cum enim matrimonium natura sua sit insolubile, fit ut semel contractum, sive iure, sive iniuria, non possit dissolvi, sicut possunt alii contractus. Unde merito Ecclesia, ut huic tanto incommodo occurreret, statuit talem contractum ab initio esse irritum, et personas ad sic contrahendum inhabiles. In caeteris contractibus haec irritatio non erat necessaria, cum voluntate contrahentium solvi possint.'

To sum up, except for the case of marriage contracts, Lessius equally adopts the regime of relative nullity in the case of mistake and deceit, on the one hand, and the case of duress and coercion, on the other. What is more, he expressly employs the analogy with the doctrine of mistake in order to prove that contracts affected by duress are also voidable at the option of the injured party. This, Lugo points out in an exposition that is heavily indebted to Lessius', is the very advantage Lessius and he have in comparison to Sánchez[927]. Contrary to Lessius and Lugo, Sánchez had not recognized a general regime of voidability for contracts affected by *dolus causam dans*. Therefore he could not, as Lessius and Lugo would, construct an argument based on an analogy with the doctrine of mistake.

4.2.4 A brief synthesis of the scholastic tradition on duress (Grotius)

The early modern scholastics' wavering expositions – abounding in juridical technicalities and tough casuistry generated by the direct application of generally established principles to practical cases – make for intellectualy stimulating, yet pretty arduous reading. Even if a Jesuit as Lessius gets near to the easy-to-read humanist style of Grotius, it is still a quite delightful experience to switch from the scholastic treatises to Grotius' plain and succinct reflections on duress in his *Law of war and peace*[928]. The great poet, jurist and theologian from Delft comforts his reader by acknowledging that previous attempts to come to grips with coerced contracts have been confusingly complicated (*implicata tractatio*).

This does not mean, however, that there is no use in trying to understand the challenging demonstrations of the scholastic coryphaei. For one thing, Grotius expressly recognizes his debt to the scholastics as he presents his own outline of the doctrine of duress. For another thing, there is much intellectual enjoyment in admiring the elegance with which Grotius offers a synthesis of the doctrines we have seen painstakingly mounted by the early modern canonists and theologians.

A major point where Grotius follows the Aristotelian-Thomistic tradition is in denying that duress results in lack of consent[929]. Contrary to mistake, duress is not actually considered to be a vice of the will in the first place (*consensus hic adfuit absolutus*). He insists, just as Lessius, that there is a problem with duress from the point of view of justice and not from the point of view of consent. He uses the Roman expression 'damage caused by injury' (*damnum iniuria datum*). So tort law, and not contract law, is seen to constitute the basis of the relief that should be granted to the coerced party. Hence, the contract is not automatically void.

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[927] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 7, dub. 2, num. 119, p. 30: 'Quarto arguitur, quia dolus dans causam contractui reddit illum irritum de iure positivo. Cum ergo dolus et metus aequiparentur, cap. cum contingat, de iureiurando, idem dicendum est de contractibus ex metu factis. Ad hoc conatur Sánchez reddere rationem discriminis inter dolum et metum. Nos tamen facilius negamus antecedens, quia ut diximus sectione praecedenti, contractus etiam ex dolo facti validi sunt, sed rescindendi (…).'

[928] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 7, p. 332-333.

[929] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 7, num. 2, p. 332-333: 'Ego omnino illorum accedo sententiae qui existimant, seposita lege civili quae obligationem potest tollere aut minuere, eum qui metu promisit aliquid, obligari: quia consensus hic adfuit, nec conditionalis, ut modo in errante dicebamus, sed absolutus.'

Through following Grotius on this point, Robert Joseph Pothier (1699-1772), the famous French natural lawyer, continued these scholastic views of duress[930]. Pothier's was a conscious choice. He perfectly knew that Pufendorf and Barbeyrac held the opposite view, but nevertheless followed Grotius and, hence, the scholastic tradition[931].

Moreover, Grotius deems minor fear (*metus levis*) to be tantamount to grave fear[932]. He thereby quotes Sylvester, Dr. Navarrus and Covarruvias – that is, exactly the authors quoted by Lessius in making exactly the same point when he confirms the relevance of minor fear in the court of conscience. As long as the fear is exerted unlawfully (*metus iniustus*), the contract is avoidable at the option of the coerced party. Grotius even seems to have taken seriously what Lessius dared to state very carefully against the common opinion of the scholastics : the annulment of a contract on account of duress exerted by a third party is based on civil law rather than natural law[933]. As a matter of natural law, the validity of a contract is not affected through duress exerted by a third party. Grotius would draw criticism for this standpoint, which he borrowed from Lessius, in the work of Pothier. The French natural lawyer preferred the contrary opinion as defended by Pufendorf and Barbeyrac[934].

4.3 Mistake (*dolus/error*)

4.3.1 Foundations

4.3.1.1 Romano-canon law

The Roman distinction between *actiones bonae fidei* and *stricti iuris* as a basis for dealing with the effects of mistake (*error/dolus*) is sufficiently well-known – at least from its

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[930] Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, part. 1, sec. 1, art. 3, par. 2 (du défaut de liberté), p. 27: '(…) on ne peut pas dire comme dans le cas de l'erreur, qu'il n'y ait point eu absolument de contrat; il y en a un, mais il est vicieux (…) l'injustice que vous avez commise envers moi, en exerçant cette violence, vous oblige de votre côté à m'indemniser de ce que j'en ai souffert; et cette indemnité consiste à m'acquitter de l'obligation que vous m'avez obligé de contracter; d'où il suit que mon obligation, quand on en supposeroit une, ne peut être valable selon le droit naturel; c'est la raison que donne Grotius.'

[931] Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, part. 1, sec. 1, art. 3, par. 2 (du défaut de liberté), p. 28-29 : ''Puffendorf et Barbeyrac pensent au contraire, que dans les termes mêmes du pur droit naturel, lorsque j'ai été contraint par violence à contracter, le contrat ne m'oblige point, quoique celui avec qui j'ai contracté n'ait eu aucune part à la violence.'

[932] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 7, num. 2, p. 333: 'Sed illud simul verissimum censeo, si is cui promittitur metum intulerit non iustum, sed iniustum, quamvis levem, atque inde secuta sit promissio, eum teneri ad liberandum promissorem, si promissor velit; non quod inefficax fuerit promissio, sed ob damnum iniuria datum.'

[933] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 7, num. 3, p. 333: 'Quod vero quidam actus rescinduntur ob metum ab alio incussum, quam quicum metum est, ex lege est civili, quae saepe etiam actus libere factos ob iudicii firmitatem, aut irritos facit, aut revocabiles.'

Compare with Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 6, num. 39, p. 202-203: 'Plerique doctores videntur sentire, ex iure naturae (…) Crediderim tamen, etc…'.

[934] Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, p. 28-29: 'Puffendorf et Barbeyrac pensent au contraire, que dans les termes mêmes du pur droit naturel, lorsque j'ai été contraint par violence à contracter, le contrat ne m'oblige point, quoique celui avec qui j'ai contracté n'ait eu aucune part à la violence.'

interpretation in the Middle Ages onwards[935]. Paragraph *Actionum autem* (Inst. 4,6,28) in conjunction with paragraph *Societas* (D. 17,2,3,3) could be taken to mean that *bonae fidei* contracts were void *ipso iure* when entered into because of deceit[936]. On the basis of paragraph *Non solum* (D. 4,3,7,3) in conjunction with law *Dolo vel metu* (C. 8,38,5), amongst other texts, it could be argued that contracts *stricti iuris* were not void automatically, but that the deceived party could be granted relief by means of an *exceptio doli* and an *actio de dolo*[937].

Even if a combination of other texts and interpretations could have led to other views – as will be attested by Lessius' and Lugo's alternative exegesis – this distinction was sanctified in the thirteenth century by the ordinary gloss *Si in hoc ipso* to law *Et eleganter* (D. 4,3,7*pr*.). The canon law tradition added further weight to this interpretation through gloss *Bonae fidei* to canon *Quum venerabilis* (X 2,25,6). The latter gloss also stated that all contracts, regardless of whether they are *stricti iuris* or *bonae fidei* must observe good faith (*bona fides*)[938] – it did not blur, however, the distinction between these contracts in regard to the effects of mistake.

The distinction between *bonae fidei* and *stricti iuris* contracts was compounded by yet another distinction that arose in the medieval interpretations of the Roman law, particularly of law *Et eleganter*[939] – perhaps under influence of the Aristotelian account of ignorance. Depending on whether the deceit had been fundamental to the conclusion of the contract or merely incidental, *dolus causam dans contractui* was distinguished from *dolus incidens contractui*. In the case of *dolus causam dans*, the deceived party would not have concluded the contract, if he had not been mistaken. Therefore, a *bonae fidei* contract affected by *dolus causam dans* was deemed void. In the case of *dolus incidens*, the party would still have wished to conclude the contract, albeit under more favorable conditions. As a consequence, the contract was not deemed void, although damages could be claimed.

During the Middle Ages, the Roman distinction between *bonae fidei* and *stricti iuris* contracts was generally accepted. In the scholastic tradition, the name of the Orléans professor

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[935] See, for instance, Zimmermann, *The law of obligations*, p. 671, and M.J. Schermaier, *Bona fides in Roman contract law*, in: R. Zimmermann – S. Whittaker (eds.), Good faith in European contract law, [The Common Core of European Private Law, Cambridge Studies in International and Comparative Law, 14], Cambridge 2000, p. 63-92.

[936] Inst. 4,6,28: 'Actionum autem quaedam bonae fidei sunt, quaedam stricti iuris, bonae fidei sunt hae: ex empto, vendito, locato, conducto, negotiorum gestorum, mandati, depositi, pro socio, tutelae, commodati, pigneraticia, familiae erciscundae, communi dividundo, praescriptis verbis quae de aestimato proponitur et ea quae ex permutatioe competit, et hereditatis petitio.'; D. 17,2,3,3 (compare with D. 4,4,16,1): 'Societas si dolo malo aut fraudandi causa coita sit, ipso iure nullius momenti est, quia fides bona contraria est fraudi et dolo.'

[937] C. 8,38,5: 'Dolo vel metu adhibito actio quidem nascitur, si subdita stipulatio sit, per doli tamen vel metus exceptionem submoveri petitio debet.'

[938] *Decretales Gregorii Papae IX suae integritati una cum glossis restitutae*, Romae 1582, col. 841: 'Non dicuntur bonae fidei, quia in eis tantum servari debeat bona fides. Quia in contractibus stricti iuris servari debet bona fides, et in quocunque contractu bona fides intervenire debet. (…) In actionibus bonae fidei multum exuberat officium iudicis et pinguius quam in actionibus stricti iuris, et istis rationibus dicuntur bonae fidei et aliae dicuntur stricti iuris.'

[939] See Glossa *Si in hoc ipso* ad D. 4,3,7*pr*. in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, cols. 508-509.

Pierre de Belleperche became increasingly associated, however, with an alternative opinion, holding that both types of contract are voidable if they are affected by mistake.

Belleperche seems to have defended that contracts affected by fundamental mistake are not void but voidable, indeed. The thrust of Belleperche's argument, however, remains directed towards the idea that all contracts must be performed in good faith, even though there is a category of actions called *stricti iuris* in addition to the category of sixteen actions called *bonae fidei*. The latter are called *bonae fidei* because they are characterized by *bona fides* to a superior degree (*propter exuberantiam bonaefidei*)[940]. Yet that does not mean, *a contrario*, that *bona fides* is not required in actions *stricti iuris*[941]. So far, Belleperche's reasoning is just a confirmation of gloss *Bonae fidei* to canon *Quum venerabilis* (X 2,25,6).

What seems novel in Belleperche is that he infers from this that it is not correct to say that contracts *stricti iuris* must be avoided by an *actio de dolo*, while contracts *bonae fidei* are immediately void because of mistake. Belleperche then tries to propose a regime of voidability for both types of contract[942]. Using distinctively Aristotelian terminology, he distinguishes contracts whose substance (*forma*) is vitiated from contracts whose substance is not vitiated[943]. Mistake is an example of an external cause (*causa extrinseca*), which does not affect the substance of the contract itself. Hence, the contractual obligation ensuing from the contract does not cease to exist.

Belleperche's argument constitutes a compelling deviation from the common opinion – and it would be perceived as such in the subsequent scholastic tradition. To our knowledge, Belleperche did not develop, however, an argument about the equal deficiency of voluntary consent in both *stricti iuris* and *bonae fidei* – as Summenhart later pretended Belleperhce did. What is distinctive in Belleperche's treatment of deceit is that he foresees a regime of

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[940] Pierre de Belleperche, *In libros Institutionum commentarii*, Lugduni 1536, ad Inst. 4, 6, 28, num. 1, p. 712-713: 'Opponitur, dicitur hic quaedam sunt bonaefidei. Contra divisio habet fieri ex opposito supponit quod actiones stricti iuris non requirunt bonam fidem. Contra C. de actio. et oblig. l. bonamfidem. Dico concedo quod in omnibus contractibus requiritur bonafides, et hoc dicitur hic propter exuberantiam bonaefidei, sic. l. alleg. ff. de verborum obliga. l. qui autem.§.qui id quod.'

[941] Belleperche, *In libros Institutionum commentarii*, ad Inst. 4, 6, 28, num. 2, p. 713: 'Quare dicuntur bonaefidei istae actiones? Dico non per abnegationem bonaefidei in actionibus stricti iuris: nam in omnibus requiritur bonafides, ut l. alleg. bonamfidem. Sed propter excellentiam quae exuberat vel aliter in l. alleg. in illis maior exuberantia requiritur bonaefidei. Dicit glossa, in multis.'

[942] Belleperche, *In libros Institutionum commentarii*, ad Inst. 4, 6, 28, num. 3, p. 715: 'Scire debetis quandoque dolus dat causam contractui ubi non eras alias venditurus alias incidit in contracu ubi alias eras venditurus te induxi: ut mihi pro minori pretio venderes, ubi dolus dat causam contractui tenet regulatriter per rationem legis quae dicit quotiens form contractus non continet vitium, licet extrinsecatio sit vitiosa mihi, nihilominus obligatio procedit ipso iure. Sed ubi forma in se vitiosa est, non contrahitur obligatio secundum causam, ut promittis interficere hominem primo casu promittis mihi decem ne interficiam, hic contrahitur obligatio licet causa extrinseca inspecta descendat ex dolo. (…) Et nun ubi induxi te per dolum ut vendas mihi forma non est vitiosa, ideo, etc.'

[943] The Aristotelian-Thomistic influence on Pierre de Belleperche and the jurists of the school of Orléans in general should not necessarily come as a surprise. Most of the clergy who taught at the law school of Orléans had previously followed 'Thomist type theological studies' in Paris, according to A. Errera, *The role of logic in the legal science of the glossators and commentators, Distinction, dialectical syllogism, and apodictic syllogism, An investigation into the epistemological roots of legal science in the late middle ages*, in : A. Padovani – P. Stein (eds.), The jurists' philosophy of law from Rome to the seventeenth century, [A treatise of legal philosophy and general jurisprudence, 7], Dordrecht – New York 2007, p. 2007, p. 136-141.

voidability for both contracts *stricti iuris* and *bonae fidei*. Belleperche's plea in favor of the abolition of the distinction of both types of contract was later confirmed by Cino da Pistoia (c. 1270-1336/7)[944]. Just as Belleperche, Cino held that both types of contracts were affected in the same way by deceit. Also, he refused to acknowledge that the superior degree of good faith required in contracts *bonae fidei* meant that those contracts needed to be declared void *ab initio* when affected by deceit[945]. It only meant that they had an action named after their own name instead of the usual *actio de dolo*. He argued that a *bonae fidei* contract must not be automatically void, since a contract affected by duress also involved *dolus* but remained valid at the option of the intimidated party anyway[946]. Cino da Pistoia did not see why the substance of the contract would be vitiated by dolus, therefore concluding with Belleperche that both types of contracts resulted were not automatically void but merely voidable when affected by deceit[947].

However, the common opinion remained hostile to these new ideas introduced by Belleperche and Cino. The authority of Bartolus de Saxoferrato might have played a crucial role in this regard. In his commentary on law *Et eleganter* (D. 4,3,7*pr*.), Bartolus rejects the heterodox ideas propounded by Belleperche and Cino, and simply confirms the Roman-based distinction between the two types of contract. The gloss contains the truth in this debate, according to Bartolus[948]. The obligation of a *bonae fidei* contract affected by *dolus causam dans* is impeded from coming into existence[949].

Bartolus is not convinced about Cino's idea that a contract *bonae fidei* must still be considered somehow valid[950]: 'I say that a *bonae fidei* contract does not contain its substance

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[944] Cino da Pistoia, *Lectura super Codice*, Venetiis 1493, ad C. 4,44,2, f. 187v : 'Modo videamus ubi dolo contrahitur, utrum contractus sit nullus. Glossae distinguunt. Aut enim contractus stricti iuris, aut bonaefidei. Si stricti iuris, indistincte tenetur contractus et non est ipso iure nullus. (…) Si est contractus bonae fidei, aut dat causam contractui, et tunc ipso iure non tenetur (…), aut incidit, et tunc tenetur. (…) Istud non reputat Pe[trus Bellapertica] verum esse, sed dicit quod indistincte tenet contractus nec habet legem contra se (…).' [continuation in next footnote]

[945] Cino, *Lectura super Codice*, ad C. 4,44,2, f. 187v: 'Et quod sit verum, probatur, quia sic est in contractibus stricti iuris, et idem in contractibus bonae fidei. Sed contra hoc instatur: quia in bonaefidei contractibus exuberat bona fides, ergo etc. Sed huic respondetur, quod exuberantior bonafides in contractibus bonaefidei operatur ut purgetur dolus per actionem ex eo contractu, sed in stricti iuris purgater per actionem de dolo. (…) Non autem operatur exuberans bonafides ut contractus sit nullus ipso iure.' [continuation in following footnote]

[946] Cino, *Lectura super Codice*, ad C. 4,44,2, f. 187v: 'Et hoc probatur etiam, quia in metu est dolus, et tamen ubi per metum fit contractus bonaefidei non est contractus nullus. (…)'

[947] Cino, *Lectura super Codice*, ad C. 4,44,2, f. 187v: 'Praeterea probat, quia quoties contractus habet suam formam propriam sua essentialia tenet ipso iure nec extrinseca causa eum annulet (…), et propter hoc maxime concludit Petrus quod omnis contractus sive stricti iuris sive bonaefidei indistincte sive dolus dederit causam sive inciderit valet.'

[948] Bartolus, *In primam Digesti veteris partem*, ad D. 4,3,7*pr*., num. 4, f. 130v: 'Mihi videtur quod glossa nostra dicta puram veritatem.'

[949] Bartolus, *In primam Digesti veteris partem*, ad D. 4,3,7,3, num. 3, f. 130v-131r: 'Sed dolus qui dat causam contractui bonae fidei impedit obligationem oriri ex illo contractu (…), secus si dat causam contractui stricti iuris.'

[950] Bartolus, *In primam Digesti veteris partem*, ad D. 4,3,7*pr*., num. 6, f. 130v: '(…) dico quod in contractibus bonae fidei non habet sua essentialia, quia ille consensus est conditionalis et conditio [si verum est illud propter quod inducitur ad contrahendum] deficit. Sed in contractibus stricti iuris habent sua essentialia, quia talis conditio de stricto iure non attenditur.'

anymore, since its consent is conditional and the condition [if that on account of which he was induced into the contract is true] has not been met. A *stricti iuris* contract, on the other hand, still contains its substance, since that condition is not looked after in such contracts.' Bartolus also rejects the analogy with duress[951]: 'If you consent on account of duress, you are not mistaken about the cause to the consent. You know the cause and your consent is pure, even though it has been given on account of duress. Moreover, the contract is valid. If you consent on account of deceit, however, you are mistaken about the cause of the contract.' In Bartolus' view, this cause has to do with the condition that the facts that make you enter into the contract are true.

Importantly, Bartolus rejects the idea that consent is vitiated by deceit. This is an argument that resonated in the early modern scholastic discussion[952]: 'This argument displeases me. If the contract would be void on account of lack of consent, then, by the same token, we would have to say that a contract *stricti iuris* is void, because it lacks consent.' Contrary to Bartolus, Summenhart would later call this a convincing argument, although he still adopted the traditional conclusion that there is a distinction. Yet Bartolus goes on: 'It is not true that deceit impedes consent to the contract. There is no mistake about the contract, but rather about the *causa* by virtue of which you are impeded from or induced to enter into the contract.'

Different still, is Baldus' treatment of the issue. 'As a matter of canonical equity (*aequitas canonica),*' Baldus claimed, 'I think that all contracts in this world are of good faith.' He did not intend this *bona fides* character of all contracts to be extended to the remedies. What it meant, according to Baldus, is that all contracts are of good faith in regard to their spirit and substantial intent. From this he concluded that any contract affected by fundamental mistake was void *ipso iure*[953]. This standpoint was at odds both with that of Belleperche and that of Bartolus. Baldus nevertheless thought that fundamental mistake should universally result in automatic nullity, since 'God, who regulates and governs everything, looks after the heart of man', and, secondly, because he could not recall that any such substantial distinction between contracts *bonae fidei* and contracts *stricti iuris* was mentioned in the texts of canon law[954].

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[951] Bartolus, *In primam Digesti veteris partem*, ad D. 4,3,7*pr*., num. 6, f. 130v: 'Ille qui consentit propter metum non errat in causa consensus, imo scit eam, et pure consentit, propter metum tamen, imo valet contractus. (…) Ille vero qui consentit propter dolum, errat in causa.'

[952] Bartolus, *In primam Digesti veteris partem*, ad D. 4,3,7*pr*., num. 6, f. 130v: 'Ista ratio non placet mihi, quia si contractus esset nullus propter defectum consensus eadem ratione diceremus nullum contracutm stricti iuris, quia consensus deficit. (…) Praeterea non est verum, quod dolus impediat consensum circa contractum, nec erratur in contractu, sed erratur in causa propter quam quis impeditur seu inducitur ad contrahendum.'

[953] Baldus, *Super decretalibus*, ad X 2,11,1, num. 12, f. 144v: 'Ego puto quod de aequitate canonica omnes contractus mundi sint bonae fidei, non dico quantum ad titulum actionis, sed quo ad mentem et substantiam intentionis, et, ideo, si dolus dat eis causam alias non contracturis, quod contractus sit nullus ipso iure…' [for continuation, see next footnote].

[954] Baldus, *Super decretalibus*, ad X 2,11,1, num. 12, f. 144v: '…quia Deus qui regulat et regit omnia respicit cor hominis et in iure canonico non memini hoc notasse in textu aliquot differentiam subtantialem inter contractum bonae fidei et stricti iuris.'

Baldus' references to the canon law suggest that it is not unlikely, indeed, that the process of re-thinking the civilian tradition could not seriously begin until after the spirit of canon law had been brought to bear upon the Roman texts. This process was fulfilled in the works of the moral theologians, who took two canons very seriously. First, canon *Quum universorum* (X 3,19,8), which stated that the law must protect the deceived and not the deceivers (*deceptis et non decipientibus iura subveniant*). If *bonae fidei* contracts were considered void *ipso iure*, deceivers could not be obliged to observe their contractual obligations at the wish of the deceived party by virtue of contract any more, since the contract was considered to be non-existent. At a certain point, the makeshift measures to prevent this from happening would no longer satisfy. The second canon that was going to play a decisive role, was canon *Quum contingat* (X 2,24,28). It expressly recommended that the law of duress and the law of mistake be treated on equal terms. Once Sánchez's regime of voidability in coerced contracts had been established, then, the traditional view that mistake resulted in absolute nullity became subject to questioning.

4.3.1.2 Aristotelian-Thomistic tradition

The third book of Aristotle's *Nichomachean Ethics* is famous not only for the influence it has had on the complex and ever-lasting debates on fear and duress. It has also been the starting point of centuries of extremely vast reflection upon the effect of ignorance and mistake on voluntary assent to a contract. As noted before, Aristotle singled out two obstacles to voluntary action: compulsion and ignorance[955]. Nonetheless, compulsion and ignorance do not result in involuntariness indiscriminately. Only when the moving principle lies entirely outside the human person – the intimidated party contributing nothing – does compulsion result in pure involuntariness. Similarly, for ignorance to result in involuntariness, it is bound to a condition, namely that the mistaken action is followed by a feeling of pain and repentance. Otherwise the ignorant party was simply a not voluntary agent, but not an involuntary agent.

Thomas Aquinas would bring this elementary analysis of ignorance and involuntariness into a more systematic account of human agency. He repeated Aristotle's idea that a movement can only be voluntary when it comes from within the agent. Yet even though movement by an intrinsic principle is a necessary condition for voluntariness, it is nevertheless not sufficient. Imbued with Aristotle's teleological view of movement as expressed in his *Physics*, Thomas makes explicit that the inclination from within must also be directed towards an end[956]. In order for that condition to be met, however, knowledge of this

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[955] Aristotle, *Ethica Nicomachea* (Ed. Bywater), 3, 1, 1109b35-36, p. 40: 'δοκεῖ δὴ ἀκούσια εἶναι τὰ βίᾳ ἢ δι᾽ ἄγνοιαν γινόμενα'.

[956] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 6), IaIIae, quaest. 6, art. 1 (*Utrum in humanis actibus inveniatur voluntarium*), concl., p. 56: 'Illa perfecte moventur a principio intrinseco, in quibus est aliquod intrinsecum principium non solum ut moveantur, sed ut moveantur in finem. Ad hoc autem quod fiat aliquid propter finem, requiritur cognitio finis aliqualis.'

end is required. As a consequence, ignorance – being the opposite of knowledge – vitiates voluntary movement.

So ignorance causes involuntariness, since your rational insight into the end of an action is impaired. Put differently, you are mistaken. Thomas then elaborated on Aristotle's disjunction of a not voluntary agent and an involuntary agent. To this effect, he distinguished a threefold relationship between ignorance and the act of will. Ignorance can precede, accompany or follow an act of will. Accordingly, the ignorance is called antecedent (*antecedens*), concomitant (*concomitans*) or consequent (*consequens*)[957]. Concomitant ignorance explains why somebody can be ignorant and still not be a voluntary agent rather than an involuntary agent. If you wish to kill your enemy, for instance, but you do so in ignorance while thinking to kill a stag, your ignorance is concomitant. This kind of mistake might be thought of as coming close to the juridical concept of *dolus incidens*, although no explicit connection is advanced by Thomas.

While concomitant ignorance leads to non-voluntariness, consequent ignorance does lead to involuntariness, but only in a very restricted sense, since this ignorance is actually consequent to an act of the will, for instance, if you do not want to know something, so that you have an excuse for commiting a sin. This is the first type of consequent ignorance and it is called affected (*affectata*)[958]. It leaves the act voluntary, because you are expected to know something. By the same token, not acting or not willing something when it is prescribed to act or to will is a voluntary act[959]. The second type of consequential ignorance stems from negligence. Therefore it is also considered to be voluntary. In both cases of consequent ignorance, Thomas still thinks is a certain element of involuntariness, because the movement to the (non-)act would not have taken place in the event of knowledge.

Ignorance is preceding the act of will when it is involuntary but still the cause of an act the mistaken agent would not have performed otherwise. A typical example is the accident whereby a hunter kills someone walking down the road. But the concept of antecedent ignorance might also be considered as coming close to the concept of *dolus causam dans*, although Thomas does not mention this.

To summarize, three different degrees of involuntariness correspond to the three different types of ignorance. This will be decisive, of course, in determining the degree to which an ignorant party is responsible for an infringement of the law on account of his ignorance. This question falls outside the scope of our argument[960]. It is worthwhile

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[957] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 6), IaIIae, quaest. 6, art. 8 (*Utrum ignorantia causet involuntarium*), concl., p. 62-63. In the early modern scholastic commentaries on this passage, *ignorantia concomitans* is often indicated as *ignorantia comitans*.

[958] For the canonical roots of this concept, see Kuttner, *Kanonistische Schuldlehre*, p. 141-144.

[959] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 6), IaIIae, quaest. 6, art. 3 (*Utrum voluntarium possit esse absque omni actu*), concl., p. 58: 'Quia igitur voluntas, volendo et agendo, potest impedire hoc quod est non velle et non agere, et aliquando debet; hoc quod est non velle et non agere, imputatur ei, quasi ab ipsa existens. Et sic voluntarium potest esse absque actu.'

[960] It is nonetheless worthwhile to examine Thomas Aquinas' highly influential doctrine on this subject in *Summa Theologiae*, IaIIae, quaest. 76 (*De causis peccati in speciali*), in : *Opera omnia iussu impensaque Leonis*

mentioning, however, that the early modern scholastics wrote vast commentaries on the Aristotelian-Thomistic teachings about duress, ignorance and mistake. Certainly the issue of *ignorantia consequens* seems to have been an issue of particular concern, undoubtedly in light of the questions of responsibility that are attached to it. For example, Lessius distinguishes between *ignorantia affectata*, which is directly voluntary, *crassa*, which is indirectly voluntary through negligence, or *vincibilis*, which is indirectly voluntary through major negligence, while stressing that it is not logically impossible for the voluntary and the involuntary to go together[961]. Some of this might have influenced his idea, also produced by Covarruvias, that mistake does not lead to involuntariness unreservedly.

4.3.2 Nullity *ipso facto* and the *bonae fidei / stricti iuris* distinction

4.3.2.1 Is mistake a vice of the will?

The influence of the Tübingen professor Conradus Summenhart on the Spanish jurists and moral theologians, certainly in shaping their liberal economic ideas, has been massive. His intensive preccupation with contracts was driven by the desire to guide as many businessmen to God by avoiding the temptations inherent in commercial life. To this effect, he showed them how to observe the virtue of justice in exchange for the most diverse circumstances. The casuistry contained in his *Opus septipertitum de contractibus* is incredibly vast, but very well structured. It is broken up into a series of seven treatises dealing with property law, money-lending, sale-purchase, rents, lease, partnership, and bills of exchange.

There is not really a general law of contract preceding Summenhart's treatise. Yet in his lengthy introduction to fraud in buying and selling he develops important ideas on deceit and mistake that would be summarized by Juan de Medina in his *Treatise on penance, restitution and contracts*. Through Medina, Summenhart's writings would live on in the early modern scholastic tradition, first in commentaries on buying-selling, later in separate chapters on the vices of the will. The fact that Summenhart and Medina were widely consulted for their discussions on mistake, particularly for buying and selling, did not mean, however, that their conclusions were accepted as commonly as they were read by the early modern scholastics. Their strong emphasis on the need for absolutely free and voluntary consent to contracts would expose them to increasing criticism.

Because they were discussing mistake in the context of fraud, justice and restitution in buying and selling, they dealt with the doctrine of lesion beyond – and below – moiety (*laesio enormis*) at the same time. Lesion was considered to be a kind of objective fraud (*defraudatio sine dolo incidens in re ipsa*). For objective fraud to lie it sufficed that a price other than the just price (*pretium justum*) had been charged in a contract, regardless of whether the vendor or

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XIII edita, tom. 7 : *Prima secundae Summae Theologiae a quaestione LXXI ad quaestionem CXIV*, Romae 1892 [hereafter : Ed. Leonina, tom. 7], p. 52-60.

[961] Lessius, *In I.II D. Thomae de beatitudine et actibus humanis*, quaest. 6, art. 8, dub. 1, p. 49-51.

On the canonical origins of the distinction between vincible and invincible ignorance, see Kuttner, *Kanonistische Schuldlehre*, p. 138-141.

buyer were aware of that[962]. The theologians borrowed the concept of objective deceit (*dolus re ipsa*) from the *ius commune*. It fitted well into the theologians' concern with commutative justice, which required that there be an objective equilibrium between what is given and received in exchange[963]. Consequently, the idea of objective deceit (*dolus re ipsa*) became quite common in scholastic contract law, in spite of the Portuguese jurist Arias Piñel's (1515-1563) late deconstruction of it. As a result, the scholastics were able to conceive of deceit without there being any trace of evil intention on the part of the 'deceiver'.

With Summenhart and Medina the idea gained ground that objective deceit could not automatically result in nullity[964]. Generally speaking, such a deception in the price merely constituted deceit incidental to the contract (*dolus incidens contractui*) rather than fundamental deceit[965]. This idea can also be found in the manuals of confessors of Angelus and Sylvester[966]. They had been careful to explain that it was up to the buyer to decide whether he wanted the contract to be rescinded or to pay the remainder of the price, even though the vendor suffered the injury. This is basically the original rule according to the medieval interpretation of C. 4,44,2[967]. Summenhart and Medina took this a step further by making an explicit distinction between the remedy (*actio*), on the one hand, and the choice (*optio*) either to rescind the contract or to demand the absolute value of the difference between the actual price and the just price, on the other. They explained in general terms that only the remedy against the objective deceiver belonged to the deceived party (*actio defraudato*). The actual option to choose between rescission or rebalancing pertained to the objective deceiver (*optio defraudanti*)[968]. In this manner, both contracting parties were in an equal position

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[962] See the excellent description of 'objective deceit' by Juan de Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, Cod. *De rebus restituendis*, quaest. 33, par. *Sed est dubium*, p. 207: 'Potest praeterea defraudatio fieri sine dolo et dicitur defraudatio incidens in re ipsa, ut si nullus dolus aut mendacium ex parte venditoris apponatur, attamen plus iusto recipit ab emptore. Et potest hoc esse dupliciter; quia vel est defraudatio ultra dimidium iusti pretii vel citra.'

[963] The doctrine of *laesio enormis* and the scholastics' idea of contractual fairness in generall, will be touched upon more extensively in the chapter on equilibrium in exchange; cf. infra.

[964] Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, Cod. *De rebus restituendis*, quaest. 33, par. *Secunda propositio*, p. 210: 'Si dolus est incidens in contractu, sive sit defraudatio infra dimidium iusti pretii sive ultra, contractus in utroque foro est validus, ita quod non est eo ipso nullus (…)'.

[965] If the deception about the price had been fundamental in the formation of the contract, then it could still give rise to absolute nullity, according to Medina;cf. infra.

[966] Sylvester Mazzolini da Prierio, *Summa Sylvestrina*, part. 1, s.v. *culpa*, quaest. 7, f. 157r: 'Si vero dolus non dedit causam contractui sed incidit in contractum, tenet quidem contractus, sed in contractibus bonaefidei agitur ex eo contractu ut suppleatur pretium, ff. de act. empt. et vend., l. Iulianus, par. Si venditor. Erit tamen in emptoris arbitrio, vel supplere pretium vel restituere rem si deceptio sit ultra dimidium iusti pretii (...), immo in foro conscientiae etiam si deceptio sit minus dimidio. In contractibus vero stricti iuris agetur de dolo (...).' This is almost a word for word copy of Angelo Carletti de Chivasso, *Summa angelica de casibus conscientiae*, Venetiis 1487, s.v. *dolus*, par. 9, f. 78v.

[967] Glossa *Elegerit* ad C. 4,44,2 in *Corporis Iustinianaei Codex* (ed. Gothofredi), tom. 5, col. 920: 'Est ergo in potestate emptoris, et idem dico econtra emptore decepto esse in potestate venditoris (…).'

[968] Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, Cod. *De rebus restituendis*, quaest. 33, par. *Tertia propositio*, p. 210: 'Si defraudatio eveniat in re, sine dolo contrahentium, et sit defraudatio ultra dimidium iusti pretii, in utroque foro datur actio defraudato contra defraudantem, ut patet: unum de duobus, scilicet, vel quod rescindatur contractus vel quod ad aequalitatem reducatur, et datur optio defraudanti, ut eligat ex his, quod velit.'

(*conditio aequalis*) in regard to the unintended and mutually embarassing situation of objective deceit.

After Summenhart and Medina, lesion would be increasingly considered as irrelevant to the validity of a contract, even if it were beyond moiety. In fact, they recognized that *laesio* was not a form of deceit in the proper sense of the word. It did not really void contractual consent. To be sure, the restoration of equilibrium in exchange (*aequalitas contrahentium*) mattered. Yet commutative justice needed to be restored without further damage to the contract. If the deceit was only incidental, as was most often the case with lesion below moiety, the validity of the contract did not need to be doubted. The main question, then, concernded the effect of fundamental deceit (*dolus causam dans*) on the validity of contractus *bonae fidei*[969]. Summenhart and Medina made the answer to the question dependent on whether the case was judged before the court of conscience or before the external court.

They deemed the contract absolutely null in conscience[970]. Importantly, they did so, on account of a very strict interpretation of the natural definition of contract as consisting of mutual consent and mutual obligation. The validity of a contract requires consent, which is absolutely voluntary[971]. Indeed, Duns Scotus famously argued that the obligations imposed upon a person by himself do not exceed the limits of his intention (*in obligationibus privatis nullus obligatur non intendens se obligare*)[972]. Referring to Aristotle, Summenhart claimed that voluntary consent is radically vitiated by fundamental mistake (*talis error causat involuntarium*)[973]. The will of the mistaken party to bring about an obligation is non-existent. This implies that the contract is null by definition, since a contract depends on mutual obligation.

In the external court, a *bonae fidei* contract affected by *dolus causam dans* was also deemed to be absolutely void. Summenhart and Medina claimed that the deceived party could

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[969] Medina does not treat contracts *stricti iuris* altogether in quaest. 33.

[970] Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, Cod. *De rebus restituendis*, quaest. 33, par. *Quibus praemissis*, p. 208: 'Loquendo de contractibus bonae fidei, quando sit contractus cum dolo dante causam contractui, sive apponatur per venditorem sive per mediatorem, ipsis contrahentibus nescientibus, sive sit defraudatio ultra sive citra dimidium iusti pretii, sive in pauco sive in multo, contractus est nullus in conscientia, et unusquisque ex contrahentibus deberet esse contentus rem suam habendo, rescisso contractu.' This radical claim is later mitigated on account of equity (*aequitas*) by Medina as regards objective deceit and deceit induced by a third party.

[971] Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, Cod. *De rebus restituendis*, quaest. 33, par. *Quibus praemissis*, p. 208: '(…) ad validitatem contractus in quo mutuo se obligant contrahentes, necessarius est consensus ipsorum in ipso contractu consentientium. Sed in casu, is, qui deceptus est ob dolum, dantem causam contractui, non consensit in illo, cum deceptus et ex errore contraxerit, alias nullatenus contracturus. Igitur nulla inde in eo fuit orta obligatio, maxime cum obligationes privatae non excedant metas voluntatis ipsius qui se obligat (…). Ac proinde seclusa iuris dispositione, contractus emptionis dolosae, nullam parit in conscientia obligationem, nec in decepto, nec in decipiente, cum de ratione contractus sit reciproca obligatio. Est enim contractus ultrocitroque obligatio (…).'

Compare Summenhart, *De contractibus*, Summarium, q. 57, dist. 3, dict. 1, [s.p.]: 'Nemo incurrit obligationem privatam nisi intendat et velit se obligare, et ita consentiat in obligationem, ut vult Scotus in iii. Distinc. xxxix tractando de iuramento doloso.'

[972] Duns Scotus, *Quaestiones in tertium librum Sententiarum*, dist. 39, quaest. 1, num. 10, in: Ioannis Duns Scoti opera omnia, Hildesheim 1968 [= anastatic reprint of the Lyon 1639 edition], tom. 7, part. 2, p. 1003.

[973] Summenhart, *De contractibus*, Summarium, q. 57, dist. 3, dict. 1, [s.p.]: 'Talis error causat involuntarium, iii. Eth., sine autem volitione et consensu non contrahitur privata obligatio.'

nonetheless take the other party to court and demand that he be condemned to perform his obligations. The performance of the contract would then be required at the option of the deceived party after the court decision (*post sententiam*). In other words, the legal ground that entitled one to enforce the contractual obligations was not the contract itself (since the contract had been invalidated automatically), but the judge's sentence[974].

Once this judgment has been pronounced in the external court, the contract must also be observed in the court of conscience[975]. Summenhart and Medina motivated this rather pragmatic solution by pointing out that it would have been absurd (*irrationabile*) to leave the deceiver in a better position than the deceived party (*melior esset conditio dolosi*)[976]. Moreover, as canon *Quum universorum* (X 3,19,8)[977] indicated, the law must protect the deceived and not the deceivers (*deceptis et non decipientibus iura subveniant*).

It was in order to solve this absurdity in a more radical way that Leonard Lessius would argue later on that, from a conceptual point of view, it was indispensable to adopt a general principle of avoidability of contracts affected by fundamental error. In this manner, the contract would not be automatically null, but voidable at the wish of the deceived party. Until the advent of this logical operation, however, in the footsteps of Summenhart and Medina, the early modern scholastics would continue to make variations on the common opinion that *bonae fidei* contracts are *ipso iure* void on account of fundamental mistake.

Before we go on to investigate these variations, one further remark is needed, though. It became common for authors in the tradition subsequent to Summenhart to identify Pierre de Belleperche with a line of thought which was at variance with the common opinion. He argued that *bonae fidei* contracts are merely voidable, just as *stricti iuris* contracts. In the words of Summenhart himself[978]:

> We now know how to refute the arguments of Pierre de Belleperche. He said that if *dolus causam dans contractui bonae fidei* really made that contract void, more precisely because that *dolus* impeded voluntary consent, then that same *dolus* should equally make a contract

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[974] Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, Cod. *De rebus restituendis*, quaest. 33, par. *Secunda pars*, p. 208: 'Respondetur, quamvis non maneat dolosus virtute contractus obligatus, cum nullus sit, manet tamen obligatus pro voto decepti, virtute iuris communis ipsum obligantis, stare contractui, si velit deceptus, idque in favorem seducti et in odium doli.'

[975] Summenhart, *De contractibus*, Summarium, q. 57, dist. 3, dict. 1, [s.p.]: 'Etiam stante praedicto casu teneretur stare contractui in favorem decepti, etiam in conscientia, quando res iam esset devoluta ad forum contentiosum, et sententia contra eum lata esset de stando in favorem decepti, quia in conscientia sua tenetur parere iudicis decreto.'

[976] Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, Cod. *De rebus restituendis*, quaest. 33, par. *Secunda pars*, p. 208: 'Quod in foro exteriori, secundum iuris dispositionem

[977] This rule was frequently used in the Romano-canon law tradition; see, for example, Hostiensis, *Summa aurea*, lib. 3, tit. *De fideiussoribus*, f. 261v, num. 3.

[978] Summenhart, *De contractibus*, Summarium, q. 57, dist. 3, dict. 1 post decimumquartum: 'Et per hoc patet solutio ad argumentum Petri de bella partica dicentis. Si dolus dans causam contractui boneae fidei faceret quod contractus ille ob id esset nullus ipso facto: eo quod ille dolus impediret consensum: tunc etiam dolus dans causam contractui stricti iuris faceret illum contractum esse nullum. Quia etiam ibi dolus impediret consensum. Consequens est flasum. Igitur, etc.'

> *stricti iuris* void, because also in that case *dolus* would impede voluntary consent. This inference would be false, however. Ergo, etc.

Summenhart goes on to say that this would have been a convincing argument, indeed, if only the reason why contracts *bonae fidei* are null were the same in both the external court and the internal court[979]. This is not the case, however, in Summenhart's view. For the reason why *contractus bonae fidei* are automatically void in the court of conscience is that they fall short of voluntary consent. However, in the external court *contractus bonae fidei* are considered void for another reason, namely because of the authority of the civil law stating that this must be the rule in the external court. In the case of *contractus stricti iuris*, the same authority of the civil law would not have it that way.

Serious doubts could be raised about the authenticity of Summenhart's reference to Belleperche. For one thing, Summenhart does not give any details about the place where he found this alleged argumentation of Pierre de Belleperche. Subsequent authors, such as Covarruvias, pretended that this argumentation could be found in Belleperche's commentary on par. *Actionum autem* (Inst. 4,6,28). Moreover, Covarruvias argued that Johannes Faber and Jean Feu had adopted the same, non-conformist position. There are serious doubts, however, whether Covarruvias' references to these authors are more than false decoration. According to the legal historian Robert Feenstra, Covarruvias almost certainly did not read Pierre de Belleperche and Johannes Faber himself, even though Jean Feu might rightly be said to have advocated the said non-conformist opinion[980]. For another thing, in his commentary on Inst. 4,6,28, Pierre de Belleperche does not exactly develop the argument which Summenhart ascribes to him[981].

In fact, the argument which Summenhart and, subsequently, Covarruvias attribute to Belleperche can be found as a fictitious counter-argument in Bartolus' commentary on law *Et eleganter* (D. 4,3,7) – as we have learned above. Bartolus eventually confirmed the traditional, Roman distinction between *bonae fidei* and *stricti iuris* contracts. Yet it might be useful to recall some of the basics of the scholastic argumentation technique. To escape the accusation of revolutionary novelty, the scholastic theologians and jurists often put forward new ideas by putting them in the mouth of a vague group of scholars (*aliqui*) or in a source that was difficult to verify. They then discussed this counter-opinion at great length, only to refute it rather unconvincingly at the end of their argumentation, or to qualify it as merely probable or not improbable. Finally, a conclusion was reached which was in accordance with

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[979] Summenhart, *De contractibus*, Summarium, q. 57, dist. 3, dict. 1 post decimumquartum (continuation of citation in preceding footnote): 'Sed dicendum quod bene probaret si nullitas conveniens contractui bonae fidei in foro contentioso: conveniret sibi precise ex illa causa ex qua sibi convenit in foro conscientiae, scilicet ex natura rei. Sed propter hoc inest sibi etiam ex dispositione iuris positivi volentis praedictum contractum bonae fidei esse nullum. Et hoc non voluit de contractu stricti iuris ut supponitur: ideo in illo foro non est ille contractus nullus / sed bene alius.'

[980] Feenstra, *De oorsprong van Hugo de Groot's leer over de dwaling*, p. 94 (n. 31).

[981] Cf. supra.

safe, traditional doctrine. This logical technique is expressly revealed to us by Lessius[982]. Incidentally, it has already been pointed out that this scholastic way of arguing was employed with great regularity by Summenhart[983].

Bartolus may still have been very antipathetic to this fictitious argument, Summenhart and Covarruvias seem to have considered it as a possible gateway to leaving behind the old distinction between *bonae fidei* and *stricti iuris* contracts. Incidentally, it turns out that Summenhart eventually approves of the reasoning that is ascribed to Belleperche[984]:

> The civil law has prescribed it that way, even though in the court of conscience both a contract *stricti iuris* and *bonae fidei* are void on account of the lack of consent, as Belleperche's argument convincingly shows.

It would only take one more step, then, namely the rejection of the assumption that voluntary consent entirely vitiates consent[985], to be able to argue that both *stricti iuris* and *bonae fidei* contracts needed to be governed by the same law, and that this law should not declare contracts affected by mistake void *ab initio* but voidable.

4.3.2.2 A humanist scholastic canon lawyer on good faith *vs* strict law

Covarruvias fused the manifold juridical and philosophical traditions of Europe into an extremely rich and potent powder keg of legal thought. His account of the meaning and the history of the concept of good faith which precedes his analysis of mistake is an example of humanist erudition at its best. It provides the immediate context against which the question of the validity of contracts affected by mistake is dealt with. Covarruvias does not fundamentally change the traditional analysis of this problem, but the form of his discussion will undoubtedly have inspired future thinkers such as Rebelo, and many of the casual remarks he makes will no doubt have helped Lessius to steer the debate in a new direction.

The first half of Covarruvias' discussion is entirely dedicated to an elucidation of the concept of good faith (*bona fides*). It is structured around the apparent tension between the universal requirement of good faith in human affairs, on the one hand, and the seemingly paradoxical fact that a category of contracts *stricti iuris* exists alongside contracts *bonae fidei*,

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[982] Lessius, *De iustitia et iure*, lib. 2, cap. 22, dub. 10, num. 56, p. 303: 'Nec obstat quod Gabriel in respons. Ad 3. argumentum contra 4. conclus. Addat, *Verum hoc dico recitative et probabiliter, sciens quosdam doctores notabiles haec scripsisse, offero tamen examini peritorum.* Sic enim loqui solemus ad declinandam invidiam, quando aliquid novi et receptae opinioni adversum ex nostra sententia proferimus.'

[983] O.I. Langholm, *The legacy of scholasticism in economic thought, Antecedents of choice and power*, Cambridge 1998, p. 112.

[984] Summenhart, *De contractibus*, Summarium, q. 57, dist. 3, dict. 1 post decimumquartum (continuation of citation in preceding footnote): 'Licet in foro conscientiae uterque sit nullus propter defectum consensus ut convincit argumentum praedicti Petri.'

[985] Which was actually taken by Covarruvias in *Relectio in regulam possessor malae fidei, de regulis iuris, lib. 6*, part. 2, par. 6, num. 6, in: Opera Omnia, Augustae Taurinorum 1594, tom. 2, p. 394. 'Sed quamvis dolus det causam contractui bonae fidei vel stricti iuris, non ex hoc sequitur consensum substantialem contractus defecisse, etenim vere contrahens consensit.' Cf. infra.

on the other[986]. Covarruvias dissolves the tension by discerning two meanings behind the single expression 'good faith'. He also uncovers the Roman legal history behind the distinction between *contractus bonae fidei* and *contractus stricti iuris*. It would seem that Covarruvias was heavily indebted to Tiraqueau's impressive treatment of strict law and how it was at odds with the principles of good faith and equity[987].

In its first meaning, good faith (*bona fides*) is synonymous with a sincere will (*syncera voluntas*). Its antonyms are falsehood (*figmentum*), bad faith and deceit (*mala fides et dolus*)[988]. According to Covarruvias, good faith understood in this way is the universal principle underlying all human commerce at least since Antiquity[989]. The conception of good faith as sincerity remained a constant in the natural law tradition[990]. Good faith (*fides*) consists in doing what you say. Hence, it is the cornerstone of justice[991]. Business and exchange must be pervaded by good faith (*in omnibus negotiis ratio bonae fidei habenda*). The ultimate yardstick of good faith is private conscience (*conscientia*)[992]. The identification between good faith and good conscience was a commonplace in the canon law tradition[993]. The good faith of an action is evaluated by the private judgment of the human person (*iudicium privatum*), who probes the morality of his own actions. This is the meaning of 'good faith' as it applies to 'possession in good faith' or 'concluding a contract in good faith'[994].

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[986] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 1, p. 391: 'In omnibus negotiis ratio bonae fidei habenda est, cum ei adversetur mala fides et dolus, qui in republica minime est tolerandus, imo a quocunque negotio summis viribus exterminandus. Hinc sane quaeritur, quamobrem iure civili actiones quaedam et contractus eo distinguantur, quod quidam sint bonae fidei, reliqui vero stricti iuris.'

[987] Tiraqueau, *De utroque retractu, municipali et conventionali, commentarii duo*, in : Opera omnia, Francoforti ad Moenum 1597, tom. 3, lib. 1, par. 35, glossa 1 (*Stricti iuris*), p. 330-335.

[988] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 1, p. 391-392.

[989] Covarruvias cites a plethora of texts from the Corpus Justinianeum, besides a couple of references to verses by actors in the ancient comic plays by Plautus (c. 254-184 BC), *Aulularia*, 4, 6, 1-3, in: *Plaute, Amphitryon – Asinaria – Aulularia*, Texte établi et traduit par Alfred Ernout, [Collection des Universités de France], Paris 1967[6], p. 187: '[Euclio senex:] Fidei censebam maxumam multo fidem esse: ea sublevit os mihi paenissume. Ni subvenisset corvus, periissem miser.'; and Terentius (c. 195-159 BC), *Heautontimoroumenos*, 4, 5, 759-761, in: *Térence, Heautontimoroumenos – Phormion*, Texte établi et traduit par J. Marouzeau, [Collection des Universités de France], Paris 1964 (hereafter: Ed. Marouzeau), p. 70-71: '[Chremes:] Videre egisse iam nescioquid cum sene. [Syrus:] De illo quod dudum…? Dictum ac factum reddidi. [Chremes:] Bonan fide?' The far-fetched nature of these references demonstrates Covarruvias' desire to show off his humanist erudition at any expense.

[990] Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, part. 1, sec. 1, art. 3, par. 3 (du dol), p. 29: 'Dans le for intérieur on doit regarder comme contraire à cette bonne foi, tout ce qui s'écarte tant soit peu de la sincérité la plus exacte et la plus scrupuleuse (…).'

[991] Cicero, *De officiis* (Ed. Testard, vol. 1), 1, 7, 23, p. 115 : 'Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas.'

[992] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 1, p. 391: 'In summa denique bonam fidem ipse interpretor iudicium illud privatum, quo quisque de rebus propriis diiudicat secum, particulariter quidem de omnibus propriis actibus moralibus. Nam et fides iudicium quoddam est quo credimus aliquid, item et illud, quo proprios nostros actus morales iudicamus. Quamobrem in hac parte fides pro conscientiae adsumitur.'

[993] J. Gordley, *Good faith in contract law in the medieval ius commune*, in: R. Zimmermann – S. Whittaker (eds.), Good faith in European contract law, [The Common Core of European Private Law, Cambridge Studies in International and Comparative Law, 14], Cambridge 2000, p. 94.

[994] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 1, p. 391: 'Quo fit, ut is dicatur bona fide possidere, bona fide contrahere, qui credit se id iuste facere, et ut dicitur, nullum habens in corde figmentum nec dolum.'

Even if good faith in the sense of sincerity is required universally, another meaning of good faith exists which is applied more restrictedly. In this sense, good faith is allegedly synonymous with equity. Amongst others, it says something about the way in which contracts should be interpreted[995]. Equity in this sense is genuine justice freed from the rigourously cold shackles of strict law (*ius strictum*)[996]. In Covarruvias' view, equity comes down to the mitigation (*mitigatio*) and the moderation (*temperamentum*) of strict law. This is a view expressed also by the Lutheran jurist Johann Oldendorp (ca. 1487-1567), who is expressly referred to by Covarruvias[997]. Strict law is subtle (*ius subtile*)[998]. It is harsh and bitter (*praedurum et asperum*). It continually runs the risk of overreaching (*summum ius, summa iniuria*)[999]. It does not yield an inch to the interpreter.

Covarruvias cites a plethora of texts to support his interpretation of equity, although they might actually not always fit as well with his own interpretation as he thought. Reference is made to the Aristotelian concept of equity (ἐπιείκεια)[1000]. Aristotle's treatment of equity had drawn a lot of attention at the beginning of Guillaume Budé's commentaries on the

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[995] This discussion is part of the larger discussion about the rigorous or equitable interpretation of laws (it might be recalled that contracts were conceived of as privately imposed laws in the first place); cf. E. Cortese, *La norma giuridica, Spunti storici nel diritto comune classico*, [Ius nostrum, 6], Milano 1964, vol. 2, p. 295-362.

[996] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 2, p. 392: 'Verum apud iuris civilis responsa interdum verbum hoc "bona fides" non tam synceram illam voluntatem et animum dolo contrarium quam aequitatem quandam et iustitiam ipsam a rigore quodam summo segregatam et puram significat.'

[997] Johann Oldendorp, *Formula investigandae actionis per quam unusquisque ius suum in iudicio persequatur, cum deliberatione aequi et boni*, Coloniae 1538, [s.p.]: 'Aequitas autem, quam alias aequum et bonum, alias aequum et iustum, alias aequumbonum sine copula dicimus, alias denique epiikian vocant, est mitigatio legis scriptae in aliqua circumstantia, utpote rerum, personarum ac temporum. Ius est (inquit Donatus), quod omnia recta et inflexibilia exigit. Aequitas est quae ex iure multum remittit.'

A good introduction to Oldendorp as well as Budé's conception of equity is included in G. Kisch, *Erasmus und die Jurisprudenz seiner Zeit*, Studien zum humanistischen Rechtsdenken, [Basler Studien zur Rechtswissenschaft, 56], Basel 1960, p. 177-259. Contrary to what its title might suggest, this compelling book is basically a study of the concept of equity in the Aristotelian tradition and in Renaissance jurisprudence.

[998] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 3, p. 392: 'Hinc denique aequitas rigori et stricto iuri opposita est mitigatio et interpretatio legis scriptae ex aliqua circunstantia personarum, rerum aut temporum. (…) Ex quibus deducitur ius strictum id dici quod praedurum sit et asperum, a quo non liceat nec latum unguem discedere, cuique nihil addi, nec detrahi possit, nisi quod scriptura loquitur. (…) Hocque ius aequitati opponitur, idemque appellatur ius subtile.'

[999] Covarruvias recounts how this saying has come down to his time from classical Antiquity, citing Terentius, Cicero, Columella and Valerius Maximus. A similar account of the history of the expression 'summum ius summa iniuria' can be found in Budé and Erasmus; cf. Kisch, *Erasmus und die Jurisprudenz seiner Zeit*, p. 190.

Terentius, *Heautontimoroumenos* (Ed. Marouzeau), 4, 5, 796, p. 73 : '[Syrus :] Ius summum saepe summa est malitia'. Cicero, *De officiis* (Ed. Testard, vol. 1), 1, 10, 33, p. 120 : 'Summum ius summa iniuria' . Columella (d. ca. 70 AD), *De re rustica*, 1, 7, 2, in: *Columella, On Agriculture*, with a recension of the text and an English translation by Harrison Boyd Ash, Cambridge Mass. – London 1960[3] [=1941], p. 78-80: 'Sed nec dominus in unaquaque re, cui colonum obligaverit, tenax esse iuris sui debet, sicut in diebus pecuniarium vel lignis et ceteris parvis accessionibus exigendis, quarum cura maiorem molestiam quam impensam rusticis adfert ; nec sane est vindicandum nobis quicquid licet, nam summum ius antiqui summam putabant crucem.' Covarruvias' reference to Valerius Maximus (1st century AD), *Dicta et facta memorabilia*, 8, 2 (*De privatis iudiciis insignibus*) concerns a section on famous trials, but this text does not contain an explicit reference to the maxim 'summum ius summa iniuria' ; cf. *Valerius Maximus, Memorable doings and sayings*, edited and translated by D.R. Schackleton Bailey, [Loeb Classical Library, 493], Cambridge Mass. – London 2000, vol. 2, p. 204-210.

[1000] Aristotle, *Ethica Nicomachea* (Ed. Bywater), 5, 10, 1137a31-1138a3, p. 110-111.

Digest, to which Covarruvias expressly refers[1001]. Covarruvias also recalls the famous verse from the *Rhetorica ad Herennium*, the oldest surviving Latin textbook on rhetorics (ca. 90 BC), that justice is equity giving everyone his due according to his 'dignity'[1002]. Furthermore; he refers to the first century rhetorician Quintilianus' admonishment that in dubious cases, where both sides seem to be right, the judge must not try to find out which right is the oldest, but which decision is the most equitable in this particular situation[1003]. All of these texts seem to suggest, indeed, that law should be handled with a certain flexibility.

According to Covarruvias, the distinction between *contractus bonae fidei* and *contractus stricti iuris* has been grafted upon the distinction between equitable and rigourous interpretation of contracts[1004]. Certainly, both contracts must be observed in good faith in the first sense of the word – as gloss *Bonae fidei sunt* to paragraph *Actionum* (Inst. 4, 6, 28) made explicit[1005]. Yet the obligations ensuing from *stricti iuris* contracts cannot be subject to interpretation by the judge[1006]. Apart from the explicitly mentioned obligations between the contracting parties, judicial discretion can impose no additional obligations on the parties to a contract of strict law by virtue of morality and equity (*ex aequo et bono*).

Covarruvias does not content himself with this analytical clarification. True to the spirit of humanism, he goes on to investigate the historical roots of this distinction in the law of Rome. The historical origins of the *bonae fidei* / *stricti iuris* distinction reach back to the *formula* procedure. Covarruvias explains how the Roman praetor first granted a short audience to the litigating parties but then delegated the actual task of judging to civilians. As he left the litigating parties, the praetor send a formular (*formula*) with them, however, including instructions for the judge as to how he needed to assess the lawsuit. If the praetor added the expression '*ex bona fide*' to the formula, it was allowed for the judge to freely assess the case according to his equitable discretion, without being bound by the formula of the praetor and the stipulations in the contract too strictly[1007].

[1001] Guillaume Budé, *Annotationes ad viginti quattuor libros Pandectarum*, Parisiis 1508, f. 1r-v.

[1002] *Rhetorica ad Herennium*, 3,3, in: *Rhétorique à Herennius*, Texte établi et traduit par Guy Achard, [Collection des Universités de France], Paris 1989, p. 89: 'Iustitia est aequitas ius uni cuique rei tribuens pro dignitate cuiusque.'

[1003] Quintilianus, *De institutione oratoria*, 7, 7, 8, in: *Quintilien, Institution oratoire, Tome 4, Livres 6-7*, Texte établi et traduit par Jean Cousin, [Collection des Universités de France], Paris 1977, p. 173: 'Plurimum tamen est in hoc, utrum fieri sit melius atque aequius; de quo nihil praecipi, nisi proposita materia, potest.'

[1004] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 4, p. 392: 'Igitur ex his apparet ratio, quare contractus quidam bonae fidei dicantur, reliqui vero stricti iuris. Nam bonae fidei contractus ideo quidam censentur, quod in his alter alteri arbitrio et officio aequissimo iudicis teneatur de eo, quod ex bono et aequo praestari oportet, etiam si in conventione id dictum non sit. Habet etenim iudex potestatem in his acitonibus iudicandi quod sibi bonum aequumque visum fuerit, quanquam nihil a contrahentibus dictum sit.'

[1005] Glossa *Bonae fidei sunt* ad Inst. 4, 6, 28 in *Corporis Iustinianaei Institutiones* (ed. Gothofredi), tom. 4 (*Volumen parvum*), col. 492: 'Sed quare magis hae dicuntur bonae fidei quam aliae? Nunquid ideo, quia possit esse mala fides in aliis? Respondetur non, quia in omni contractu debet bona fides intervenire.'

[1006] Glossa *Bonae fidei sunt* ad Inst. 4, 6, 28 in *Corporis Iustinianaei Institutiones* (ed. Gothofredi), tom. 4 (*Volumen parvum*), col. 492: 'Cum ergo dolus ubique puniatur vel mala fides, ad quid bonae fidei istae dicuntur? Respondetur, aliae stricti iuris dicuntur, quia non venit in eis nisi quod stricte exigit natura actionis. Unde non veniunt usurae ex mora in contractibus stricti iuris (...), sed in contractibus bonae fidei sic (...).'

[1007] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 3, p. 392: 'Praetor vero statuta die vocatis ad se litigaturis eisque summatim auditis formulam quandam ex proposita causa concipiebat, quam ad pedaneum

Evidence for Covarruvias' historical interpretation is taken from a variety of texts in Cicero, Seneca, and Boethius. Our learned canonist cannot prevent his academic pride from pointing out that formerly, professors of civil and canon law ignored these origins of the *bonae fidei* / *stricti iuris* distinction. He adds to his self-esteem by refuting, on the basis of his wide reading of the classics, an entirely wrong attempt at historical explanation of the distinction by Ullrich Zasius (1461-1535)[1008]. Referring to Dionysius Halicarnassus, the humanist jurist Zasius had claimed that some contracts were called *bonae fidei* by the Romans, because once upon a time they had been celebrated and concluded in the temple of the Godess Fides.

Once the right meaning of good faith with respect to *contractus bonae fidei* has been definitively settled, Covarruvias turns to the question of mistake. To begin with, he firmly denies that the law of the Church has abandoned the discriminatory treatment of *bonae fidei* and *stricti iuris* contracts. As mentioned above, this had been claimed by Baldus de Ubaldis[1009]. Since the distinction is adopted by the civil law and never explicitly rejected by the canon law, the silence of the canon law must be interpreted as an approval of the civil law regime, according to Covarruvias[1010]. Perhaps Baldus' opinion might be justified in case of pious causes, but pious causes can at most constitute an exception to the rule.

Covarruvias recalls and confirms the *ius commune* rules, which consider that *bonae fidei* contracts affected by *dolus causam dans* are automatically void (*nullus ipso iure*), whereas *stricti iuris* contracts are voidable (*rescindendus*) under the same circumstances. Citing André Tiraqueau and François le Douaren[1011], he embarks upon a historical investigation, explaining that 'ipso iure' means that the contract is void from the outset because of the fixed rules of civil law (*ius civile*) as opposed to the law created by the moderating intervention of the praetores (*ius praetorium*). From this he infers that it is

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iudicem deferent litigatores. Quamque formulam in quibusdam iudiciis stricte in ea fere verba, quibus contrahentes uti fuissent aut in alia ex natura rei ita includebat, ut iudici fas non esset ab eius praescripto discedere, etiam si forte id aequum esse censeret. (…) In quibusdam vero contractibus, his videlicet qui a iurisconsultis bonae fideii dicuntur, praetor cum iudices dabat addere solebat illa verba: ex bona fide; Ex qua praetoria formula liberam iudicandi facultatem iudex habebat iuxta id quod sibi aequum visum fuisset, nec tenebatur ad strictam praetoris delegationem, nec ad contractus praeduram verborum conceptionem.'

[1008] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 3, p. 393: 'Etenim hanc rationem veteres iuris utriusque professores (…) non omnino ignorarunt, tametsi originis cognitionem minime nacti fuerint. (…) Zasii rationem reiiciendam esse censeo, potissime quia ex variis auctorum locis apparet, apud Romanos contractus istos testibus et arbitris celebrari solere, et eo praesertim, quod non meminerim apud Dionysium Halicarnasseum me legisse quod Zasius ex eodem auctore retulit. (…)'

[1009] Cf. supra, p. 232-233.

[1010] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 5, p. 393: 'Quarto subsequitur ex praecedentibus, falsam esse opinionem Baldi qui in cap. 1 de plus petit. in fine scribit iure canonico contractus omnes bonae fidei censeri etiam eos qui iure civili stricti iuris nominantur, atque idcirco iure pontificio sublatam esse distinctionem contractuum stricti iuris a contractibus bonae fidei. (…) Etenim haec conclusio falsa est, nec iure pontificio alicubi haec actionum distinctio reprobata fuit. Unde cum ea iure civili admissa sit, existimandaum est in dubio tacite a iure ipso pontificio admitti.'

[1011] André Tiraqueau, *Commentarii in l. Si unquam, C. De revocandis donationibus*, Lugduni 1546, s.v. *revertatur*, num. 119-120, p. 660-661; François le Douaren, *De in litem iurando iudiciisque bonaefidei etiam arbitrariis commentarius*, Lugduni 1542, num. 15-19, p. 25-28.

impossible to believe, as Pierre de Belleperche *cum suis* had done, that contracts *bonae fidei* are voidable[1012].

Importantly, in the footsteps of Summenhart, our canonist goes on to rebuke the argumentation of Belleperche[1013]. Yet in the process of doing so, he might actually have sown the seeds for the phoenix from Orléans to rise from his ashes in the work of Leonard Lessius. Belleperche had allegedly argued *ex absurdo* that if the civil law really deemed contracts *bonae fidei* void, that must have been because the contract fell short of consent and hence was vitiated in its very essence (*substantia*). As a matter of natural law, this would hold equally true in the case of contracts *stricti iuris*, however. Therefore, Belleperche was thought to have argued, along these lines contracts *stricti iuris* should have been considered void *ipso iure*, too. Since this is not the case, the common opinion is absurd.

Covarruvias then mentions Summenhart's criticism of Belleperche. Summenhart's is an argument from power. He simply states that civil law prevails, because it has the authority to overrule natural law[1014]. The natural law might consider that substantial consent is equally lacking in both contracts *stricti iuris* and *bonae fidei*. Even so, the civil law is free to rule that both types of contract are subject to differential treatment, according to Summenhart. Now Covarruvias doubts whether it was allowed for Summenhart to accept Belleperche's assumption about the lack of substantial consent in *bonae fidei* contracts in the first place[1015]. For if you accept that mistake undermines substantial consent in *bonae fidei* contracts, it is true that the same must be said about *stricti iuris* contracts.

Our canonist wants to prevent that argument from gaining force, however, and denies, therefore, that *dolus causam dans* affects substantial consent (*sed quamvis dolus det causam contractui bonae fidei vel stricti iuris, non ex hoc sequitur consensum substantialem contractus defecisse, etenim vere contrahens consensit*)[1016]. This is exactly the kind of reason, however, which could be exploited by a clever theologian as Leonard Lessius in order to

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[1012] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 6, p. 394: 'Atque haec ideo praenotata fuere, ut hinc constet apud veteres iurisconsultos verba isthaec, ipso iure, idem significare quod illa, iure civili, ad differentiam iuris praetorii, eiusque aequitatis ac moderationis. (…) Sexto ab huius quaestionis definitione infertur plurima cessare quae per Petrum, Cynum et alios adducuntur adversus communem sententiam (…). Nam ius civile irritum esse censet contractum bonae fidei ab ipso quidem initio (…) Eaque actio de dolo ipsi contractui videtur inesse sicuti et exceptio doli quemadmodum superius probatum, quicquid aliter hac de re doctores nostri scripserint.'

[1013] It needs to be recalled that the reference to the alleged argumentation by Pierre de Belleperche is dubious; cf. supra.

[1014] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 6, p. 394: 'Unde secundum eum [Conradum] etiam si ex natura rei ob deficientem consensum hi contractus bonae fidei et stricti iuris pares sint, tamen quo ad iuris civilis remedia et dispositionem liberam impares censentur et censendi sunt. Cum liberum legi fuerit hoc uni concedere et alteri negare variis ex causis.'

[1015] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 6, p. 394: 'Non tamen omnino est admittenda ratio suprascripta, qua diximus dolum dantem causam contractui consensum impedire, quatenus consensus substantia contractus est. (…) Nam si haec fuisset principalis ratio, ex qua ius civile voluit et statuit nullum esse contractum bonae fidei, profecto eadem ratione idem foret in contractibus stricti iuris dicendum, cum et in eis substantia, id est consensus deficeret., quod fatetur Bar. In d.l.et eleganter, col. 3. Sed quamvis dolus det causam contractui bonae fidei vel stricti iuris, non ex hoc sequitur consensum substantialem contractus defecisse, etenim vere contrahens consensit.'

[1016] See the previous note.

advocate a general regime of nullity at the option of the wronged party[1017]: not even a *bonae fidei* contract can be deemed to be entirely void merely on the grounds of mistake.

What is more, Covarruvias ends with an extremely important concession. 'In the court of conscience (*forum animae*)', he concludes with reference to Summenhart[1018], 'the *bonae fidei* / *stricti iuris* distinction in the event of *dolus causam dans* is irrelevant.' The reason is that the court of conscience merely pays attention to the law of nature (*natura rei*). As a result, Covarruvias' thought offered opportunities for both advocates and adversaries of the *bonae fidei* / *stricti iuris* distinction to vindicate the famous canonist as a partisan of their opinions.

4.3.2.3 Molina: mistake makes contracts void *ab initio*

Contrary to what might be expected, Luis de Molina's treatment of mistake does not mark the beginning of an entirely novel approach to the effects of mistake on contractual validity. As had been the case with Soto, Molina's main discussion of mistake is still part of the specific law of sale[1019]. His conclusions reach a high level of generality, however, so that at the end of his argument, he feels obliged to tell his reader how the general rules which he developed should eventually be applied to the concrete business of buying and selling (*hactenus dicta ad praxim aptantur*)[1020]. Moreover, his reflections are of considerable depth and they have been very influential as they formed the implicit background against which Lessius reshaped the whole debate some years later. Neither is his thought a servile imitation of the conclusions reached by Summenhart, Medina, or Covarruvias.

To start with, Molina adopts three distinctions that we have already seen in Summenhart and Medina. First, he distinguishes factual deceit (*re ipsa*) from intentional deceit (*a proposito*)[1021]. Second, Molina adopts the usual distinction between deceit that turns out to be the final motivating cause of the contract (*dolus causam dans*) and deceit that has been merely incidental to the agreement (*dolus incidens*). Third, he distinguishes between deceit exerted by the other party to the contract (*per ipsummet venditorem*) and deceit

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[1017] See the remarks made on Summenhart's exposition above.

[1018] Covarruvias, *Relectio in regulam possessor*, part. 2, par. 6, num. 6, p. 394: 'In animae iudicio minime considerandum esse hanc differentiam contractus bonae fidei et stricti iuris, quotes dolus dederit causam contractui (…) siquidem in eo foro non tractatur de subtilitabius his et distinctionibus iuris civilis a praetorio, sed tantum agitur de natura rei, secundum quam non differt contractus stricti iuris quantum ad hoc a contractu bonae fidei (…).'

[1019] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352 (*validane sit emptio et venditio in qua dolus intervenit*).

[1020] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, col. 417, num. 16.

[1021] It needs to be recalled that factual deceit derives from considerations of justice in exchange. This Aristotelian idea was part and parcel of the scholastic tradition, although nowadays it is difficult to think of 'deceit' without evil intentions on the part of one of the contracting parties in the first place. Of course, the entire debate on *laesio enormis* is connected to this concept of factual deceit, which takes place regardless of the intention of the contracting parties.

stemming from a third party (*per tertium*)[1022]. Molina does not include, as Lessius would, a distinction between substantial and accidental deceit. Instead, he adamantly sticks to the difference between contracts *bonae fidei* and *stricti iuris*. It forms the organisational lynchpin of his exposition.

Molina sets out to confirm the distinction made between contracts *stricti iuris* and contracts *bonae fidei* as a matter of civil law[1023]. In the external courts, the former are merely voidable if affected by mistake, while the latter are automatically void. As a matter of conscience, though, he thinks that *bonae fidei* contracts as well as *stricti iuris* contracts are void *ipso facto*, since voluntary consent is equally vitiated through deceit in both cases[1024]. He rejects the opinion of 'the few' who hold that *bonae fidei* contracts are voidable at the option of the deceived party by virtue of an *exceptio doli*[1025]. Molina expressly opposes this adoption of the rules applied to *stricti iuris* contracts in the case of *bonae fidei* contracts, while his younger colleague from Leuven, Lessius, would do precisely that. In the event of onerous *bonae fidei* contracts – except marriage[1026] – Molina always sanctions *dolus causam dans* with nullity *ab initio*. Moreover, he draws an explicit parallel with his solution of duress: mistake and deceit lead to involuntariness and autonomic nullity, just as consent which has been extorted by duress[1027].

Molina then adds an important modification to this conclusion: although a *bonae fidei* contract affected by mistake is automatically void in both courts, if the deceived party wishes the contract to remain valid, the defrauder must observe the contract. Molina would draw heavy criticism of Lessius for the paradox behind his conclusion that the contract is

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[1022] As regards deceit exercised by a third party, it needs to be recalled that in the scholastic tradition, it seems to have had a much wider meaning than just persons external to the contract. Under the heading *dolus a tertio* we also see them dealing with material influences external to the contract itself, including changed circumstances.

[1023] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 259, col. 27, num. 6.

[1024] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 259, col. 28, num. 7 : 'Illud cum Conrado et Covarruvia, locis citatis, et cum aliis admonuerim, in conscientiae foro, quando dolus causam dedit contractui, etiam si is sit stricti iuris, esse nullum. Ratio est, quoniam consensus in contractum per dolum, quando secluso dolo eliciendus non fuisset, insufficiens ex ipsa rei natura est, ut ex eo obligatio ratione talis contractus resultet, eo quod non sit tam voluntarius quam ad id est necesse.' Compare Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, col. 416, num. 14.

[1025] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 259, cols. 27-28, num. 6 : 'Quare reiicienda est paucorum sententia, quos Panormitanus, Covarruvias et Conradus referunt, asserentium, etiam quando dolus dat causam contractui bonae fidei, non esse ipso jure nullum, sed rescindendum esse doli exceptione, non secus ac contractus stricti iuris doli exceptione rescinditur.'

[1026] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, cols. 413-414, num. 5: 'Illud est observandum, quamvis conclusio proposita locum habeat in bonae fidei contractibus onerosis, in matrimonio tamen locum non habere, ut disp. 259 citata dictum est. Si enim quis per dolum, qui causam det contractui, cum aliqua contrahat, affirmans se habere divitias aut esse nobilem vel habere alias qualitates, quas non habeat, sane, interim dum dolus errorem non causet in personam aut in conditionem libertatis, validum est matrimonium propter naturam, indissolubilitatem, ac privilegia eius contractus.'

[1027] Molina, *De iustitia et iure*, tom. 2, (*De contractibus*), tract. 2, disp. 352, col. 412, num. 2 : 'Cum ergo error involuntarium in re proposita causet, assensusque extortus sit per dolum ac injustitiam eius, cui consentiens intendebat se per eum obligare, consequens est, ut non magis efficax sit ad obligandum, stando in foro conscientiae ac jure naturali, quam consensus extortus per vim et metum, de quo disp. 326 ad 2 ostendimus non obligare.'

automatically void at the option of the deceived party (*in decepti favorem ipso iure nullus*)[1028]. In taking this view, Molina actually sacrificed juridical logic on the altar of punishment (*in poenam doli*), natural equity (*naturalis aequitas*) and the common good (*bonum commune*)[1029]. Just as Summenhart and Medina before him, he realized that the juridical sanctioning of deceit with nullity *ab initio* would favor the deceiver, since he could take advantage of the other party and then simply take to his heels. Yet contrary to Summenhart and Medina, Molina did not think that the deceived party needed to wait for a sentence in court in order to be able to enforce the contract on the part of the deceiver. He thought it much more probable that natural equity obligated the deceiver to remain loyal to the contract even before he was compelled by a judge to fulfill his contractual obligations (*etiam ante ullam iudicis sententiam*)[1030].

There is another point on which Molina departs from the standpoints of Summenhart and Medina: the influence of *dolus causam dans* exerted by third parties on the validity of a contract as a matter of natural law. To be sure, there was no doubt about the validity of contract, no matter how mistaken one of the parties had been by a third party, as a matter of positive law[1031]. Yet the non-mistaken party to this type of contract could not be granted a right to enforce the contract before the court of conscience, according to Summenhart and Medina, since the other party had not assented voluntarily. By natural definition, a contract consists in mutual and voluntary consent. They concluded from this that if one of the parties had not consented voluntarily, the contract had not come into existence altogether. The non-mistaken party would commit a sin if he nonetheless wished the mistaken party to honour his contractual obligations.

Molina acknowledged that deceit by a third party remained without effect on the validity of a contract as a matter of positive law. He did not think, however, that the court of conscience must be ruled by a different law. As a matter of natural law, too, a contract remains valid even though one of the parties to the contract has been mistaken by a third

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[1028] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, col. 412, num. 2: 'His ita constitutis, prima conclusio est. Quando dolus causam dat emptioni aut venditioni aut cuicunque alteri contractui bonae fidei, altero contrahente in dolo communicante, contractus neque in conscientiae neque in exteriori foro valet, sed in decepti favorem est ipso iure nullus (…), quod si deceptus velit nihilominus stare contractui, decipiens dissolvere illum non potest, sed cogitur illi stare.'

[1029] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, col. 413, num. 4: 'Ac sane, quando alter contrahentium sua culpa est per accidens causa, quod ex parte alterius nulla obligatio oriatur, nullum omnino est absurdum, quod ex contractu, ex quo alioqui utrinque obligatio oriretur, nascatur ex altera tantum parte. His accedit, ius humanum videri intendisse tribuere vim consensui dolosi ad eum obligandum ante latam sententiam, iudicisve compulsionem, non solum in poenam doli, sed etiam ex naturali aequitate, et quoniam ita bono communi erat expediens.'

[1030] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, col. 413, num. 4 : 'Ego probabilius multo arbitror, absolute, quando quis per dolum causam dantem contractui cum aliquo celebravit contractum, manere obligatum in conscientiae foro ad standum illi, etiam ante ullam iudicis sententiam aut compulsionem, modo deceptus velit, idque nihil impediente quod ex parte decepti nec in conscientiae nec in exteriori foro consurgat obligatio.'

[1031] E.g. Glossa *In hoc ipso*, 3 ad D. 4,3,7 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 508.

party. What is more, Molina points out[1032], 'that is precisely the reason why I did not merely build my argument around involuntariness (*involuntarium*) in my first conclusion, as Summenhart and Medina did, but rather around the injury and deceit (*iniuria ac dolus*) by means of which the deceiving contracting party extorted the other party's contractual obligation towards him.' Indeed, in demonstrating why *bonae fidei* contracts are automatically void, Molina pointed out that the mistaken party had given his consent because the deceiver had elicited this consent through deceit and injustice. The assent was not merely involuntary but extorted through deceit and injustice (*assensus extortus per dolum ac injustitiam*)[1033].

On account of the injury he suffered, the mistaken party is granted an action against the third party who deceived him, according to Molina[1034]. The contract itself, however, remains valid. Involuntary consent stemming from mistake about the motive to the contract (*error penes motivum*) does not affect the validity of onerous contracts as a matter of natural law – although it does invalidate gratuitous contracts[1035]. Similarly, involuntary consent stemming from ignorance of certain decisive circumstances (*ignorantia circunstantiarum*) is irrelevant to the validity of a contract. Molina explains why no contract can be deemed to be made under that condition as a matter of natural law (*ex ipsa natura rei*)[1036]: when asked, no contracting party would ever wish that condition (*lex*) to rule the contract, and it would not be expedient to the common good either.

Thus far we have seen Molina's view of the effects of *dolus causam dans* – exerted either by a party to the contract or by a third party – on *bonae fidei* contracts. He thinks they are absolutely void in both the external and internal forum, but on account of equity he still grants the mistaken party a claim to performance if she should wish so.

When it comes to contracts *stricti iuris* affected by *dolus causam dans*, Molina takes a quite confusing view[1037]. On the one hand, he says that a contract *stricti iuris* affected by

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[1032] Molina, *De iustitia et iure*, tom. 2, tract. 2, disp. 352, col. 414, num. 8 : 'Arbitror, contractum illum, stando in solo iure naturali, esse validum, falsumque esse fundamentum, cui Conradus et Medina nituntur, nempe, involuntarium illud sufficiens esse, ut contractus ille natura rei, standoque in solo iure naturali, sit nullus. Atque hac de causa nos in probatione primae conclusionis innixi non fuimus soli involuntario, ut Conradus et Medina nituntur, sed potissimum iniuriae ac dolo, quo contrahens ipse, comparatione cuius resultare obligatio debet, consensum extrahit.'

[1033] Molina, *De iustitia et iure*, tom. 2, tract. 2, disp. 352, col. 412, num. 2, cited above.

[1034] Molina, *De iustitia et iure*, tom. 2, tract. 2, disp. 352, col. 414, num. 7: 'Quando dolus causam quidem dat contractui, sed adhibetur a quodam tertio, non communicante altero contrahente in dolo, validus est contractus, datur tamen decepto actio adversus tertium qui dolum adhibuit.'

[1035] Molina, *De iustitia et iure*, tom. 2, tract. 2, disp. 352, cols. 414-415, num. 8: 'Quo loco observa, quamvis involuntarium, quod oritur ex errore, non quocunque, sed causae, cui donans nititur ad donandum, invalidam reddat donationem, ut disp. 209 late explanatum est. In contractibus tamen onerosis, involuntarium quod ex errore oritur penes motivum unde quis inducitur ad contrahendum cum aliquo, ut ad emendum, permutandum, conducendum, etc. non vitiat contractum ex rei ipsius natura, et multo minus eum vitiat involutarium, quod oritur ex ignorantia aliarum, quas si sciret, non celebraret talem contractum.'

[1036] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, col. 415, num. 8 : 'Ratio autem est, quoniam nullus contrahentium admitteret eam legem, si illam proponeret alter contrahentium, neque ea lex communi expedit bono, quare contractus ex ipsa natura non censentur sub ea lege celebrati.'

[1037] Molina, *De iustitia et iure*, tom. 2, (*De contractibus*), tract. 2, disp. 352, col. 416, num. 14: 'Quinta conclusio. Quando dolus causam dedit contractui stricti iuris, validus est contractus in foro exteriori. Conceditur tamen decepto exceptio, quod dolus causam dederit contractui, ut, ope talis exceptionis, non cogatur implere, siquid contractus restat adhuc implendum. Item, si, post contractum impletum, deceptus in aliquo sit damno,

mistake is absolutely null (*ipso iure nullus*), citing Summenhart and Covarruvias, but he immediately adds to this that the defrauder is bound to rescind the contract if the mistaken party wishes him to do so – which suggests that the nullity is only relative. Moreover, Molina claims that the law of conscience governing contracts *stricti iuris* affected by mistake should be similar to the law of the land. But the law of the land considers contracts *stricti iuris* to be valid, even if they are affected by mistake, and voidable at the option of the mistaken party. Lugo and Grotius undoubtedly had this passage in mind, amongst other texts, when they deplored the confusion created by the scholastics on the subject of mistake.

Less confusing and quite conventional is Molina's view that *dolus incidens* does not affect the validity of either a contract *bonae fidei* or a contract *stricti iuris* at all. The contract itself remains untouched, because of the rule that what is useful is not vitiated by the useless (*utile per inutile non vitiatur*)[1038]. The cases envisaged here are mostly to do with contracts in which commutative justice has been violated through the conveyance of a good in exchange for an unjust price. Contracts *bonae fidei* affected by incidental deceit do give rise to restitution of the excess in the price (*quod ratione doli plus dedit*), even in case of lesion below moiety, before the internal as well as the external forum[1039]. Contracts *stricti iuris* can only give rise to restitution in the court of conscience[1040].

4.3.2.4 Sánchez: delictual and criminal liability

Compared to his elaborate discussion on the impact of duress on the validity of a contract, Sánchez's treatment of deceit and mistake is rather disappointing, at least from the point of view of the development of a general law of contract. He does treat mistake quite extensively as a diriment impediment to marriage[1041], but he fails to give an elaborate account of the impact of mistake on contractual consent in general. Relevant in this context, however, are a couple of statements made by Sánchez in the framework of his chapter on engagement contracts (*sponsalia*). The question whether such contracts are void ipso facto or only voidable at the option of the mistaken party matters to him, since it determines the applicability or otherwise of the *impedimentum publicae honestatis*. In short, this diriment impediment renders void a marriage between an engaged party and a blood relative of the other engaged party, since the preceding engagement creates a certain bond of conjunction

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conceditur ei actio de dolo adversus decipientem, ut damnum resarciat (…). Hanc etiam conclusionem ex parte stabilivimus disp. 259 citata. Ubi cum Conrado, Covarruvia et aliis diximus, in foro conscientiae contractum esse ipso iure nullum, tenerique dolosum ad rescissionem illius, si deceptus ita velit, eo quod consensus, per dolum et iniuriam extractus, sufficiens non sit ad obligandum deceptum, expedireque ut idem in exteriori foro sanciretur.'

[1038] For the origins of this rule in VI 5,13,37, see D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter*, München 2007, p. 239, num. 34-35. It has rightly been argued that this rule draws its origins from the Roman law of testate succesion (*favor testamenti*), notably D. 45,1,1,5, and that it was initially restricted to it; cf. Zimmermann, *The law of obligations*, p. 708-709 and 720.

[1039] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, col. 416, num. 14.

[1040] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, cols. 416-417, num. 15.

[1041] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 2, lib. 7, disp. 18-24, p. 68-93. Of particular interest is his discussion on the relevance or not of mistake about the quality (*error qualitatis*) of the spouse, which was traditionally thought to redundant; for a discussion, see P. Fedele, *Error qualitatis redundans in errorem personae*, [Biblioteca de 'Il diritto ecclesiastico'], Roma 1934, p. 5-6.

(*vinculum coniunctionis*), which, even though it is less strong than affinity (*affinitas*), dissolves a subsequent marriage of that type[1042]. This impediment cannot come about for either of the parties if the engagement contract is automatically avoided by virtue of mistake[1043].

While Sánchez considers contracts affected by duress to be voidable at the option of the coerced party, he seems inclined to think that contracts *bonae fidei* affected by *dolus causam dans* are avoided automatically. His argumentation is based on the idea that mistake renders contractual consent involuntary (*error involuntarium causat*), and, hence, radically nullifies contractual obligation[1044]. Sánchez is reluctant, though, to give a straightforward answer to the question whether the deceiver can still be bound by the engagement contract. He deems it more probable that both parties are delivered from the obligation that was created by giving their word of engagement, although he leaves open the possibility of delictual liability[1045]. His solution is reminiscent of Molina's. He argues that the deceiver can be bound to the engagement contract on account of the wrongful harm that he did to the other party (*ratione damni secuti*), provided that the deceived party wishes the engagement to remain valid. Sánchez expressly refers to the analogous solution in the case of fictitious promises, where the deceiver can also remain bound by virtue of delictual liability[1046]. Also, Sánchez envisages that the deceiver can be held to perform the engagement contract by virtue of criminal liability (*in poenam fraudis*), at least from the moment he has been condemned by the judge[1047]. This solution recalls Summenhart's and Medina's.

In light of his indebtedness to Molina, on the one hand, and to Summenhart and Medina, on the other hand, it is no surprise to find that Sánchez considers the question what effect the deceit by a third party has on the validity of an engagement contract to be very difficult (*maior difficultas*). As mentioned before, Summenhart and Medina acknowledged that deceit by a third party could not compromise the validity of a contract as a matter of positive law, but insisted that the law of conscience must be different. Molina, on the other hand, argued that, even in conscience, a contract affected by deceit exercised by a third party remained valid. Molina admitted that the mistaken party could be granted an action for damages against the deceiver, but confirmed the validity of the contract. At first, Sánchez

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[1042] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 2, lib. 7, disp. 68, num. 1, p. 228.

[1043] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 64, num. 1, p. 110: 'Huius rei cognitio necessaria valde est, propter publicae honestatis impedimentum, si enim sponsalia valida sint, quamvis postea irritentur, orietur utique, quod secus est, si ipso iure irrita sint.'

[1044] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 64, num. 3, p. 110: 'Et ratio est, quoniam sic deceptus sponsus, consensurus minime erat, sed errore ductus consensit, in quo alter per dolum et iniustitiam participavit, cum ergo error involuntarium causet, assensusque sit per dolum et iniustitiam extortus eius, cui alter consentiens se intendebat obligare, invalidus et inefficax erit.'

[1045] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 64, num. 3, p. 110: 'Et breviter nunc probabilius credo, utrumque liberum esse a fide sponsalium, nisi aliud damnum secutum sit. Ratione enim damni secuti posset decipiens teneri altero volente, sicut de ficte promittente late dixi supra disp. 10.'

[1046] Discussed supra, p. 166-169.

[1047] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 64, num. 3, p. 110: 'Posset etiam decipiens in poenam fraudis cogi stare sponsalibus, volente altero. Cum tamen haec poena sit, iudicis sententiam desiderat.'

follows Summenhart and Medina, submitting that deceit, whether stemming from the other party to the contract or from a third party, frustrates voluntary consent, which is the natural prerequisite of contractual obligation[1048]. Eventually, however, Sánchez concludes with Molina that those contracts of good faith, particularly engagement, are not frustrated by deceit from a third party. Citing Bartolus and Covarruvias, he points out that this form of deceit does not concern the substance of the contract, but the cause that leads to the conclusion of the contract[1049]

4.3.2.5 A swansong to nullity *ab initio*

The huge persistence in the early modern scholastic tradition of the Roman idea that *dolus causam dans* resulted in absolute nullity for *bonae fidei* contracts emerges one last time very clearly from the work *On obligations* by the Portuguese Jesuit Fernão Rebelo. Published in 1608, at the time when Lessius' *On justice and right* had been on the market for about three years, it shows signs of the same turn towards a general law of contract while safeguarding the common opinion that *dolus causam dans contractui bonae fidei* results in absolute nullity.

From an organisational point of view, Rebelo's questions about the effects of mistake on contractual validity are part of a chapter on general contract law (*De contractibus in genere*) preceding a systematic discussion of specific contracts[1050]. Yet despite this modern format, it clings to the traditional view of mistake advocated by the common opinion represented by Molina and Sánchez amongst others. In light of the new approach to this question which had just about been advocated by Lessius (see below), Rebelo's deeply conventional account appears like the swan-song of a firmly resisting yet bygone tradition.

Rebelo expressly makes the answer about the effects of mistake on contractual validity dependent on the solution of the larger question whether it makes sense to distinguish contracts *bonae fidei* from contracts *stricti iuris*. In an exposition that paradoxically seems both to imitate and deviate from Covarruvias' ideas, Rebelo arrives at the conclusion that both according to the Roman canon law (*utrumque ius*) and the law of conscience (*forum conscientiae*) the discriminatory treatment of contracts *bonae fidei* and *stricti iuris* is fundamental[1051].

Importantly, this means that the interpretation of the extent of the obligations (*ratio obligandi*) deriving from these respective contracts differs: obligations ensuing from contracts

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[1048] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 64, num. 4, p. 110: 'Secundo, quia deficit consensus, cum ex errore praestitus sit, et nihil magis contrarium consensui quam error.'

[1049] Sánchez, *Disputationes de sancto matrimonii sacramento*, tom. 1, lib. 1, disp. 64, num. 5, p. 110: '(…) Non deficit substantialis consensus, ut probat optime Bartolus (…), Covarruvias (…), non enim error contingit circa substantialia contractus, sed circa causam ad contrahendum inducentem (….)'.

[1050] Rebelo, *Opus de obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 2 (*Utrum in contractibus bonae fidei obligatio sit extendenda, in contractibus vero stricti iuris restringenda*) and quaest. 6 (*De dolo sive fraude infirmante contractus*).

[1051] Rebelo, *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 2, sect. 1, num. 4, litt. a, p. 198: 'Unde ad quaestionem conclusio sit. Non solum in utroque iure, sed etiam in foro conscientiae admittendum est istud discrimen, ut quidam contractus, vel quasi contractus, quoad obligandi rationem ampliorem, alii restrictiorem interpretationem suapte natura recipere debeant, prout doctores communiter ac iura affirmant.'

bonae fidei call for an extensive interpretation (*amplior*), while obligations deriving from contracts *stricti iuris* require a restrictive interpretation (*restrictior*). Rebelo compares the variety in the nature of contracts to the variety in the nature of precious natural materials[1052]: it is possible to extend wax, but it is impossible to extend adamant. He drew this metaphor from the Spanish canonist Francesco Sarmiento de Mendoza (d. 1595), who argued against Baldus that, even as a matter of canon law, not all contracts should be interpreted along the lines of good faith[1053].

Quoting gloss *Bonae fidei sunt* to paragraph *Actionum* (Inst. 4, 6, 28) Rebelo indicates just as Sarmiento, that, of course, this distinction does not imply that contracts *stricti iuris* are not governed by good faith, in the sense that deceit and fraud must be absent. Covarruvias, too, had insisted that the word '*bona fides*' can have two senses, depending on whether it is being opposed to fraud or being opposed to strict interpretation. Rebelo recalls that the distinction between contracts *bonae fidei* and *stricti iuris* has only to do with the latter contradistinction, namely with the interpretation of contracts[1054]. The canon law does require all contracts to be concluded in good faith, viz. without deceit, as a matter of course, although it had not blurred the distinction between *bonae fidei* and *stricti iuris* contracts.

Contrary to Covarruvias, Rebelo indicates that the interpretation in contracts *bonae fidei* has nothing to do with the Aristotelian concept of equity (*epieikeia*). Granted, the distinction is closely linked to the interpretation of the extent of contractual obligation rather than to the tolerance of deceit in them. Yet equity (*epieikeia*) implies that the intent of the legislator (*intentio legislatoris*) is taken into consideration rather than the literal wording of the law, because they are thought to be in conflict with each other. The interpretation of a *bonae fidei* contract, on the other hand, is based on the nature of the contract (*natura contractus*), because the nature of the contract is thought to be tantamount to the declaration or intent of the contracting parties[1055]. By definition, there cannot be a conflict between the nature of the contract and the intent of the parties.

[1052] Rebelo, *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 2, sect. 1, num. 4, litt. b, p. 198: 'Sicut alia est natura adamantis, saphiri vel alterius lapidis, quam nulla ratione possis extendere; alia vero auri, caerae, panni vel corii, quae extensionem suapte natura possunt recipere, ita proportione quadam de multiplici contractuum natura sive materia philosophandum est.'

[1053] Francesco Sarmiento de Mendoza, *De selectis interpretationibus*, Francoforti ad Moenum 1580, lib. 3, cap. 3, num. 1 (*De iure canonico etiam sunt contractus stricti iuris*), p. 187 : 'Si enim materiam ligneam vel lapideam, qualis est materia contractuum stricti iuris, velimus extendere, vel diducere, sicut materiam plumbeam, seu auream, qualis est materia contractuum bonae fidei, non esset ex bono et aequo procedere, sed materiam corrumpere.'

For biographical details of Sarmiento, see Antonio, *Bibliotheca Hispana nova*, p. 476-477.

[1054] Rebelo, *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 2, sect. 1, num. 3, litt. d, p. 198: 'Sed cum bona fides dupliciter dicatur, ut notat glossa citata, uno modo, quod contraria sit dolo aut fraudi, quo pacto omnes contractus bonae fidei esse debent, hoc, sine dolo et fraude celebrari ac impleri; altero per antonomasiam, hoc est, propter exuberantem fidem, quae in certis contractibus esse debet (quod scilicet ad multa ex bono et aequo, prout iudex sive vir prudens arbitrabitur, de quibus non fuit actum inter partes, suapte natura extendi debeat) a fide, hoc secundo modo sumpta, contractus dicuntur bonae fidei, ut opponuntur aliis stricti iuris, quia etiam ex eo tales dicuntur, quod natura sua habent, ut in eis non debeat fieri extensio, nisi ad ea, de quibus expressio facta fuit.'

[1055] Rebelo, *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 2, sect. 1, num. 3, litt. e-a, p. 198: 'Unde etiam colliges hanc bonam fidem secundo modo acceptam longe diversam esse ab Epicaeia, qua

From this theoretical distinction Rebelo infers the common opinion that the effect of *dolus causam dans* on contracts *stricti iuris* is different from the effect of mistake on contracts *bonae fidei*: the former are voidable (*rescindi possunt*), whereas the latter are void (*ipso iure irritus*)[1056]. He nevertheless indicates that his own opinion is different. As a matter of fact, in another place of his work, he adopts a general regime of nullity *ab initio* for both *bonae fidei* and *stricti iuris* contracts affected by *dolus causam dans*[1057]. If they are affected merely by *dolus incidens*, say lesion, they remain valid[1058].

Another inference from this general distinction concerns the irrelevance of changed circumstances on *bonae fidei* contracts[1059]. If you become aware of a circumstance that would have prevented you from entering into a contract if you had known about it at the moment of concluding the contract, you can revoke a *stricti iuris* contract. A *bonae fidei* contract, however, cannot be rescinded if suddenly circumstances change for the worse or a past circumstance is brought to light.

Last, Rebelo argues that the law of duress and the law of mistake are fundamentally different[1060]. Duress makes contracts voidable, while mistake brings about nullity *ab initio*[1061]. Duress does not remove voluntary consent altogether, while mistake and the subsequent ignorance are incompatible with voluntary consent. Only Lessius would succeed in bringing the law of mistake and duress together.

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iudex solet iudicare secundum intentionem legislatoris praetermissis interdum verbis legis. Nam in extendenda vel decurtanda sive restringenda obligatione contractus attendi debet semper natura ipsius contractus et in quibusdam amplior, in aliis restrictior interpretatio facienda erit naturae cuiusque contractus congruens; quod ipsum nec verbis nec intentioni contrahentium saltem implicite repugnans est, sed potius consentaneum.'

[1056] Rebelo, *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 2, sect. 1, num. 6, litt. b, p. 199: 'Contractus bonae fidei in quo intervenit dolus dans causam contractui est ipso iure irritus, non tamen ii qui sunt stricti riuis, quamvis per exceptionem doli rescindi possint.'

[1057] Rebelo, *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 6, sect. 2, num. 9, litt. a, p. 213: 'Si vero dolus causam contractui det, omnis contractus, sive lucrosus ille sit, cuiusmodi est liberalis promissio ac donatio facta homini et intuitu hominis, et alii, in quibus solum ex parte decepti obligatio existit, sive onerosus, in quo utrimque obligatio cernitur, sive sit bonae fidei, sive stricti iuris, in foro quidem conscientiae invalidus est, uno excepto matrimonio (…).'

[1058] Rebelo, *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 6, sect. 2, num. 8, litt. c-e, p. 213.

[1059] Rebelo, *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 2, sect. 1, num. 8, litt. d, p. 199: 'Contractus stricti iuris generaliter non extenduntur ad ea quae praecogitata minime sunt. Unde si postquam aliquid v.g. liberaliter pollicitus es, superveniat magna difficultas vel inopinatus eventus, quae si praecogitasses, non promisisses, fas est non stare promissis, ut etiam docet D. Thom. 2.2.quaest.110.art.3.ad.5 communiter receptus. Secus de bonae fidei contractibus dicendum, unde (…) nefas erit ab allis resilire propter inexcogitatum eventum, de quo si praecogitasses, non contraxisses.'

[1060] Rebelo, *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 6, sect. 2, num. 11, litt. c, p. 214: 'Obiicies rursus, metus dans causam contractui etiam bonae fidei, non reddit illum ipso iure nullum, sed tantum venit rescindendus, si metus probetur (…). Pari ergo ratione nec dolus dans causam contractui bonae fidei illum ipso iure rescindet. Neganda tamen est consequentia.'

[1061] In *De obligationibus justitiae, religionis et charitatis*, part. 2, lib. 1, quaest. 5, num. 17, p. 211, Rebelo had claimed that duress results in absolute nullity. Cf. supra.

4.3.3 Voidability and the end of the *bonae fidei* / *stricti iuris* distinction

As he returned from an exciting investigation into the long forgotten roots of Grotius' views on mistake, the eminent legal historian Robert Feenstra wondered whether the manifest dependency of Grotius on Lessius meant that the cradle of the modern doctrine of mistake must be transferred from present-day Holland to Belgium[1062]. Ever since, scholars have confirmed the seminal contribution of Lessius to the development of our concept of mistake[1063]. Apart from laying bare the obvious influence of Lessius on Grotius, it falls outside the scope of this dissertation, however, to try to weave an almost impossible direct web of lineage between the past and the present. It is a daunting task to try to come to grips with the bright yet somewhat cloud covered minds of the scholastics themselves. Yet there are several good reasons, indeed, for a jurist to investigate Leonard Lessius' analysis of the vices of the will, and of mistake in particular.

4.3.3.1 The format of Lessius' revolution

The first reason why Lessius is worthy of scrutiny has to do with the form and context of his account. He poses the question about the effects of mistake on contractual validity in general terms (*utrum contractus, cui error vel dolus causam dederit, sit validus*), and he does so within the framework of an autonomous chapter on the law of contract in general (*de contractibus in genere*), which preceeds a systematic discussion of the panoply of specific contracts. Hence, the doctrine of mistake ceases to be a commentary on a particular paragraph from the body of Roman or canon law, a special topic of the law of sales, or a gloss to the law of marriage, vows and oaths. Furthermore, Lessius' account of mistake displays three of the central characteristics of his works: brevity, lucidity, and logical consistency. While we have seen his predecessors running into absurd conclusions in order to reconcile the legal tradition with the needs of society, Lessius ingeniously alters the juridical framework itself.

Preceding the actual discussion is a list of three distinctions on which his solution depends[1064]. It is not entirely the same as the list mentioned at the outset of Molina's discussion. First, Lessius distinguishes substantial mistake or deceit (*circa substantiam rei*) from accidental mistake (*circa accidentia et extrinseca*). Second, he mentions the usual distinction between *dolus causam dans* and *dolus incidens*. Third, he points out three different sources of the mistake: the other party to the contract (*a parte quae tecum contrahit*), an independent third party (*a tertio*), or your own judgment (*ex propria tua opinione*). In contrast with Molina, the distinction between contracts *bonae fidei* and *stricti iuris* does not play a significant role as an organisational principle in Lessius' exposition any more. Quite the

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[1062] Feenstra, *De oorsprong van Hugo de Groot's leer over de dwaling*, p. 100.

[1063] E.g. M.J. Schermaier, *Mistake, misrepresentation and precontractual duties to inform, The civil law tradition*, in: R. Sefton-Green (ed.), Mistake, fraud and duties to inform in European contract law, The Common Core of European Private Law Series, Cambridge 2005, p. 56.

[1064] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 27, p. 198.

reverse, it is the convergence of these traditionally distinguished types of contract that is at the heart of Lessius' argumentation.

Starting with the first distinction, Lessius is capable very quickly of sorting out where the real crux of the debate lies. As soon as mistake concerns a substantial element of a contract, as when a buyer receives glass instead of a gem, the answer is easy: the contract falls short of substantial consent (*consensus substantialis*), and, accordingly, is void *ab initio* as a matter of natural law[1065]. If mistake does not concern a substantial element, the solution bifurcates according to the question whether mistake is fundamental or incidental to the contract. If mistake is incidental to the contract (*dolus incidens*) the solution needs no further clarification either: the contract remains valid. Even in case of lesion beyond moiety (*laesio enormis*), the only requirement is that equality in exchange be restored[1066]. Contrary to Molina, Lessius does not differentiate between contracts *stricti iuris* or *bonae fidei* at all. The more problematic case, however, concerns non-substantial mistake that has been decisive in entering into the contract (*dolus causam dans*).

In order to come to grips with the rather complicated issue of non-substantial yet fundamental mistake, Lessius brings in the third distinction, depending on whether the mistake was caused by the other party to the contract or by another person, including the mistaken party herself. Both questions are thoroughly dealt with by Lessius. They are the source of a stimulating and innovative debate toward which we will successively turn our attention. In the first debate we will see how Lessius brings about a turnaround in the scholastic tradition by advocating a general regime of voidability in the case of *dolus causam dans*, thereby removing the traditional distinction between contracts *bonae fidei* and *stricti iuris*. In the second debate, he first follows Molina, but then curiously argues in favor of a generalized tacit condition allowing a party to rescind a contract – also paying damages if the other party would suffer injury from that – in the event that he realizes that he has been deceived by a third party or by his own wrong understanding of external circumstances.

4.3.3.2 General application of voidability

The second reason why it is worthwhile examining Lessius' thought on duress has to do with the content of his argumentation itself. With one stroke of the pen, Lessius overturns what had

[1065] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 27, p. 198: 'Quando contingit in altero contrahentium esse errorem circa substantiam rei, contractus iure naturae est irritus. (…) Ratio est, quia deest substantialis consensus, nam non consentit in illam rem, sed in aliam, quam putat subesse istis accidentalibus.'

[1066] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 28, p. 198: 'Si non sit error circa substantiam, contractus est validus, modo dolus non det causam contractui. (…) Probatur, quia iste vere consentit, v.g. in emptionem istius rei, sciens et volens, absque metu et fraude. Qui consensus sufficiens est ad contractus validitatem. (…) Hinc sequitur, contractum esse validum, etiamsi quis deceptus sit in pretio ultra dimidium, quia dolus non dedit causam contractui, sed solum est causa maioris vel minoris pretii.'

become established as the common opinion in the sixteenth century[1067]. Lessius comes straight to the point[1068]:

> When deceit is fundamental to the contract and the other party to the contract is its instigator or at least an associate to the deceit, [a] the contract is still not entirely void (*non omnino irritus*) as a matter of natural law, [b] although it is voidable at the option of the deceived party (*pro arbitrio eius qui deceptus est irritari potest*), provided the contract is dissoluble.

This is a statement of which the novelty is probably inversely proportional to its brevity. Lessius proceeds by producing arguments in favor of both of its components before he goes on to refute the traditional distinction made between contracts *stricti iuris* and *bonae fidei* when it comes to the effects of mistake.

As regards the fact that the contract is not entirely void [a], Lessius argues that it follows from the commonly shared assumption that a contract *stricti iuris* remains valid as a matter of civil law even if it is affected by deceit or duress. He indicates that it would have been impossible for the law of the land to take that view if the contract had been absolutely void as a matter of natural law[1069]. For what is void as a matter of natural law cannot be validated by civil law. The validity of a contract *stricti iuris* affected by deceit or duress as matter of civil law presupposes, then, that a contract is not absolutely void as a matter of natural law either.

From the canon law of marriage, Lessius draws additional support for the claim that contracts affected by deceit or duress are not entirely void. For a marriage contract remains valid even if it has been entered into by deceit or duress. In addition, there is a canon rule of marriage stating that if the mistaken party wishes the contract to be upheld, the deceiver cannot revoke his assent, lest he benefits from his evil act. This is yet another sign for Lessius that the contract cannot have been completely invalidated by the deceit. Last, by hypothesis, the deceit does not concern the substance of the contract. It only concerns the motivation (*causa*) behind the contract, which constitutes a merely extrinsic and accessory element of the contract.

Lessius is careful enough, however, to conclude that a contract affected by *dolus causam dans* is still open to avoidance by the mistaken party herself [b]. He founds the mistaken party's right to avoid the contract both on the contract itself and the extra-contractual liability for fault of the deceiver. The contract can be avoided because of lack of full consent to the contract on the part of the mistaken party (*ratione defectus consensus*) as

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[1067] Gómez, *Commentarii variaeque resolutiones*, tom. 2, cap. 2, num. 21, p. 224-225.

[1068] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 29, p. 199: 'Si dolus det causam contractui, et proveniat ab altera parte, vel saltem illa sit particeps doli, contractus adhuc iure naturae non est omnino irritus, tamen pro arbitrio eius qui deceptus est, (si solubilis sit) irritari potest.'

[1069] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 29, p. 199: 'Communis sententia doctorum est, contractum stricti iuris, etiamsi dolus vel metus ei causam dederit, validum esse, doli tamen mali vel metus exceptione actionem elidi, et colligitur ex l. dolo 5, C. de inutilibus stipulationibus, et apertius Institut. de exceptionibus, initio. Hoc autem falsum esset, si iure naturae esset omnino irritus. Quia quod iure naturae est irritum, iure civili non potest esse validum et tribuere actionem.'

well as on the injury she incurred (*ratione iniuriae*)[1070]. Lessius points out that the difference between duress and mistake lies precisely in the twofold source for restitution in the case of mistake. Contrary to mistake, duress can only be offset on account of the injury done to the intimidated party, since coerced consent is not affected by involuntariness altogether.

By virtue of both of these grounds, the mistaken party is granted a right to withdraw from the contract (*dolus tribuit ius recedendi a contractu*). There is no need for a judge to grant this right to the deceived party. The harm done to the contractual right of the mistaken party is offset by immediately granting him a right to invalidate the contract. The right to revoke his assent is a natural consequence of the injury done to him. This argument actually mirrors the ideas produced by Henríquez and Sánchez in respect to the effect of duress on contractual validity.

Lessius' conclusion does not coincide with that of Molina, however. Lessius can logically pretend that the contract remains valid if the mistaken party renounces the right to rescind the contract that is naturally granted to him on account of the extra-contractual fault by the other party to the contract. Molina could not do so without running into absurd conclusions, since he adopted the principle that mistake automatically results in nullity.

There is another important idea put forward by Lessius in order to argue that contracts affected by *dolus causam dans* are voidable at the option of the mistaken party: every contract includes the implicit or tacit condition (*tacita conditio*) that you will fulfill it, unless you discover – even after the conclusion of the contract – that you have been seriously mistaken[1071]. Nobody has the intention of binding himself so strongly that he cannot withdraw from his obligation when he feels he has been gravely mistaken. This is a tacit condition deriving from the law of nations and confirmed by daily practice and custom, according to Lessius[1072]. He nonetheless indicates that a party who avails himself of this tacit condition to withdraw from the contract is bound to make compensation if the other party suffers serious damage from the rescission of the contract.

So far, Lessius has argued in favor of a general principle of voidability *as a matter of natural law* in contracts affected by fundamental mistake. He also argues, however, that the same must hold true *as a matter of civil law*[1073].

For one thing, Lessius argues that the civil law should adopt the general regime of relative nullity because that would allow the civil law to follow the natural law as closely as

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[1070] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 29, p. 199: 'Itaque diplici iure potest talis contractus rescindi, ratione iniuriae et ratione defectus consensus, qua parte ignoravit. Cum autem metu extortus est, solum ratione iniuriae rescindi potest.'

[1071] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 29, p. 199: 'Omnis contractus solubilis iure gentium videtur habere hanc tacitam conditionem, quod contrahens stabit contractu, nisi deprehenderit se graviter deceptum, id est, tali errore qui sit causa contractus. Nemo enim ita intendit inhaerere contractui, ut non possit retrocedere, etiamsi ex gravi errore contraxisset; quia defuit plenus consensus.'

[1072] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 33, p. 200-201: 'Quia alter non potest conqueri de iniuria, cum tacita mens contrahentium sit, non obligare se ad implendum contractum, si se deceptos deprehendant, idque confirmat consuetudo passim recepta. Eadem conditio tacite ex usu omnium gentium intelligitur in promissione standi contractu eiusque non revocandi. Si tamen inde alteri damnum obveniret, deberet alter compensare.'

[1073] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 31, p. 199-200.

possible (*magis consentaneum iuri naturae*) – which is highly recommendable, of course. For another thing, Lessius cites the argument that a system of nullity at the option of the wronged party is much more conducive to the common good (*magis expediens bono publico*). As the saying goes 'whoso diggeth a pit shall fall therein'. In his discussion of gambling and gaming contracts, Lessius insists on it that the law should make sure that defrauders are caught by their own evil acts[1074].

In arguing that civil law is compatible with the idea of general voidability, Lessius defies the entire scholastic legal and moral philosophical tradition, of course. Granted, Pierre de Belleperche and other jurists of the Orléans school had taken a similarly unorthodox position, but Lessius acknowledges that their arguments do not hold water. He proposes to endorse their conclusion, but to substitute his own argumentation for theirs.

Lessius starts from a close reading of law *Si dolo* on the alleged nullity *ab initio* of contracts *bonae fidei* affected by mistake (C. 4,44,5) and argues that it actually contains more or less the same formulation as law *Dolo* (C. 8,38,5), which is undisputedly interpreted as prescribing relative nullity in contracts *stricti iuris*. Hence, the text of law *Si dolo* does not suggest that contracts *bonae fidei* are absolutely void, but that they can be rescinded (*posse rescindi*).

An extremely interesting argument from the medieval legal tradition concerns the proposed equal treatment of duress and mistake (*metus et dolus in iure censentur paria*). It is prescribed by canon *Quum contingat* (X 2,24,28). Lessius holds that coerced contracts are always voidable and not void as a matter of both civil and natural law, he infers from this simple syllogism that voidability must also be the solution to contracts affected by mistake in the civil court.

There is still much more to be said about Lessius' use and interpretation of the law of Rome in order to support his view about the general regime of nullity at the option of the deceived party. For exampe, Lessius gives an explanatory account of the Roman law of mistake, which heavily resembles the historical digression developed by Covarruvias. It should suffice here, however, to quote Lessius' conclusion to this argument, which expresses his novel position in his own words[1075]:

> For all those reasons I think that the truth is that there is no difference in the court of conscience [when it comes to the effects of mistake on the validity of a contract] between contracts of good faith and of strict law that have been caused by fundamental mistake. Both types of contract are somehow valid and produce an unstable obligation as a matter of natural law before the court of conscience. This obligation can be removed by the mistaken party when he detects the deceit. This obligation cannot be removed as a matter of civil law.

[1074] Lessius, *De iustitia et iure*, lib. 2, cap. 26, dub. 2, num. 11, p. 344-345.

[1075] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 31, p. 199: 'Ob has rationes sentio esse verius, nullum esse discrimen hac ex parte in foro conscientiae inter contractus bonae fidei et stricti iuris, cum dolus causam dedit, sed utrosque aliquo modo esse validos, et parere aliquam debilem obligationem iure naturae in foro conscientiae, quae tamen dolo detecto possit elidi per eum qui deceptus est. Neque hanc obligationem iure civili impedire.'

Obviously, Lessius devised a juridical framework that enabled him – and the subsequent juridical tradition – to allow for the interests of the deceived party without needing to commit logical inconsistencies. Molina had not reached that stage of systematical perfection. Accordingly, he drew sharp criticism from Lessius.

It is absurd to believe that the deceiver can still be made to fulfill his contractual obligations before a judge has condemned him to do so (*ante sententiam*), according to Lessius, if a *bonae fidei* contract has first been declared void *ipso iure*[1076]. In that event, the deceiver cannot be held liable on account of the contract (*ratione contractus*) anymore. Consequently, he can only be held to perform as a measure of punishment (*ratione poenae*). Yet nobody can be forced to execute a punishment until condemnation has been pronounced in court (*post sententiam*). Sánchez had passed a similar criticism on Molina's paradoxical defence of automatic nullity of coerced contracts at the option of the intimidated party before the judge's sentence.

4.3.3.3 General application of the tacit condition

Even if Lessius criticized his older colleague Molina for his inconsistency, he presumably drew inspiration from him in refuting the idea that mistake induced by third party resulted in contractual invalidity. As pointed out before, Summenhart and Medina had thought so, because they held that a contract affected by *dolus causam dans a tertio* fell short of voluntariness. No doubt thinking of Molina, yet citing only the gloss, Bartolus, and Covarruvias, Lessius argues that voluntary consent cannot be affected by that kind of deceit, since it does not concern mistake about a substantial element of the contract, but merely an accidental circumstance external to the contract, namely its motive (*ut circa causas quae alliciunt vel avocant a contractu*)[1077]. The contract remains absolutely valid.

Only in the event of gratuitous contracts can motivation be considered a sufficient ground to compromise the validity of the contract. As Lessius puts it, you need to take into account the habitual tacit intention (*intentio tacita et habitualis*) behind an act of liberality, because the mere tacit intention takes the form and authority of a law (*lex*) in case of gratuitous contracts – except in the case of vows. This consideration is even recommended in order to avoid needless disputes. With onerous contracts, however, the mistaken party cannot benefit from rescission of the contract. For he should either blame himself for having been negligent, or claim an action against the third party who deceived him[1078].

[1076] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 32, p. 200: 'Sed habet difficultatem: si enim non tenetur implere ratione contractus, ergo solum ratione poenae: at nemo tenetur ad poenam nisi post sententiam.'

[1077] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 33, p. 200.

[1078] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 33, p. 200: 'Si vero sit onerosus, maior est difficultas, quia hic contractus pendet etiam ex consensu alterius, qui talem conditionem nollet admittere. Deinde, quia vel tua opinione deceptus es, et sic tibi ipse imputare debes, quod rem melius non examinaveris; vel dolo tertii, et sic in illum actionem habes, ut expresse habetur d. l. Et eleganter 7, ff. de dolo, et l. Si proxeneta 2, ff. de proxeneticis.'

Suddenly, Lessius seems to have changed his mind, however, and departed from the viewpoints of Molina in the same way. As we have pointed out before, the scholastics considered a change in circumstances *sensu lato* as almost similar to deceit exerted by a third party, discussing it in the margin of deceit exerted by a third party, accordingly. Molina had expressed his reluctance towards the granting of relief in onerous contracts on the basis of ignorance of certain decisive circumstances at the moment of contract formation, because of the insecurity that would ensue from its recognition[1079]. Lugo would express the same concern half a century later. Lessius departs from that line of thought, though[1080].

The modification that Lessius makes concerns the case of invincible mistake (*error invincibilis*) from which one of the parties in an onerous contract suffers. Insofar as none of the parties has yet performed (*res adhuc integra*), Lessius thinks that it is nearer to the truth to say that the deceived party can withdraw from the contract as soon as the true circumstances have become clear to him.

He draws an explicit parallel with the acquittal to perform in the event of changed circumstances (*status rerum notabiliter mutatus*)[1081]. A past event that comes to light only now is tantamount to a new event that occurs after conclusion of the contract. Moreover, customary law and the law of nations alike recognize the existence of the tacit condition (*tacita conditio*) mentioned before, according to Lessius. The only qualification concerns the need for the party who wants to rescind a contract on account of the tacit condition to compensate the other party for the damage he incurs (*si tamen inde alteri damnum obveniret, deberet alter compensare*)[1082]. This is a central idea that will be picked up by Grotius.

When performance has already been made by either one or both of the parties (*res non integra*), Lessius further refines his increasingly casuistical account. If the other party to the contract was aware of the circumstance, say a defect in the merchandise, and he did not reveal that hidden defect to the buyer, the contract is voidable at the option of the mistaken party – at least as a matter of positive law. Lessius believes that a vendor is not under a duty of disclosure as a matter of natural law, unless the buyer explicitly asks for his information about hidden defects[1083].

[1079] Molina, *De iustitia et iure*, tom. 2 (*De contractibus*), tract. 2, disp. 352, col. 415, num. 8: 'Ratio autem est, quoniam nullus contrahentium admitteret eam legem, si illam proponeret alter contrahentium, neque ea lex communi expedit bono, quare contractus ex ipsa natura non censentur sub ea lege celebrati.'

[1080] This is a turnaround in Lessius' argumentation which escaped Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen*, p. 93sq. He is rightly criticized for this by Feenstra, *De oorsprong van Hugo de Groot's leer over de dwaling*, p. 97.

[1081] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 33, p. 200: 'Quia si tale quid post contractum eveniret, non teneretur illum implere, eo quod status rerum sit notabiliter mutatus; ergo etiam non tenebitur, si id quod ab initio latebat, postea se aperiat. Nam paria sunt, supervenire de novo et proferri in lucem seu incipere cognosci.'

In fact, Lessius' positions seem to be wavering here. In another context, he had explicitly rejected this argument, and he associated it with Medina; cf. *De iustitia et iure*, lib. 2, cap. 21, dub. 5.

[1082] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 33, p. 200-201.

[1083] Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 33, p. 201: 'Si autem is qui tecum contrahit, conscius est vitii, contractus est irritus in tuum favorem, ita ut pro arbitrio tuo, detecto vitio possis illum irritare vel confirmare. (…) Ratio est, quia tunc censetur particeps doli. Nam tenebatur quasi ex officio, saltem iure positivo,

To conclude with, Lessius thought it necessary to allow for changed circumstances in both onerous and gratuitous contracts. If we put this in the terminology of Rebelo, Lessius can be said to have wished that the regime adopted in case of contracts *stricti iuris*, namely the recognition of changed circumstances, also be applied to contracts *bonae fidei*.

Lessius does not make use of this terminology himself. Still it sheds light on a striking resemblance between his generalized application of the regime of nullity at the option of the wronged party (usually associated with contracts *stricti iuris*) to contracts affected by *dolus causam dans ab altero*, and his generalized application of the tacit condition (usually associated with contracts *stricti iuris*) to contracts affected by *dolus causam dans a tertio vel seipso*.

4.3.3.4 Voidability without tacit condition

Even if he has been recognized as one of the most outstanding exponents of the movement himself, Juan de Lugo's assessment of the scholastic doctrine on mistake was hardly different from Hugo Grotius' conclusion two decades before him: mere confusion[1084]. Lugo's own analysis of mistake is characterized by the usual breadth and depth of his thought. He seems inclined to adopt Lessius' conclusion about the universal relative nullity of contracts affected by mistake, but he is favorable to Molina's standpoints, too, certainly when it comes to mistake induced by changed circumstances. Medina's and Sánchez's standpoints on mistake, on the other hand, are entirely rejected.

Lessius' innovative argumentation is judged extremely convincing by Lugo (*fortissima argumenta*)[1085]. He thinks it is very wise to consider contracts *bonae fidei* voidable (*non nulla sed rescindenda*) on account of law *Si dolo* (C. 4,44,5). Moreover, it is entirely true that treating duress and mistake on equal terms (*dolus et metus aequiparantur*) is recommended by canon *Quum contingat* (X 2,24,28). Last, a general regime of nullity at the option of the wronged party is not only in line with the *ius utrumque*. It is also in perfect conformity with natural law (*magis consentit iuri naturae*) and it is highly conducive to the common good and the prevention of deceit (*magis expedit ad bonum publicum et ad coercendos eiusmodi deceptores*)[1086].

Moreover, Lugo goes on to lend additional support to Lessius' thesis. He argues that a contract affected by mistake cannot be considered null on account of lack of voluntary consent (*ex involuntario*). Against Medina (and Rebelo for that matter), he argues that voluntary consent is not wholly vititated by mistake (*voluntarium simpliciter*). If mistake does not concern a substantial element of the contract, there is no lack of substantial consent either,

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aperire tibi omnia occulta rei vitia. (…) Puto tamen, seposito illo iure positivo, illum ex iustitia ad hoc non teneri, nisi rogatum, ut infra cap. 21 dubitatione 11 dicetur.'

[1084] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 67, p. 18: 'Circa hoc variae sunt doctorum sententiae propter diversa principia, quae supponunt, et non mediocrem confusionem pariunt.' As to Grotius, see below.

[1085] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 72, p. 19.

[1086] On the late medieval origins of the notion of *bonum publicum*, see K. Pennington, *The prince and the law, 1200-1600, Sovereignty and rights in the Western legal tradition*, Berkeley 1993, p. 232-235.

even though mistaken consent can be considered as being affected by mixed involuntariness (*involuntarium mixtum*)[1087]. The fact that contracts are not avoided by ignorance for which the party himself or a third party is responsible[1088], demonstrates that consent induced by mistake or deceit does not vitiate a contract[1089].

Lugo also confirms the idea defended by Lessius that the contract cannot be entirely void, albeit voidable still, on account of injury (*ex iniuria*)[1090]. Molina and Lessius had already pointed out that the mistaken party benefits from a right to rescind the contract by virtue of the injury done to him. Lugo wants to prevent himself, however, from running into the absurdity Molina had fallen into – but which he attributes to Sánchez without mentioning Molina. He is therefore careful to stress that, formally speaking, the right to rescind the contract is granted by virtue of the contract itself – which is still valid – and not by virtue of the injury (*non nascitur formaliter ex iniuria sed ex ipso contractu*). Consequently, if the mistaken party renounces his right to avoid the contract, he does not need to renew his consent or to beg for the consent of the deceiver. The deceived party can claim performance by the deceiver without the need for a judicial sentence (*ante sententiam*).

So far we have seen how Lugo adopted Lessius' idea of nullity at the option of the wronged party as the appropriate sanction for contracts caused by deceit induced by the other party to the contract. As regards *dolus causam dans* induced by the mistaken party himself or a third party – including external circumstances – Lugo seems to have endorsed the principle that such contracts do not cease to be valid. Abstracting from the complex casuistry surrounding this topic, one might say that this principle had been defended more firmly by Molina than by Lessius. Both were of the view that gratuitous contracts could be avoided on account of initial or subsequent mistake about the circumstances that had led to the contract (*error circa causam sive motivum principale donandi*)[1091]. Lessius, however, ultimately indicated that this might well be true also of onerous contracts on account of a kind of tacit condition implicit in every contract as a matter of customary law and the law of nations.

[1087] Remember the Aristolian-Thomistic analysis of duress; cf. supra.

[1088] A fact which Medina had denied; cf. supra.

[1089] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 73, p. 20: 'Secundo probari potest hoc ipsum, quia quod deceptio proveniat ab altero contrahente vel proveniat a te ipso, qui te decepisti, parum refert, cum in utroque casu aeque auferat scientiam requisitam ad voluntarium. Cum ergo validus sit contractus, quando te decepisti, imo quando alius tertius te decepit sine participatione contrahentis, dummodo deceptio non sit circa substantiam, eodem modo validus erit, quando a contrahente deciperis, quod attinet ad consensum requisitum ex parte tua.'

[1090] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 78-79, p. 21: 'Similiter ergo contractus dolo factus, quia voluntarius fuit, potuit in decepto obligationem producere, licet ipse deceptus ob iniuriam sibi illatam ius habeat adversus decipientem ad infirmandam obligationem illam, si voluerit. Unde merito dixit Molina, ante iudicis sententiam posse deceptum obligare decipientem ad persistendum in contractu, quia ad hoc sufficit nolle uti iure, quod habet ad rescindendum illum, nam eo ipso obligatio contractus perseverat se ipsa, sine alio adminiculo. (…) Ex quod ad argumenta Sancii supra proposita facile responderi potest. Ad primam dicimus, obligationem decipientis ad implendum contractum non nasci formaliter ex iniuria, sed ex ipso contractu, qui quandiu a decepto non dissolvitur potestate et iure quod habet ad dissolvendum, validus manet et obligat utrumque contrahentem ad sui observationem.'

[1091] Cf. supra and Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 69, p. 19, and num. 89, p. 24.

Lugo is wary about making general statements as to the effects of changed circumstances or the supervening knowledge of different circumstances at the moment of the formation of contract. He cites Sánchez's wavering statements as a proof of the intricate complexity of the matter of changed circumstances[1092]: 'Look how difficult it is to unravel the view of the scholastics in this matter. A preeminent doctor as Sánchez, who treated this topic in such a careful and exemplary way, still got caught in the obscurity and inconsistency of his own thought.' It is extremely difficult to state as a general rule that a contracting party is not bound to observe a contract if circumstances change (*status rerum mutatus*)[1093]. If circumstances change considerably (*notabiliter*), however, this restraint is subject to interpretation.

Concerning *dolus causam dans contractui* for which the other party cannot be liable in any way, Lugo concludes that it cannot have an avoiding effect upon onerous contracts. He thus adopts the general conclusion of Molina, and implicitly rejects the final observations made by Lessius. For the sake of legal security (*propter securitatem contractus*), the smooth practice of contract-based exchange (*usus contrahendi*) and the flourishing of business in general (*commercium humanum*), Lugo rejects the so-called '*clausula rebus sic stantibus*' in contracts entailing mutual obligations[1094]. All onerous contracts must be as secure, stable, and firm as marriage contracts[1095]. Consent to an onerous contract must be unconditional and absolute (*oportet quod consensus sit absolutus*). Parties need to be prudent and thoughtful before they enter into a contract.

Even if, in the footsteps of Lessius, Lugo abandoned the distinction between *bonae fidei* and *stricti iuris* contracts, then, his loyalty to Molina impeded him from adopting the idea that contracts invariably include a tacit condition. Treating gratuitous and onerous contracts on the same terms when it comes to mistake, as will become obvious in the

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[1092] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 87, p. 23: 'Vides quam difficile investigari possit doctorum sensus in hoc puncto, cum sic doctor, qui cum maiori distinctione hoc tractavit, adeo varie et obscure loquatur.'

[1093] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 87, p. 23: 'Advertendum est, regulam illam generalem, quod obligatio cesset, quando id advenit, quod si ab initio fuisset, consensu impediret, difficillimam esse, et de ea late tractat Sánchez (…). Fortissima argumenta contra eam affert, praesertim, quod sequeretur, nullum in rebus humanis contractum firmum manere, quia saepe adveniunt postea aliqua, quae si fuissent praevisa, contractus non fuisset factus, et in universum dicit, promissionem et votum (non tamen loquitur de professione et votis continentibus statum religiosum) non obligare, adveniente notabili rerum mutatione, secus si non esset notabilis (…).'

[1094] It should be noted that the term '*clausula rebus sic stantibus*' does not figure in any of the scholastic texts themselves.

[1095] Lugo, *De iustitia et iure*, tom. 2, disp. 22, sect. 6, num. 92, p. 24: 'Nam sicut in matrimonio et professione dicebamus propter firmitatem et perpetuitatem status, consensum exigi omnino absolutum, ita in aliis contractibus onerosis exigitur propter securitatem contractus consensus absolutus, quoties non erratur circa substantiam aut dolus dolus ab altero contrahente non apponitur dans causam contractui. Alioquin de omni eiusmodi contractu et de eius valore ac securitate posset dubitari, quod non esset conveniens commercio humano et contrahendi usui, sed expositum innumeris periculis et litibus. Passim enim diceret postea contrahens se deceptum fuisse a semetipso et ductum falsa causa contraxisse. Oportet ergo, quod consensus sit absolutus, et quod contrahentes prius videant bene quid sibi expediat, antequam consentiant, ne postea facile contractus in dubium revocentur.'

following paragraphs, it seems as though Grotius had remained more faithful to the sole doctrine of Lessius.

4.3.4 The impossibile synthesis of the scholastic tradition on mistake (Grotius)

Grotius deplores the perplexing state in which he finds the scholastics' treatment of mistake (*perplexa satis tractatio*). As noted above, he expressed a similar critique in regard to their treatment of duress.

Grotius' indebtedness to Lessius' doctrine of mistake is sufficiently well known[1096]. In a couple of seminal contributions, Robert Feenstra demonstrated that Grotius' brief notice on mistake was indebted to Lessius' ideas on mistake down to the smallest details – deeper still than Diesselhorst had dared to imagine and indicate. Schermaier pointed out that the doctrine of Lessius actually came closer to present-day conceptions of substantial mistake than Grotius' calque of it[1097]. Strangely enough, however, on account of the inside perspective on scholastic legal thought taken in this dissertation, it would seem that in other points of his teachings Grotius was even more influenced by Lessius than in his doctrine on mistake[1098]. Granted, Grotius begins his outline by listing almost the same distinctions that Lessius briefly comments upon at the outset of his dubitatio on deceit and mistake[1099]. It is also highly probable that the references to Antonine of Florence, Summenhart, Medina, and Navarrus have been directly copied from Lessius[1100].

Yet the thrust of Grotius' plea seems to correspond to only half of Lessius' argument. Within the context of the alleged absolute nullity (*irritus*) of *bonae fidei* contracts affected by *dolus causam dans* for which the other party to the contract was liable, Lessius had attempted to show that, first of all, it did not make sense to distinguish *bonae fidei* from *stricti iuris* contracts, because, secondly, all contracts affected by *dolus causam dans ab altero* were to be deemed relatively null at the option of the mistaken party (*irritandus*). Grotius' plea, however, is not driven by any of these attempts. True, the absence of any reference to a difference

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[1096] Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen*, p. 82sq; Feenstra, *De oorsprong van Hugo de Groot's leer over de dwaling*, p. 137-159; Feenstra, *L'influence de la Scolastique espagnole sur Grotius en droit privé, Quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause*, p. 377-402; N. Jansen, *Seriositätskontrollen existentiell belastender Versprechen, Rechtsvergleichung, Rechtsgeschichte, und Rechtsdogmatik*, in: H. Kötz - R. Zimmermann (eds.), Störungen der Willensbindung bei Vertragsabschluss, Tübingen 2007, p. 136-137.

[1097] Schermaier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB*, p. 143.

[1098] See the notes on Grotius in the chapters of this thesis dealing with duress, immoral promises, and equilibrium in exchange.

[1099] Compare Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 5, num. 27, p. 198 with Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 6, num. 1, p. 331: 'De pacto errantis perplexa satis tractatio est. Nam distingui solet inter errorem circa substantiam rei, et qui non sit circa substantiam; an dolus causam dederit contractui, an non; fueritne alter quicum actum est doli particeps; sitne actus stricti iuris, an bonae fidei.'

[1100] See the in-depth analysis by Feenstra, *De oorsprong van Hugo de Groot's leer over de dwaling*, p. 89-95. At first, Feenstra was mistaken about the identity of 'Conum.' [Conradus Summenhart] in Grotius' text, deeming it to be a reference to a certain 'Lancellottus Conradus'. In *L'influence de la Scolastique espagnole sur Grotius en droit privé, Quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause*, this error was rectified.

between *stricti iuris* and *bonae fidei* contracts suggests that Grotius had successfully assimilated Lessius' rejection of this distinction. Incidentally, the same goes for Pothier's treatment of mistake, where the Roman distinction has disappeared[1101]. Yet Grotius does not seem to be concerned about making clear once and for all whether a contract affected by mistake is void or voidable[1102].

The second part of Lessius' discussion, on the other hand, constitutes the very kernel of Grotius' doctrine of mistake. Lessius famously argued in favor of a tacit condition (*tacita conditio*) intrinsic to all contracts, regardless of whether they were gratuitous or onerous. This condition implied that parties to a contract could withdraw from a contract if they felt they had been seriously mistaken. They needed to compensate the other party for the inconvenience and damage, if necessary. This is exactly the principle that Grotius raises to the main point of his doctrine of mistake[1103]: 'If based on the presumption of a fact which is actually inexistent, a promise is of no validity by nature, since the promisor did not assent to the promise but under a certain condition (*conditio*) which in reality did not exist.'

Grotius' conclusion is based on a comparison with the extent of the obligation stemming from a law (*lex*) based on factual assumptions, which turn out to be false[1104]: 'If a law is based on the presumption of a fact, but that fact is actually non-existent, then the law is not binding, since the law falls short of its basis if the fact is not truly there.' It is often thought that the analogy between a contract and a law is an innovation introduced by Grotius in this very context. It is beyond doubt, however, that it dates back at least to the *ius commune* and had become a commonplace in early modern scholasticism[1105].

In the third and last point of his brief account, Grotius notes that a promisor is liable to pay damages to the promisee if he wants to rescind the contract on account of mistake because he has not been careful (*negligens*) in examining the circumstances surrounding the contract or in expressing his consent[1106]. This qualification is reminiscent of Lessius' concession that damages must be payed to the promisee if he is damaged by the rescission of

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[1101] Pothier, *Traité des obligations, selon les regles, tant du for de la conscience, que du for extérieur*, part. 1, sec. 1, art. 3, par. 1 (de l'erreur), p. 21-26.

[1102] If considered separately, the only hint in this direction would seem to imply that Grotius is rather in favor of absolute nullity of promises affected by mistake; cf. Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 6, num. 2, p. 332: 'Similiter ergo dicemus, si promissio fundata sit in praesumptione quadam facti quod non ita se habet, naturaliter nullam eius esse vim, quia omnino promissor non consensit in promissum, nisi sub quadam conditione, quae reipsa non exstitit.' Such an interpretation is not accepted, however, by Feenstra, who argues on account of *De jure belli ac pacis* 3, 23, 4 that Grotius considered promises affected by mistake to be relatively null. Cf. Feenstra, *De oorsprong van Hugo de Groot's leer over de dwaling*, p. 98 (n. 52) and p. 100 (n. 64).

[1103] See the quotation in the preceding note.

[1104] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 6, num. 2, p. 332: '(…) si lex fundetur in praesumptione aliqua facti, quod factum revera ita se non habeat, tunc ea lex non obliget, quia veritate facti deficiente deficit totum legis fundamentum.'

[1105] For the scholastic use of the analogy between *lex* and *contractus*, see our *Jesuit freedom of contract*, p. 441.

[1106] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 6, num. 3, p. 332: 'Quod si promissor negligens fuit in re exploranda, aut in sensu suo exprimendo, et damnum inde alter passus sit, tenebitur id resarcire promissor, non ex vi promissionis, sed ex damno per culpam dato, de quo capite infra agemus.'

an onerous contract on account of the tacit condition[1107]. There seems to be no parallel in Lessius for Grotius' opinion that a mistaken party has a claim to compensation by virtue of the injury done to him, even though the deceit has not been fundamental to the contract – a mere alternative description for the scholastic concept of *dolus incidens*. But in line with the scholastics, Grotius ends his exposition by indicating that he does consider a promise in which mistake is incidental invalid only pertaining to the part of the promise affected by the mistake[1108]. Grotius was undoubtedly thinking here of the rule that the useful should not be vitiated by the useless (*utile per inutile non vitiatur*), which was expressly used by Molina.

To sum up, there is no doubt about Grotius having been highly familiar with the scholastics in general and Lessius in particular. In addition, the scholastic discussion on mistake influenced Pothier through the work of Grotius. The striking resemblance between major parts of Grotius' *De iure belli ac pacis* and Lessius' *De iustitia et iure* should not make us blind, however, to the differences in scope of their respective doctrines.

4.4 Conclusion

Quite unsurprisingly, the scholastics recognized that contractual obligations can be hindered by duress (*metus*) and mistake (*error/dolus*). The reason why they did so, however, might be less obvious and monolithic than expected. It looks as though the weight of the Romano-canon legal tradition and the Aristotelian-Thomistic philosophical tradition prevented them from conceiving of mistake and duress exclusively in terms of lack of voluntary consent. The effect of duress and mistake, respectively, on the validity of a contract is not explained in unanimous terms either. Although it is common for present-day lawyers to think that contracts affected by duress or mistake are voidable at the option of the intimidated or mistaken party, respectively, only at the beginning of the seventeenth century did the scholastics, and Lessius in particular, reach such a generalized conclusion. Presumably, it was the result of an attempt to translate an authentic desire to promote equity into a coherent legal doctrine.

Although fear seems to compromise 'contractual freedom', the Roman law and Aristotle indicated that coerced consent can be voluntary consent anyway. Only when the constant man test is satisfied, can relief be granted. The requirements for meeting this test

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[1107] There is no need to doubt, as Diesselhorst did, Grotius' dependence on Lessius in this respect; cf. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen*, p. 97. Feenstra is right in pointing out that Grotius' remark is slightly more generalizing than Lessius' remark, which concerned onerous contracts in which none of the parties had hitherto performed; cf. *De oorsprong van Hugo de Groot's leer over de dwaling*, p. 98-99 (n. 55-58). It is hard to see, however, why Grotius' explicit addition that this compensation is based on *damnum per culpam datum* would constitute a major (albeit the single one) discrepancy between Grotius and Lessius; cf. *L'influence de la Scolastique espagnole sur Grotius en droit privé, Quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause*, p. 386. It is exactly to the merit of scholastics, such as Molina and Lessius, to have argued that rescission in contracts tainted by mistake can be equally granted on account of extra-contractual injury and lack of contractual consent.

[1108] Grotius, *De jure belli ac pacis* (Ed. De Kanter-Van Hettinga Tromp – Feenstra – Persenaire), lib. 2, cap. 11, par. 6, num. 3, p. 332: 'Si vero adfuerit quidem error, sed in quo fundata non fuerit promissio, ratus erit actus, utpote non deficiente vero consensu: sed hoc quoque casu si is cui promittitur dolo errori causam dederit, quicquid ex eo errore damni promissor fecit, resarcire tenebitur, ex alio illo obligationis capite. Si pro parte fundata erit errore promissio, valebit pro reliqua parte.'

seem to have been lowered over time. Drawing on Soto and Covarruvias, Sánchez widely extended the evil events that can be deemed to have an effect upon a constant man, for example the loss of a minor part of his property. The extent to which threats to persons other than, albeit related to, the contracting party himself could satisfy the constant man test, was also considerably enlarged, so as to include blood relatives in general and friends. Albeit reluctantly, reverential fear and importunate pressure were sometimes recognized as constituting grave fear. Minor fear was thought to invalidate a contract before the court of conscience. Lessius' endorsement of this view left its marks on Grotius.

The question of duress and contractual validity urged the scholastics to constantly find a balance between the duty to protect contracting parties against undue influence, on the one hand, and the need to provide incentives for people to practise the virtues of constancy and fortitude (as explicited by Soto), on the other. The scope of the invalidating power of duress was therefore also limited, for example by the emphasis on the direct connection that must exist between the evil feared and the conclusion of a contract. The Jesuits were fairly unanimous about that, except for Lugo. A further qualification to the ready granting of relief on account of duress concerned compulsion exercised legitimately. The use and abuse of fictitious litigation threats turned out to be a thorny topic in this respect, which highlighted the importance Sánchez and Lessius attributed to individual rights.

The delictual approach to duress prevailed with the early modern scholastics. As Henríquez and Sánchez put it, the injury done to the intimidated party by compelling him to conclude the contract needed to be reversed by granting him the right to decide whether he wished to avoid the contract or to compel the intimidator in his turn to observe the contract. Sánchez, Lessius and Lugo therefore concluded that duress was sanctioned with nullity at the option of the intimidated party (*irritandus*). Consequently, the intimitated party did not need a renewed assent by the intimidator anymore if he wanted the contract to remain valid despite the injury done to him. Grotius would adopt this idea from Lessius and thus guarantee its survival. This was not an obvious choice at the time. Molina and Rebelo, for instance, had claimed that a contract affected by duress was automatically void (*ipso iure irritus*) on account of lack of consent.

The debate on mistake moved along the same lines of thought. The *ius commune* originally supported the idea that *bonae fidei* contracts affected by fundamental mistake were sanctionned with absolute nullity, while contracts *stricti iuris* remained valid at the option of the mistaken party. Imbued with Aristotelian and Scotist philosophy, Summenhart and Medina concluded that *bonae fidei* contracts affected by fundamental mistake must be void *ab initio* for lack of their essence, namely voluntary consent. In the footsteps of Summenhart, Covarruvias inferred from this that it was not implausible to state that both *bonae fidei* contracts and *stricti iuris* contracts must be absolutely void, since both were equally vitiated in their substance. Yet for their own part they eventually remained loyal to the Roman distinction. Importantly, though, Covarruvias added that he was inclined to think that mistake did vitiate voluntary consent in the end.

Molina therefore thought it safer to argue that the mistaken party is granted a right to decide over the existence of the contract because of the injury that has been done to him, and

not merely on account of the possible lack of voluntary consent. Molina believed that the mistaken party could exercise such a right even before a sentence had been pronounced that condemned the deceiver to perform his contractual duties. In this manner, equity needed to prevent that nullity of the contract was to the advantage of the deceiver. A similar concern to protect the deceived party had led Summenhart and Medina to claim that the deceived party could revalidate the contract. Although they equally considered the contract to be void ipso iure (*irritus*), they found it equitable to state that the contract could be revalidated at the option of the deceived party, on the condition that the deceived party had been condemned in court. Sánchez's account indicated the absurdity of Molina's position: if a contract is deemed void in an absolute sense, the deceiver cannot be bound by it anymore, unless by way of punishment pronounced in a court, since contractual obligations have been annihilated *ipso iure* for both parties.

Inspired by the dissenting opinion from the Orléans jurists, Lessius set out to design a more efficacious and logical solution to this problem. He argued that both *bonae fidei* and *stricti iuris* contracts affected by fundamental deceit were voidable at the option of the deceived party (*irritandus*). From this perspective, the deceiver's assent to the contract remained valid, so that he could be urged to fulfill his obligations if the mistaken party wished. The mistaken party was naturally granted a right to confirm or to rescind the contract as a compensation for the injury that had been done to him. The contract was not avoided automatically, because voluntary consent could not be deemed to be entirely vitiated by mistake. Consequently, the distinction between *bonae fidei* / *stricti iuris* contracts had been dissolved.

Within the limits of this investigation, we may conclude that Lessius was the first among the scholastics to have conceived of a general application of nullity at the option of the wronged party as a sanction to both duress and mistake. With one stroke, Lessius deviced a juridically consistent way of implementing the concern expressed by canon law to treat mistake and duress on equal terms, and not allowing the law favor deceivers.

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