

Jesuit freedom of contract

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Summary

This paper describes and explains the central role of the principle of contractual liberty with the Jesuits of the early modern period. Designed as a diptych, it intends to clarify how the legal and the moral philosophical tradition mutually enriched each other at the threshold of modernity. The 'ius commune' helped the Jesuits in formulating the idea of negative freedom, only for that 'ius commune' to undergo a transformation itself under the influence of the scientific account of contract law that the Jesuits were to develop on its basis. First it will be shown how the Jesuits arrived at a moral problem-solving method capable of freeing man from unduly burdensome obligations before the court of conscience through the application of the law of property and procedure. Secondly, this paper will highlight the turn towards positive freedom through the Jesuits' elaboration of a general doctrine of contract as a mutually accepted promise centered around the notions of liberty, consensualism, and the image of the will as a private legislator.

Keywords

Contract law, *forum internum*, *ius commune*, Jesuits, Lessius

Finding that liberty

Recent years have seen a coincident increase in both scepticism about the survival of contract as the queen component of a liberally established legal order, and high rhetoric about the individual right of self-determination in a free and democratic society – as if history were to remind us that great phrases are often inversely proportional to reality. Against the backdrop of growing regulation decreed by a greedy welfare state, the perceived historical transition from status to contract has long been reinterpreted as being turned

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topsy-turvy¹. At a certain moment, some went even so far as to proclaim the death of contract². Of late, scholars have responded in a more positive way by unearthing hidden treasures of historical experiences with contract law in order to lay the foundations of a renewed and strengthened general theory of contract. The early modern scholastic experience, in particular, has been assigned the role of being both the cradle and the future of civil and common law contract doctrine³. Instead of trying to make sense of present day contract law by resorting to Kantian or utilitarian moral philosophy⁴, we are invited to revisit modern contract doctrine in its original Aristotelian-Thomistic framework. For cut off from what is believed to form its genuine moral philosophical context, present contract law cannot but drift and die⁵. This paper does not seek to resolve the controversy surrounding James Gordley's daring claims⁶. It shares a common fascination, though, for an incredibly vast, widespread and stimulating intellectual and practical treatment of various branches of law by the early modern scholastics, and its Jesuit branch in particular⁷. At the very least, it offers comparative legal historians a view on

¹ Compare the well-known analysis of Henry Sumner Maine at the end of the nineteenth century with that of Wolfgang Gaston Friedmann a hundred years on. A selection of illustrative texts of both authors is included in R. Feenstra / M. Ahsmann, *Contract, Aspecten van de begripven contract en contractsvrijheid in historisch perspectief*, [Rechtshistorische Cahiers, 2], Deventer 1988², p. 61–66, num. 43–45.

² An obvious exponent is G. Gilmore, *The death of contract*, Columbus 1974. Interesting reflections are also contained in P. S. Atiyah, *The rise and fall of freedom of contract*, Oxford 1979.

³ J. Gordley, *Foundations of private law: property, tort, contract, unjust enrichment*, Oxford 2006.

⁴ See C. Fried, *Contract as promise, A theory of contractual obligation*, Cambridge Mass. 1981, and R. Posner, *Economic analysis of law*, Boston 1972, respectively.

⁵ Thus the diagnosis of James Gordley in his groundbreaking *Philosophical origins of modern contract doctrine*, Oxford 1991, p. 230–248.

⁶ See the diverging appreciations of the *Philosophical origins*, which range from Italo Birocchi's sceptical review in *Tijdschrift voor Rechtsgeschiedenis*, 61 (1993), p. 132–137, to David Ibbetson's most enthusiastic reading in *The Journal of Legal History*, 17 (1996), p. 188–191.

⁷ Prior to Gordley, the relevance of the scholastics' treatment of contract law had been underlined by 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, *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; P. Cappellini, *Sulla formazione del moderno concetto di 'dottrina generale del diritto'*, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 10 (1981), p. 323–354, and I. Birocchi, *Saggi sulla formazione storica della categoria generale del contratto*, Cagliari 1988, p. 36–41. Of late, A. Somma paid some attention to Molina and Lessius in his *Autonomia privata e struttura del consenso contrattuale, Aspetti storico-comparativi di una vicenda concettuale*,

a system both contemporary and an alternative to legal humanism, *Usus modernus pandectarum* and protestant natural law, that seeks to adapt traditional legal thought to the challenges of the early modern period by combining sound knowledge of Roman and canon law with philosophical traditions and customary practices. At best, knowledge of scholastic legal theory proves to be indispensable for a meaningful reading of protestant natural lawyers like Grotius⁸. Yet the principal aim of this paper is not to try to map the so-called ‘*translatio studii*’. Rather, it aims to give an autonomous explanation of the flourishing of the principle of contractual freedom (*libertas contractuum*)⁹ with the Jesuit moral theologians of the first half of the seventeenth century, with particular attention paid to Leonardus Lessius (1554–1623)¹⁰. This

[Problemi di diritto comparato, 4], Milano 2000, p. 71–73. Another recent contribution on Jesuit contract doctrine is A. Guzmán Brito, *La doctrina de Luis de Molina sobre la causa contractual*, in: A. Guzmán Brito, *Negocio, contrato y causa en la tradición del derecho europeo e iberoamericano*, Navarra 2005, p. 407–439. Of interest, too, is Thomas Duve’s *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*, [Norm and Struktur], Köln 2009 [forthcoming]; I am grateful to Professor Duve for his willingness to provide me with a draft version of his paper.

In the last two decades early modern scholastic legal thought has also been the subject of several monographs. See, amongst others, 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 concept of unjust enrichment in late scholasticism*, [Rechtshistorische reeks van het Gerard Noodt Instituut, 35], Nijmegen, 1996; F. Grunert / K. Seelmann (eds.), *Die Ordnung der Praxis, Neue Studien zur Spanischen Spätscholastik*, [Frühe Neuzeit, 68], Tübingen 2001; 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; 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; and J.Q. Whitman, *The origins of reasonable doubt, Theological roots of the criminal trial*, New Haven–London 2008.

⁸ With regard to particular issues in contract law like the vices of the will, Robert Feenstra has convincingly argued in his *De oorsprong van Hugo de Groot’s leer over de dualing*, in: L. Jacob (ed.), *Met eerbiedigende werking, Opstellen aangeboden aan Prof. Mr. L.J. Hijmans van den Bergh*, Deventer 1971, p. 87–101, that Grotius is still more heavily indebted to Lessius and the early modern theologians than Malte Diesselhorst (*supra*, n. 7), had suggested. Martin Josef Schermaier claims that the present doctrine of error in the ABGB is closer to Lessius than to Grotius and the protestant natural lawyers; cf. *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB*, [Forschungen zur neueren Privatrechtsgeschichte, 29], Wien–Köln–Weimar 2000, p. 143. From a more general philosophical point of view, there is no over-stressing Franco Todescan’s warning that natural lawyers like Pufendorf were more inspired by the early modern, Catholic theologians than they were willing to acknowledge themselves; see *Le radici teologiche del giusnaturalismo laico*, III: Il problema della secolarizzazione nel pensiero giuridico di Samuel Pufendorf, [Per la storia del pensiero giuridico moderno, 57], Milano 2001, p. 5–6.

⁹ An expression literally figuring in Lessius, *De iustitia et iure ceterisque virtutibus cardinalibus*, Antverpiae 1621, lib. 2, cap. 17, dubit. 6, num. 43, p. 203.

¹⁰ The need to study the Jesuits as a distinct branch within the vast corpus of early modern scholasticism has been stressed by Sven Knebel, *Wille, Würfel und Wahrscheinlichkeit: Das*

contribution has been designed as a diptych. In the second part it will show how the Jesuits developed a general theory of contract and promise centered around liberty, consensualism, and the idea of the individual as a private legislator. Yet the idiosyncrasy of their astonishingly liberal contract doctrine can only be explained properly against the background of the early modern theologians' view of human agency and a description of the court before which they intended to judge concrete cases. Providing that much-needed yet often neglected context is the challenge of the first part of this paper. Neither sub-part of this diptych can reveal its ultimate sense without an eye for the whole.

The politics of (con)science

The voluminous treatises on justice and law (*De iustitia et iure*), on restitution (*De restitutione*) and on contracts (*De contractibus*) of the early modern Jesuits will definitely continue to exercise their magic elusiveness as long as 'law' is exclusively understood in the sense of 'loi'. On the other hand, it is interesting enough to find that no small part of the modern concept of 'law' derives its force as well as its contents from the very treatise on laws and on God as the ultimate lawgiver (*De legibus ac Deo legislatore*) written by Francisco Suárez (1548–1617). It is in the introduction to this most influential book of Jesuit legal literature that we find a clue as to the political and ecclesiological embeddedness of the early modern theologians' preoccupation with the universe of laws and rights. In light of the growing ambitions of secular state power and their inclination towards Machiavellian reason of state, Suárez proposed a new model of Church–State relationships that shines in sound

System der moralischen Notwendigkeit in der Jesuitenscholastik, [Paradeigmata, 21], Hamburg 2000. This is not to say, however, that the Jesuits' doctrines are a monolithic bloc.

On the life and times of Lenaert Leys (Leonardus Lessius), born near Antwerp and professor of moral theology at the Jesuit College of Leuven from 1585 to 1600, see T. Van Houdt / W. Decock, *Leonardus Lessius: traditie en vernieuwing*, Antwerpen 2005. Less recent and somewhat biased is the hagiographic account provided by C. Van Sull, *Léonard Lessius de la Compagnie de Jésus (1554–1623)*, [Museum Lessianum, Section Théologique, 21], Louvain–Paris–Bruxelles 1930. From a methodological point of view, his compelling role as a bridge-figure between the renaissance of theological and legal thought on the sixteenth century Iberian peninsula, and the northern natural law traditions of the seventeenth century is sufficiently known from the various contributions by Robert Feenstra. His treatise *De iustitia et iure* was first published in Leuven by Masius in 1605, but the Plantin-Moretus printing house was eager to get Lessius publish subsequent editions with them. In this paper, the fifth edition (1621) is taken as a starting point, given that it was the last edition Lessius could revise during his life. An overview of all the Antwerp, Lyon, Paris, Douai, Milan, Brescia and Venice editions of Lessius's *De iustitia et iure* up till the 19th century 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, 60], Brussel 1998, p. XVIII–XXV.

diplomacy. Theologians have a right to engage in civil law, according to Suárez, given that all secular laws, through their legislator (*causa proxima*), derive from God as from their first cause (*causa prima*)¹¹. In Suárez's natural law account of secular power, political authority is a necessary and hence natural constituent of human life in a community, yet given the concept of nature as Creation, it is also divine in a derivative sense¹². Political power is not directly ordained by God, though. From his theoretical assumption of a 'state of nature', Suárez neatly demonstrates that authority becomes established through a purely humane and natural process¹³. Only upon the *dêmos* in its entirety is natural and hence divine power conferred directly. The community then passes on its natural power to a specific authority¹⁴. Put differently, on account of its derivatively divine nature, positive legislation is potentially binding in conscience, that is provided it is in accordance with the precepts of natural law. Now theologians have a duty to guide man (*homo viator*) on his earthly pilgrimage back to his Divine origin, which in essence includes advising him about the objective laws that govern his existence, and from which he derives subjective rights as well as duties. So theologians must have a good understanding of civil law and get involved in its elaboration and interpretation. This is not to say that Suárez wants the State to be ruled by the theologians. Such an arrogant claim would have ruined a hitherto fairly diplomatic approach. Instead, secular rulers who take natural law (mastered by the Church's scholars) as the model of their own legislative activities, are promised full support and cover by the Catholic church in trying to maintain their independent secular power. Suárez held that a rule of positive law complying

¹¹ Francisco Suárez, *De legibus ac Deo legislatore*, in: Opera omnia, editio nova a Carolo Berton, Parisiis (apud Vives) 1856, tom. 5, Prooemium, p. IX–X; and *De defensione fidei catholicae*, in: Opera omnia, editio nova a Carolo Berton, Parisiis (apud Vives) 1859, tom. 24, lib. 3, cap. 2, num. 1, p. 206.

¹² See, for example, Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 21, num. 6, p. 258.

¹³ The concept of a 'state of nature' already figures in scholastic writings prior to Suárez to reflect upon the question what man would be like if there were no grace and divine revelation. Yet, as a method of considering the bases and necessity of political power, it first emerges in Suárez and Hobbes, as Harro Höpfl points out in his *Scholasticism in Quentin Skinner's Foundations*, in: A. Brett / J. Tully / H. Hamilton-Bleakley (eds.), *Rethinking the foundations of modern political thought*, Cambridge 2006, p. 127–128.

¹⁴ Thus a basic principle of Suárez's political theory as it was directed against lutheranism and the absolutist tendencies of James I Stuart. See, for instance, *De defensione fidei catholicae*, lib. 3, cap. 1, num. 5, p. 207. In interpreting the famous 'lex regia' (Dig. 1,4,1 and Inst. 1,2), Suárez insists on the contractual origins of political power, cf. *De defensione fidei catholicae*, lib. 3, cap. 1, num. 12, p. 210. Drawing on his master's political thought, Lessius would describe the relationship between the governor and the governed in terms of an employment contract in *De iustitia et iure*, 2,1,3,13, p. 17: 'Tota respublica se habet ad principem sicut particularis persona ad custodem, quem stipendio ad se tuendum et custodiendum conduit; et ob hanc causam maxime procuratio boni communis pertinet ad illum ἀρχιτεκτονικῶς'. Lessius had taken lessons with Suárez during his stay at the Collegio Romano from May 1583 till April 1584.

with natural precepts was binding in conscience¹⁵. For it pertains to positive law to embody and specify general natural law principles¹⁶. To sum up, then, Suárez prudently tried to serve both the interests of the Church and the increasingly absolutist secular rulers¹⁷.

The political philosophy of one of the brightest minds their order ever spawned, sheds light on the Jesuits' commitment to giving natural-law-based advice on all sorts of practical problems to princes and private persons who for the sake of their own soul, and in view of ecclesiastical backing of their power were kindly invited to align their legislative or commercial activity with natural law principles. In both modern and early modern terms, the society of Jesus passed itself off as a body of consultants. Their liability for harmful or wrong advice and the billing of the consultancy were discussed by Lessius accordingly¹⁸. The dedication of Lessius's *De iustitia et iure* to archduke Albert and his spouse Isabelle is expressly designed as a mirror-for-princes in which they are recommended to follow the principles of virtue and natural law in their government of the Southern Netherlands¹⁹. All existing problem-solving tools, ranging from Aristotelian philosophy, over *ius commune*, to scholastic theology were merged by the Jesuits to find adequate answers to new challenges such as the rise of commercial capitalism, the growing power of the secular state, and the prospering of protestant sects. In this manner, the Jesuits successfully tapped into a Catholic natural law tradition that traced back its origins to the revival of Thomist philosophy in universities across Europe, and with the Dominicans of the Convento San Estebán in Salamanca in particular, where Francisco de Vitoria (1486–1546) and Domingo de Soto (1495–1560) had already tried to give a natural-law-based answer to the challenges facing them in light of the economic, political, and human turmoil following the discovery of the Americas. Francisco de Toledo (1532–1596), former pupil of Soto and professor at the Collegio Romano, played a particular role in transferring the Salmantine tradition to the young Jesuit

¹⁵ Cf. Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 24, num. 2, p. 269.

¹⁶ On the hierarchical relationship between natural and positive law, see Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 21, num. 10, p. 259–260. Compare with Thomas Aquinas, *Summa Theologiae*, IaIIae, quaest. 96, art. 4.

¹⁷ We have elaborated on this in *Counter-Reformation diplomacy behind Suárez's constitutionalist theory*, in: A. Botero Bernal / R. Narvaez (eds.), *Actas del Primer encuentro latinoamericano de historia del derecho y la justicia* [forthcoming].

¹⁸ As to liability, see *De iustitia et iure*, 2,7,7,33–34, and 2,13,10,77–78. In *De iustitia et iure* 2,35,13,79, Lessius has it that certainly in contractual matters, just like a professional lawyer a confessor can demand a price for his advice.

¹⁹ Although Archduke Albert is said to have always carried Lessius's *De iustitia et iure* enthusiastically with him, his rejection of Lessius's *Defensio potestatis summi pontificis* (in which political views similar to those of Suárez are espoused) is known to have been equally strong; see T. Van Houdt, *Leonardus Lessius over lening, intrest en woeker, De iustitia et iure, lib. 2, cap. 20, Editie, vertaling en studie*, Leuven 1995 [PhD], vol. 2, p. 305–306.

order²⁰. Francisco Suárez had studied law, philosophy and theology at Salamanca with the Dominican Bartolomé de Medina (1528–1581) amongst others, and would hand down the Spanish tradition to Jesuits from all across Europe like Leonardus Lessius as a professor of scholastic theology at the Collegio Romano²¹. It should not go unnoticed either that other leading lights of the Jesuit order like Luís de Molina (1535–1600) and Juan de Mariana (1536–1623) received their training at the University of Alcalá de Henares at a moment when Salamanca thought was very present there. The Jesuits both assimilated and surpassed Dominican scholasticism, however, in that they increasingly enriched traditional theological teaching with the distinctly juridical tradition of the *ius commune*²². Sporadically, even legal humanists like Charles Dumoulin figure among their sources, though religious orthodoxy may have impeded them from quoting the French *mos gallicus* more frequently. It would not even be inappropriate to label the early modern Jesuits' preoccupation with law as a form of *Usus theologicus pandectarum*, given their equally salient concern to harmonize Roman law with customary practices. It is simply stunning to see the Jesuits' amazing experience and prolificacy in law despite the statutes of the *Societas Jesu* prohibiting them from occupying chairs in a law faculty²³. An observation which also holds true with regard to their unsurpassed knowledge in political affairs. It suffices to recall classical Jesuit pieces of political writing, like Pedro de Ribadeneyra's (1526–1611) *Tratado del príncipe cristiano*, and Adam Contzen's (1571–1635) *Politica*. In 1741, Ignaz Schwarz (1690–1763) from Münckhausen would publish his *Institutiones iuris publici universalis* as a reply to the natural law treatises of Grotius, Pufendorf, Thomasius, Vitriarius and Heineccius²⁴. Already by the mid-17th century, Jesuits had written vast, systematic, and influential books on various branches of law. The Spanish canonist Thomas Sánchez's (1550–1610) impressive *De matrimonio* would remain one of the

²⁰ See J.W. O'Malley, *The first Jesuits*, Cambridge Mass.–London 1994, p. 249.

²¹ Compare 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, p. 858–860.

²² A similar observation is made by Paolo Grossi in *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.

²³ MHSI, *Constitutiones* 3, p. 191 (= pt. VI, c. 3, s. 7).

²⁴ Scant biographical details on Ignaz Schwarz, who served as a history professor at the University of Ingolstadt, are provided by C. Sommervogel, *Bibliothèque de la Compagnie de Jésus*, tom. 7, Bruxelles–Paris 1896, col. 946–949. Unfortunately, no further information on Schwarz can be gained from the standard survey of early modern German political and administrative thought by M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Band I: 1600–1800, München 1988, although it does contain a fundamental introduction to German experiments with *ius publicum universale* in the seventeenth and eighteenth centuries which will prove indispensable for anyone with an interest in exploring Schwarz's political thought in its proper intellectual context; cf. p. 291–297.

standard treatises of post-Tridentine matrimonial law²⁵, and the law of obligations as contained in Lessius's *De iustitia et iure* would heavily influence both the moral theological tradition and Grotius's natural law. The Frenchman Joseph Gibalin (1592–1671), a professor of canon law and theology at the Jesuit college of Lyon and an occasional counsellor to Richelieu, wrote a treatise on private and commercial law, *De universa rerum humanarum negotiatione tractatio scientifica*²⁶, which is highly indicative of the Jesuit's ambition to develop a real legal science. If we take into account the title of another one of Gibalin's systematic and scientific treatises, this time on canon law, his *Scientia canonica et hieropolitica*²⁷, it should not come as a surprise that some have gone as far as rebaptizing the Jesuits' transformation of both law and moral theology as a second canon law ('un droit canon second')²⁸. The Spanish Jesuit Pedro de Oñate's (1568–1646) exquisite four-volume treatise *De contractibus* on general contract law, the law of lucrative contracts, and the law of synallagmatic contracts should remind us, though, that Jesuit legal science pertained to much more than merely ecclesiastical matters²⁹.

²⁵ On Sánchez, see J.M. Viejo-Himénez, s.v. *Sánchez*, in: M.J. Peláez (ed.), *Diccionario crítico de juristas españoles, portugueses y latinoamericanos (hispánicos, brasileños, quebequeses y restantes francófonos)*, 2.1, Zaragoza–Barcelona 2006, p. 480–481.

²⁶ The full title of the Lyon-edition (1663) is even more emblematic of the fusion of the entire legal and theological tradition into a single legal science: 'De universa rerum humanarum negotiatione tractatio scientifica, utriusque foro perutilis. Ex iure naturali, ecclesiastico, civili, romano, et gallico. In qua negotiorum humanorum aequitas per omnes negotiationis causas, materias, formas universales ac singulares contractuum, commerciorum, atque sunallagmaticoona diversa genera, ex iisque ortas obligationes, scientificae et solide explicatur, humanarum scientiarum et artium rectus ac pravus usus demonstratur, singulorum statuum, officiorum ac munerum rationes, atque adeo universa oeconomica et politica traduntur'.

²⁷ Again, the full title as taken from the Lyon-edition (1670) is even more telling: 'Scientia canonica et hieropolitica. Opus novum, in tres tomos partitum, in quo singula, quae toto corpore iuris Pontificii sparsa sunt, ad certa, et indubitata principia reducuntur; et ex illis innumerae quaestiones, ad forum tum internum, tum externum pertinentes, facile et solide, quamvis non semper ex vulgi sensu, explicantur. Privati Galliae mores, ac iura cum Romanis conciliantur: universa denique moralis Theologia, ex certis, et constantibus scholasticae principiiis, Patrum sensu, et ecclesiasticis legibus docetur'. It should be noted that C. Sommervogel, *Bibliothèque de la Compagnie de Jésus*, Bruxelles–Paris 1892, tom. 3, col. 1401, num. 7 wrongfully made reference to the title of this work as being 'Sententia canonica et hieropolitica, etc.' – a mistake copied by P. Duclos, s.v. *Gibalin*, in: C. O'Neill – J. Domínguez (eds.), *Diccionario histórico de la Compañía de Jesús biográfico-temático*, vol. 2, Roma–Madrid 2001, p. 1727, and by B. Basdevant-Gaudemet, s.v. *Gibalin*, in: P. Arabeire / J.L. Halpérin / J. Krynen (eds.), *Dictionnaire historique des juristes français XIIIe–XXe siècle*, Paris 2007, p. 365.

²⁸ See P. Legendre, *L'inscription du droit canon dans la théologie, Remarques sur la Seconde Scolastique*, in S. Kuttner / K. Pennington (eds.), *Proceedings of the fifth international congress of medieval canon law*, Salamanca, 21–25 September 1976, [Monumenta iuris canonici, Series C: subsidia, 6], Città del Vaticano 1980, p. 443–454.

²⁹ Pedro de Oñate, 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 monumental treatise on both general and particular

Moreover, it definitely was not a mere intellectual exercise of legal theorists *avant la lettre*. On the contrary, against the backdrop of the objective law hanging over their God-given existence in a political society, it served the practical purpose of determining the subjective rights and duties of people of all walks of life in day-to-day practice³⁰, as is also obvious from Diego de Avendaño's (1594–1688) *Thesaurus Indicus*³¹. Significantly, Leonardus Lessius considered the debates on practical issues (*quaestiones disputatae*) which he organised every week for his students at the Jesuit college of Leuven as the hall-mark of the Jesuit order³².

The court of conscience

These systematic treatises on law and moral theology provided the Church with the tools and know-how to create a universe of laws of conduct in all fields of life that would enable it to counter the growing body of positive state legislation issued by increasingly centralized non- or even anti-Catholic governments³³. During the fifteenth and sixteenth centuries, secular courts

contract doctrine, in part published after his death, amounts to a synthesis of the early modern scholastic doctrine of contract, 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; and 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.

³⁰ Against the background of their direct influence on Grotius's development of the idea of subjective rights, the Jesuits Molina, Suárez, and Lessius are discussed by P. Haggemacher, *Droits subjectifs et système juridique chez Grotius*, in: L. Foisneau (éd.), *Politique, droit et théologie chez Bodin, Grotius et Hobbes*, Paris 1997, p. 73–130. Another indispensable study on the Iberian and scholastic roots of the concept of subjective rights is A. Folgado, *Evolución histórica del concepto del derecho subjetivo, Estudio especial en los teólogos-juristas españoles del siglo XVI*, [Pax juris, Escorialensium Utriusque Studiorum Scripta, 4], Madrid 1960. More recent publications on the subject include A. Brett, *Liberty, right and nature: individual rights in later scholastic thought*, [Ideas in Context, 44], Cambridge 1997, F. Carpintero Benítez's *El derecho subjetivo en su historia*, Cádiz 2003, and the contributions by Hartung, Kaufmann, Pessoa, Schüssler, Seelmann, and Tosi in: M. Kaufmann / R. Schnepf (eds.), *Politische Metaphysik, Die Entstehung moderner Rechtskonzeptionen in der Spanischen Scholastik*, [Treffpunkt Philosophie, 8], Frankfurt am Main et al. 2007.

³¹ On Avendaño, see A. Muñoz García, *Diego de Avendaño (1594–1688), filosofía, moralidad, derecho y política en el Perú colonial*, [Fondo editorial Universidad Nacional Mayor de San Marcos, Serie Humanidades], Lima 2003.

³² Cf. M.W.F. Stone / T. Van Houtd, *Probabilism and its methods: Leonardus Lessius and his contribution to the development of Jesuit casuistry*, *Ephemerides Theologicae Lovanienses*, 75 (1999), p. 363–364. In preparing these practical courses, Lessius made extensive use of the canonist Martín de Azpilcueta's (Dr. Navarrus) *Manuale confessoriorum et poenitentium*, on which he also wrote an unpublished commentary.

³³ See the analysis made by Paolo Prodi in *Una storia della giustizia, Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna 2000.

across Europe had been taking the wind out of the Church's sails, indeed, by gradually adopting its principles of success, thus nibbling away at the Church's share in the market for litigation. As regards contract law, for instance, secular courts had almost universally adopted the original canon law recognition of the binding nature of naked pacts³⁴. However, if states could conquer territories, the Church could conquer souls and consciences, irrespective of the countries they were dwelling in. By attributing to these souls inalienable rights by birth, and in making these natural rights-endowed subjects obey the rules of natural law, the Church would be able to attack positive legislation from within, with conscience as its battleground and the Jesuits serving as its 'storm troopers'. Not without reason have historians made the case for re-naming Catholicism in the period going from the Council of Trent until the end of the Ancien Régime as 'confessional Catholicism'³⁵. For the main business of the Church, certainly for its storm troopers, would become the court of conscience. For a correct understanding of conscience in its early modern Catholic and juridical conception, it is vital to reflect upon its Latin designation as a *forum* or a *tribunal*, that is a real court: *forum poenitentiale, forum internum, forum sacramentale, forum conscientiae*. Significant of this turn towards conscience as a distinct field of jurisdiction obeying its own system of laws is the appearance of a new literary genre reminiscent of the *Differentiae utriusque iuris* that were in vogue in the heydays of the Medieval *ius commune*: the *Differentiae inter utrumque forum, iudiciale videlicet et conscientiae*. As one of its authors the Carthusian Juan de Valero (1550–1625) has it³⁶: 'A judge in [either a secular or an ecclesiastical external] court has no legitimate jurisdiction beyond his own territory. A parish priest, on the contrary, can confess his flocks and absolve them wherever on earth he is'. The omnipresent and global character of this re-fashioned court of conscience could hardly be better described.

³⁴ See the various contributions, particularly the one by R.H. Helmholz on *Contracts and the canon law*, included in: J. Barton (ed.), *Towards a general law of contract*, [Comparative studies in continental and Anglo-American legal history, 8], Berlin 1990.

³⁵ On the use of the term 'confessional Catholicism', see J.W. O'Malley, *Trent and all that, Renaming Catholicism in the early modern era*, Cambridge Mass. 2002, p. 119–145.

³⁶ J. Valero, *Differentiae inter utrumque forum, iudiciale videlicet et conscientiae*, Cartusiae Maioricarum 1616, 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. [...]'. 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, where he was closely connected to the Jesuits as can be seen from a letter Michael Julian (1557–1621), the rector of the Jesuit college at Mallorca, wrote to Valero and which was conceived as a dedication to the *Differentiae*. It is no coincidence either that Valero heavily draws on Leonardus Lessius all along his treatise. More biographical details can be found in A. Gruys, *Cartusiana*, 1: *Bibliographie générale et auteurs cartusiens*, Paris 1976, p. 169.

As to its working, the self-accusation or rather the scruples of the penitent – stirred by pastoral sermons and fraternal admonition, of course – are indispensable. The penitent, at once plaintiff and defendant, is assisted by a priest who can act as both lawyer and God's substitute judge. Yet however paradoxical this may seem, the court of conscience was primarily conceived of as a place of relief and comfort. As the proverb ran, a confessor was expected to be a lion in the pulpit and a lamb in the confessional box³⁷. Juan de Valero warns us that 'the tribunal or court of conscience has a double role. On the one hand, it concerns the sacrament of penance. On the other hand, and regardless of the sacrament of penance, it is aimed at easing the soul by relieving it from scruples and obligations'³⁸. This is the way, indeed, in which from the outset theologians had conceived of the function of the court of conscience. An author himself of a treatise *De contractibus* that would prove to be very influential on the Salamancan tradition, Jean Gerson (1363–1429), had already insisted in his *Doctrina contra nimis strictam et scrupulosam conscientiam* on the need to stop the spread of doubts of conscience that risked to turn into a most pestiferous and counter-productive sense of moral defeatism³⁹. Therefore, it should not come as a surprise to find that the scholastics made a sharp distinction themselves between precepts (*praeceptum*) and counsels (*consilium*), removing the latter from the sphere of obligations that are enforceable in the court of conscience⁴⁰. The *forum internum* only pretended to be a place where rights and obligations deriving from natural precepts could be reinforced. It needs to be stressed, too, that Jesuits like Lessius neatly separated natural law from divine law, considering the latter as a mere instance of positive law. Contrary to divine law, natural law was thought to be based not on divine revelation, but on human nature and the nature of things. Lessius expressly states⁴¹: 'Natural law is the law which

³⁷ Cf. T. Van Houdt, *De economische ethiek van de Zuid-Nederlandse jezuit Leonardus Lessius (1554–1623): een geval van jезuitisme?*, *De zeventiende eeuw*, 14 (1998), p. 27–37.

³⁸ Valero, *Differentiae*, praeludia, rubr. ad num. 2, p.1: 'Forus interior et conscientiae est duplex, alter spectans ad sacramentum poenitentiae, alter ad sedandam animam ab scrupulis et eius obligationibus extra sacramentum'.

³⁹ Cf. M.W.F. Stone, *Scrupulosity, probabilism and conscience, The origins of the debate in early modern scholasticism*, in: H. Braun / E. Vallance (eds.), *Contexts of conscience in early modern Europe, 1500–1700*, London 2004, p. 4.

⁴⁰ On the thirteenth century roots of this distinction, see D. Witschen, *Zur Bestimmung supererogatorischer Handlungen, Der Beitrag des Thomas von Aquin*, *Freiburger Zeitschrift für Philosophie und Theologie*, 51 (2004), p. 27–40. 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.

⁴¹ Lessius, *De iustitia et iure*, 2,2,9, p. 20: 'Ius naturale dicitur quod ex ipsis rerum naturis oritur, scilicet ex natura rationali et naturali conditione operum de quibus hoc ius disponit.

derives its existence from the very nature of things, that is from rational nature and the natural condition underlying the deeds this law regulates. Therefore, on the assumption that human nature exists, its rectitude does not depend on any ordination freely decreed by God or man, but on the very nature of things'. Hence its immutable and secular character⁴². To be sure, the theologians fully recognized that moral debt (*debitum morale seu debitum ex honestate*) also brings about a natural obligation, but the only natural obligation they deemed enforceable in the court of conscience was the natural obligation ensuing from natural law (*debitum ex iure naturali*)⁴³.

The court of conscience was not only the place where law rather than morality was enforced. In addition to the sanctions it imposed in the hereafter on the infringement of natural law precepts by labelling them as mortal or venial sins, the inner court also passed judgments that had consequences *hic et nunc* on earth. Of course, the theologians acknowledged that the regulation of patrimonial rights was first and foremost a matter of civil law. But restitution and the establishment of equilibrium between assets valuable in money definitely formed an integral part of their job as confessors too⁴⁴. For if restitution was possible, no sin could be forgiven unless the balance upset between people and their goods was restored⁴⁵. Still more symptomatic of the real impact of sentences pronounced in the court of conscience are the legal remedies before the external courts that follow from them. Juan de Valero affirms that any infringement on the natural law brings about a sanction

Unde eius rectitudo, supposita existentia naturae humanae, non pendet ex aliqua libera ordinatione Dei vel hominis, sed ex ipsa rerum natura'.

⁴² On the late scholastic origins of Grotius's 'impious hypothesis', see A. Dufour, *Les Magni Hispani dans l'œuvre de Grotius*, in: F. Grunert / K. Seelmann (eds.), *Die Ordnung der Praxis, Neue Studien zur Spanischen Spätscholastik*, [Frühe Neuzeit, 68], Tübingen 2001, p. 351–380.

⁴³ 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'.

⁴⁴ Valero, *Differentiae*, praeludia, num. 4–5, p. 1: 'Observa quod lex civilis seu forus contentiosus solum intendit conservationem patrimonii, et non curat de salute animae, ut docet Innocentius in c. sicut dignum, num. 5 de homicidio [X 5,12,6]. Et ideo non mirum si multis differentiis (de quibus infra late agetur) differat forus contentiosus a foro animae et interiori, cum contentiosus, ut praediximus, non curet nisi de reservando patrimonio. Forus vero animae solum et principaliter intendat servare animam a peccato. Et etiam curat de restitutione alieni patrimonii, si casus talis sit, quod ad liberandum animam a peccato, sit ei necessarium restituere aliquid, cum dimitti nequeat peccatum, nisi restituatur ablatum, cap. si res aliena, 15 [sic], q. 6 [C. 14, q. 6, c. 1]'.

⁴⁵ Cf. Lessius, *De iustitia et iure*, 2,7,10 and Augustinus, *Epistula* 153, num. 20 [PL 33]: 'Si enim res aliena, propter quam peccatum est, cum reddi possit, non redditur, non agitur poenitentia, sed fingitur: si autem veraciter agitur, non remittetur peccatum, nisi restituatur ablatum; sed, ut dixi, cum restitui potest'.

hic et nunc in the *forum contentiosum*. Any time a person does not obey the natural law, for instance by not observing his duty to make restitution, an action or exception lies in the external court to the party who is by nature entitled to that person's performance. In the ecclesiastical court, he can have recourse to evangelic denunciation (*denuntiatio evangelica*) and to the judge's office (*officium iudicis*)⁴⁶. Better still, he can defend himself at any time with an exception of bad faith (*exceptio malae fidei*) against a plaintiff who has been sentenced in the court of conscience. This holds true before the secular external courts, too, given that a secular judge is supposed to recognize all exceptions grounded in canon law equity⁴⁷.

Conscious self-ownership

Valero may well have been a good guide in marking the contours of the tribunal of conscience, he is not, however, the best exemplar. Should we wish to find the ultimate grounds for the birth of freedom of contract at the outset of the seventeenth century. After all, that remains a distinctly Jesuit affair. Mindful of man's status as a natural being created in the image of God and hence endowed with the divine-like capacities of reason and will, they focussed on man's ability to have governing power and authority over both other persons and things capable of being subjected to him as man's most fundamental right. They called this distinctly human power *dominium*, which only in a limited sense can be translated by 'ownership' (*dominium proprietatis*), since it also includes political or jurisdictional power (*dominium iurisdictionis*)⁴⁸. Still, in defining *dominium* as a real right entailing the most perfect use and disposition over a thing within the limits set by the law, Lessius came very close to our modern definition of ownership⁴⁹. All goods that could be

⁴⁶ Valero, *Differentiae*, praeludia, num. 15, p. 2: 'Ubi cumque quis est ligatus et tenetur aliquid restituere vel facere in foro conscientiae, si id non faciat vel restituit – licet ad id non teneatur in foro iudiciali nec compelli in eo possit – remedium esse adire Ecclesiam per denunciationem evangelicam seu iudicalem. Ut deducitur ex Abba [Panormitano] in c. quia plerique, num. 17 ante secundum casum, de immunitate ecclesiarum [X 3,49,8]. Ad iudicem quippe ecclesiasticum spectat impedire peccatum vel ab eo liberare, cap. novit, de iudiciis [X 2,1,13], Abbas [Panormitanus] in cap. 1, num. 2 de pactis [X 1,35,1].

⁴⁷ Valero, *Differentiae*, praeludia, num. 16, p. 2: 'Et ad istam denunciationem tradit regulam notabile Petrus de Ancharano consilio 5, incip. Pro parte, ubi dicit quod ubi quis potest conveniri in foro ecclesiastico per dictam viam denunciationis, multo magis poterit excludi exceptione malae fidei in foro civili. Quia exceptiones descendentes ex aequitate canonica debet secularis iudex admittere, cap. licet de iururiando, lib. 6 [VI 2,11,2], cap. 2 de exceptionibus eodem libro [VI 2,12,2]. Quod commendat Felinus [Sandaeus] d. cap. fin. num. 3 in fin. de praescriptionibus [X 2,26,20]'.

⁴⁸ See Lessius, *De iustitia et iure*, 2,3,1,1–4.

⁴⁹ Lessius, *De iustitia et iure*, 2,3,2,7, p. 22: 'Dominium est ius in re extendens se ad omnem eius usum seu dispositionem nisi lege prohibeatur'.

augmented or diminished through work and industry could form the object of *dominium*⁵⁰. Thus, contrary to what the Dominican Tommaso da Vio Cajetano had held in his commentary on Thomas Aquinas, Lessius strongly affirmed what Domingo de Soto had brought up in the middle of the sixteenth century, namely that man was also the owner (*dominus*) of his fame and honour⁵¹. An ambition of the Jesuits that was not marginal would prove to be the stimulation of industry and zeal inside as well as outside the classroom, indeed, through the incentive of honour and fame; and it is small wonder that theologians like Lessius put liability for harm to immaterial rights such as the right to good reputation on a par with harm to material rights, both requiring a redress as a matter of commutative justice⁵². There is a strong case to be made, too, for the Jesuits' liberation of the spirit of commercial capitalism, again on the basis of their astonishing willingness to reward a hard-working businessman's prudence and industry⁵³. Typically, Lessius does not recognize that the political community has a right as a matter of commutative justice to make a businessman sell certain goods for the sake of the common good, even though criminal law may impose sanctions on the acquisition of an excessively monopolistic position ensuing from the businessman's legitimately performed industry⁵⁴. Lessius's argumentation is that a *dominus* has an absolute and sacrosanct property right over his goods. It is the very sign of his ownership

⁵⁰ Lessius, *De iustitia et iure*, 2,4,10,57, p. 40: 'Dominium non est nisi in res eas quas nostra industria nobis possumus adsciscere. Has enim sicuti possumus acquirere, ita etiam relinquere. Atqui vitam nemo sua industria potest acquirere'.

⁵¹ Cf. Domingo de Soto, *De iustitia et iure*, Salmanticae 1562 [editio princeps: Salmanticae 1553–4], lib. 4, quaest. 2, art. 3, p. 284: 'Opinio ergo nostrae contraria [sc. Caietani] collocat honorem et famam in ordine vitae, nos autem in ordine bonorum exteriorum. (...) Homo vere ac legitime est suorum bonorum omnium dominus, ut citra cuiuspiam iniuriam, quae proprie sit contra iustitiam, possit illa dispendere ac negligere, illisque uti. Honor et fama sunt propria hominis bona, ei iure naturali concessa, atque ab ipso acquisita et aucta. Neque ulla iustitiae lege, si est privata persona, prohibetur illa dispendere'. Lessius, *De iustitia et iure*, 2,4,11,59–60.

⁵² See J. Gordley, *Reconceptualizing the protection of dignity in early modern Europe: Greek philosophy meets Roman law*, in: M. Ascheri e.a. (eds.), *Ins Wasser geworfen und Ozeane durchquert*, Festschrift für Knut Wolfgang Nörr, Köln–Weimar–Wien 2003, p. 281–305.

⁵³ This case has already been made, incidentally, by H.M. Robertson in his *Aspects of the rise of economic individualism: a criticism of Max Weber and his school*, [Cambridge studies in economic history, 1], Cambridge 1933. Compare F. Carpintero Benítez, *Los escolásticos españoles en los inicios del liberalismo político y jurídico*, *Revista de estudios histórico-jurídicos*, 25 (2003), p. 341–373, and W. Decock, *Lessius and the breakdown of the scholastic paradigm*, *Journal of the history of economic thought*, 31 (2009), p. 57–78.

⁵⁴ Lessius, *De iustitia et iure*, 2,21,21,151, p. 296: 'Nec refert quod hac ratione inducta sit caritas, quia etiam multitudo emptorum inducit caritatem, non tamen ideo illi emendo peccant contra iustitiam, quia actio illa ex qua provenit caritas non est contra iustitiam. Neque etiam supprimendo seu non vendendo, quia non tenetur ex iustitia tunc vendere, cum nullo pacto se ad hoc obligarint. Poterant enim eas in aliud tempus servare vel in alia loca deferre vel etiam vastare absque iniuria cuiusquam, quia perfectum dominium earum habebant. Neque cives habebant ius iustitiae ad eas emendas, nisi ipsis vendere volentibus, alioquin dicendum esset ipsos peccaturos fuisse contra iustitiam, si res suas in flumen proiecissent'.

that he would even have the power to destroy them if he wished so⁵⁵. Lessius's younger colleague Juan de Lugo (1583–1660) would confirm that a private person only needs to look after his own interest (*privata commoda*), since he considered the use of information which helps an individual to acquire a dominant market position an essential part of economic prudence (*prudencia oeconomica*)⁵⁶. Gregorio de Valentia (1549–1603) would unhesitatingly speak about the lawful love for one's own property (*ius amandi proprias res*)⁵⁷. The sole comparison with Valero's absolute prohibition on the devastation and unlimited use of privately owned goods in the court of conscience, illustrated exactly on the basis of the case of an industriously created monopoly, suffices to highlight the exceptionally liberal views the Jesuit moral theologians took⁵⁸.

The Jesuits not only held that man has a strong right of property over his goods. The mainstay of their liberalism was founded upon the assumption that human will is the owner of its very actions (*voluntas domina suorum actuum*)⁵⁹ – a key premise they had insisted on if only to enable them to refute the Dominicans and the Lutherans in the dogmatic controversy on the interaction between grace and free will in the process of justification⁶⁰. Given that they considered freedom of action to be a right 'possessed' by man's free will, the Jesuits would now be able to apply a key controversy within the law of property to the question of human agency and conduct in general. What we are witnessing here, is a masterly example of the reception of legal reasoning into moral theology, which eventually would prove to be not entirely without consequences for the subsequent transformation of law itself. The legal problem at issue concerns your good faith, and hence lawful prescription, when you continue to possess a thing even if doubts have arisen as to the lawfulness of your ownership of this thing. In the footsteps of the utmost influential Spanish canonist Diego de Covarruvias y Leyva (1512–1577), yet contrary to Domingo de Soto and Adrian of Utrecht (1459–1523), Lessius affirms that even in doubt you still have enough good faith to lawfully continue your possession of a thing initially acquired in good faith. In producing reasonable arguments

⁵⁵ Cf. Lessius, *De iustitia et iure*, 2,3,2,8, p. 22: 'Proprium est perfecti domini ut possis re tua uti pro tuo arbitratu eam vel tibi servando vel vendendo vel donando vel vastando'. And *o.c.*, 2,4,10,58, p. 40: 'Proprium veri domini est rem pro arbitratu suo posse perimere etiam voluptatis causa'.

⁵⁶ Juan de Lugo, *Disputationes de iustitia et iure*, Lugduni 1652, tom. 2, disp. 26, par. 2, num. 143, p. 303.

⁵⁷ 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.

⁵⁸ Cf. Valero, *Differentiae*, s.v. *peccatum*, diff. 15; s.v. *obligatio*, diff. 7; s.v. *venditio*, diff. 5.

⁵⁹ See Lessius, *De gratia efficaci, decretis divinis, libertate arbitrii et praescientia Dei conditionata disputatio apologetica*, Antverpiae 1610, cap. 5, num. 11, p. 53.

⁶⁰ See W. Decock, *The early modern scholarly debate on divine grace and justice in economic exchange*, in K. Härter (ed.), *Gnade, Vergebung und Gerechtigkeit in der frühen Neuzeit*, [Veröffentlichungen des Max-Planck-Instituts für europäische Rechtsgeschichte] [forthcoming].

for his view, Lessius quotes the maxim that in doubt the position of the possessor is the stronger (*in pari dubio melior est conditio possidentis quam non possidentis*)⁶¹. It would be no exaggeration to claim that the vicissitudes of this rule converge with the history of Jesuit moral philosophy itself. In the mid-seventeenth century we find the Spanish Jesuit Antonio Perez (1599–1649) claiming, indeed, that the ‘*melior est conditio possidentis*’-rule of *ius commune* property law has been the singular cornerstone on which the whole building of Jesuit moral theology had been established⁶². The origins of this rule can be traced back from canon law through to the *Corpus Iustinianicum*. In his rules of law Pope Boniface VIII transferred the Digest principle ‘*melior est conditio possidentis*’ into a procedural context, where it came to mean that the defendant was given the benefit of the doubt: ‘*in pari delicto vel causa potior est conditio possidentis*’⁶³. The canon lawyer Martín de Azpilcueta’s (1493–1586) endorsement of these *ius commune* principles and its transposition into the context of human agency proved sufficiently authoritative for the Jesuits to adopt and further elaborate on them⁶⁴. But how far was this rule of property law to be extended into the realm of human agency? Suárez thought it could be applied to all doubts of law (*dubium iuris*), but not generally speaking to doubts of fact (*dubium facti*). In 1577 Bartolomé de Medina had brought about a revolution in moral theology by stating that in doubt, a probable opinion could be followed even if other opinions were more probable – an opinion was deemed probable if it was backed either by sound argument or good authority⁶⁵. This theory, known as ‘probabilism’, radically departed from traditional ‘probabilioristic’ or ‘tutoristic’ doctrine which held that in doubt, for the sake of our soul the safer opinion had to be followed, namely that a certain obligation existed⁶⁶. Not only had tutorism been the traditional Catholic doctrine to deal with moral uncertainty, it continued to be standard moral decision-making theory in Protestant circles,

⁶¹ Lessius, *De iustitia et iure*, 2,6,3,11, p. 56.

⁶² 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; 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.

⁶³ Dig. 43,33,1,1, and VI, reg. iur. 65.

⁶⁴ Cf. Martín de Azpilcueta (Dr. Navarrus), *De ablatorum restitutione*, tom. 2, lib. 3, cap. 4: ‘in dubiis, maxime in materia iustitiae, melior est conditio possidentis’. Also with regard to lying and mental reservation, Dr. Navarrus laid the foundations of much of the Jesuits’ doctrines, certainly with Lessius.

⁶⁵ Cf. B. de Medina, *Expositiones in Primam secundae divi Thomae*, quaest. 19, art. 6.

⁶⁶ On the vicissitudes of probabilism as a moral problem solving method from Antiquity till modern times, see 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.

for instance in seventeenth century England⁶⁷. Medina had still limited his probabilistic doctrine to doubts about the need to obey if that would have led to notable losses⁶⁸. Suárez, on the contrary, consistently adopted the teaching of his Salamancan master to doubts about the law and precepts in general. Any time doubts about a law's validity or existence started to plague a person, he could ignore it, for as a general rule, an individual possessed freedom of action until a law sufficiently and clearly promulgated had come to abolish it (*lex dubia non obligat*)⁶⁹. Other Jesuits like Thomas Sánchez and Juan de Salas would radicalize the liberty-centered system of probabilism, even if Gabriel Vasquez seems out of tune with the liberal thrust of Jesuit moral philosophy in general. Thomas Sánchez would extend the rule from matters of justice to all virtues⁷⁰. Juan de Salas (1553–1612), who wrote a remarkably positive review (*censura*) of Lessius's *De iustitia et iure*⁷¹, expressly talks about man's possession of liberty and his right to do what is most useful to him⁷². Up until the early eighteenth century Jesuits would continue to endorse this view of freedom of action as a property protected by the '*melior est conditio possidentis*-rule'. Ignaz Schwarz, for instance, has it that 'this rule providing that the position of the possessor is the stronger not only holds true as a matter of [civil] justice, but also in conscience. The reason is that in conscience man has a firm right of possession of his liberty'⁷³.

⁶⁷ On Soto's tutorism, see T. Deman, *Probabilisme*, in Dictionnaire de Théologie Catholique, tom. 13, part. 1, Paris 1936, col. 460–461, and M.W.F. Stone, *The origins of probabilism in late scholastic moral thought, A prolegomenon to further study*, Recherches de Théologie et Philosophie Médiévales (Forschungen zur Theologie und Philosophie des Mittelalters), 67.1 (2000), p. 149–154.

⁶⁸ Cf. 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. 160.

⁶⁹ For an in-depth study of this principle in both Suárez and Lessius, see M.W.F. Stone / T. Van Houdt, *Probabilism and its methods: Leonardus Lessius and his contribution to the development of Jesuit casuistry*, *Ephemerides Theologicae Lovanienses*, 75 (1999), p. 359–394.

⁷⁰ Cf. T. Sanchez, *Opus morale in praecepta Decalogi*, Antverpiae 1614, tom. 1, lib. 1, cap. 10, num. 11, p. 41: 'Quae ratio aequae militat in cuiuscunque virtutis materia. Nam ex altera parte est aequale obligationis ius dubium, ex parte voluntatis, et ex parte illius virtutis; ex altera autem est ius certum possessionis libertatis pro voluntate, dum non probatur eius libertatis privatio obligatione aliqua contracta. Ergo idem dicendum est in cuiuscunque virtutis materia'.

⁷¹ ARSI, *Censurae*, tom. 3, 1603–1631, 654.

⁷² 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.

⁷³ 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

It is not difficult to see the utmost liberalistic turn implied in this generalized combination of the ‘*melior est conditio possidentis-rule*’ with the idea of freedom as a basic good possessed by human will. What is more, there is clear evidence that the Jesuits consciously favoured this liberalistic policy in the court of conscience. As is pointed out by Antonio Perez, the Jesuits deliberately took the view that in doubt you are still in possession of your liberty (*dubitans est possessor suae libertatis*), since they actively sought to promote freedom of action and the relief of too many burdensome obligations (*quia favent libertati operandi et ab innumeris obligationibus homines liberant*)⁷⁴. Hence it is not surprising to find Lessius applying the maxim of liberalism par excellence (everything not explicitly forbidden, is allowed) to solve particular cases of conscience⁷⁵. Any law pretending to limit man’s original freedom should convincingly prove its right, for the onus of proof lies with the plaintiff. A law is comparable to a plaintiff, indeed, and man as a defendant remains in his original state of freedom until the existence of obligation is proved beyond doubt⁷⁶. With regard to the natural law obligation to make restitution, for example, a man cannot be bound by any legal obligation to ‘negatively’ prevent someone else from incurring damage absent his own fault or involvement unless such an obligation derives from his social position or if he has promised to do so by contract (*ex officio aut contractu*)⁷⁷. Consequently, you are not bound in the court of conscience to run to the rescue of someone who is drowning as a matter of justice, although you might consider it to be an unbinding, moral obligation. To be sure, injustice and harm to the rights of other people can ensue from ‘positive’ actions. In that event, an obligation

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*’.

⁷⁴ Perez, *De iustitia et iure*, tract. 2, disp. 2, cap. 4, num. 78, p. 174.

⁷⁵ For example, Lessius, *De iustitia et iure*, 2,21,5,47.

⁷⁶ 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’.

⁷⁷ 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, dubit. 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’.

to make restitution and repair the damage caused to someone else's patrimony does arise as matter of natural law. Apart, though, from cases of unjust enrichment through your wittingly or unknowingly possessing another's good (*ratione rei acceptae*), or the unjust and often criminal acquiring of a thing through theft, or murder, for example (*ratione iniustae acceptionis*), an obligation for you to make restitution can only arise through your freely conferring upon another by contract the right to claim a performance from you (*ex contractu*).

From *ius commune* to *libertas contractuum*

Being the sovereign owner of its choices and courses of action, will acts as a person's private lawgiver which is in a position to bind itself through a contract as though contract were a personally issued law. The consequences of the Jesuits' basic and explicit treatment of contract as an act of private legislation – a couple living together ever since Dig. 50,17,23, recognized by Boniface VIII in VI 5,13,85, thought to be married by Domat, and enjoying its offspring in art. 1134 of the French Civil Code – will become apparent mostly with regard to the formation and the interpretation of contracts⁷⁸. However, we need to deal first with the 'scholastic' nature of early modern Jesuit contract doctrine, and the right as well as false conclusions often unconsciously drawn from this. Scholasticism is often deemed to imply an unduly high esteem for authoritative texts and professors. But did that impede the early modern scholastics from establishing the consensualist principle of freedom of contract? A key principle of the scholastic method consists in defining basic concepts and highlighting a priori assumptions before tackling the theoretical question or the practical case at hand. It requires sufficient demonstration, too, of a certain acquaintance with past scholarship before starting and pretending to know everything much better. In fact, that is what we find Lessius doing in chapter seventeen of his book on the virtue of justice (*de contractibus in genere*), before he launches his own and proper view of contract as promise in the subsequent chapter (*de promissione et donatione*).

In sketching the established *ius commune* teachings on contract, Lessius already points out some of the shortcomings in the Roman and medieval account of contract law compared with his own natural law doctrine. Although he quotes Labeo's time-honoured definition of contract as *synallagma* or

⁷⁸ 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.

mutual obligation⁷⁹, Lessius slightly modifies the formula in calling contract merely an external signal of practical significance which produces an obligation for both parties to the contract on account of their mutual consent⁸⁰. Next, by referring to C. 4,21,16 he opens up the definition to the effect that it also includes unilateral contracts, like donation, only to finish by saying that, personally, he uses ‘contract’ as a synonym to ‘pact’⁸¹: ‘We understand contract in the widest of senses, that is as a pact, so that it also encompasses gratuitous contracts, which we should consider as a kind of semi-contract’. As such, any pact, defined by Lessius as a mutually accepted expression and coincidence of wills, that is a *conventio* in the Roman sense of the word in which the element of acceptance is underlined⁸², is to be considered enforceable. At which point Lessius stresses the need for mutual acceptance of the externally expressed wills⁸³: ‘Even though a donation or promise are mutually willed, these wills do not constitute a pact in essence unless they are mutually accepted by their addressee. For only through acceptance do they change into a pact’. Otherwise we are not dealing with a pact in Lessius’s sense, but rather with an unbinding ‘*conventio*’ or ‘*pactum*’ in the Roman sense of the word. It is precisely his stressing the need for acceptance along with the offer to get a binding contract, which makes Lessius a unique harbinger of a fundamental principle of present day contract doctrine⁸⁴. Yet despite the glimpses of innovation surprising us right from the outset, the traditional Roman categories of enforceable contracts, and the Medieval doctrine of the *vestimenta pactorum* are reviewed first. Lessius reduces the ‘clothes reinforcing a naked pact’ to just six categories: unilateral performance (*interventus rei*), oral solemnities (*verba*), written solemnities (*litterae*), a name (*nomen*), addition to an enforceable contract (*cohaerentia cum contractu*), and oath (*iuramentum*)⁸⁵.

⁷⁹ Dig. 50,16,19.

⁸⁰ Lessius, *De iustitia et iure*, 2,17,1,2, p. 195: ‘Itaque contractus est signum externum practicum, ultrocitroque obligationem ex consensu contrahentium pariens, quod nomine Graeco [sc. synallagmati] clarius indicatur’.

⁸¹ Lessius, *De iustitia et iure*, 2,17,1,5, p. 196: ‘Nos nomine contractus utimur hinc ample, ut idem sit quod pactum et comprehendat contractus gratuitos, qui sunt veluti semicontractus’.

⁸² Dig. 2,14,1.

⁸³ Lessius, *De iustitia et iure*, 2,17,1,5, p. 196: ‘Unde donatio et promissio, etiamsi a duobus communi consensu fiant, antequam sint acceptatae et accedat consensus reciprocus eius in quem diriguntur, non habent rationem pacti: sed per acceptationem transeunt in pactum’.

⁸⁴ Cf. J. Gordley, *Philosophical origins*, p. 79–82, and R. Zimmermann, *Ius commune, Europäische Rechtswissenschaft in Vergangenheit und Gegenwart*, in D. Heirbaut / G. Martyn (eds.), *Napoleons nalatenschap: tweehonderd jaar Burgerlijk Wetboek in België / Un héritage napoléonien: bicentenaire du Code Civil en Belgique*, Mechelen 2005, p. 408, n. 182.

⁸⁵ An excellent overview of the development of the theory of the *vestimenta pactorum* from Piacentino up till André d’Exea is provided in I. Birocchi, *Saggi sulla formazione storica della categoria generale del contratto*, Cagliari 1988, p. 104–128, and, even more extensively, I. Birocchi, *Causa e categoria generale del contratto, Un problema dogmatico nella cultura privatistica*

The points at which *ius commune* deviates from natural law doctrine are systematically indicated, then. Lessius insists on the enforceability of innominate contracts as a matter of natural law, for instance, despite the civilian requirement of either unilateral performance or the addition of another vestimentum⁸⁶. In expounding his doctrine of the vices of the will, Lessius makes a huge effort to demonstrate that from a natural law point of view, the distinction between the *contractus bonae fidei* and the *contractus stricti iuris* concerning mistake does not make sense⁸⁷. As common late scholastic doctrine held, the court of conscience was explicitly conceived of as the court of equity (*forum aequitatis*) which tried to get rid of the subtleties introduced by Roman civil law precisely through generalizing the *bona fides* requirement. In this manner, Lessius tried to introduce a general regime of relative nullity ensuing from mistake and deceit (*error / dolus*), contrary to the usual civil law regime which he summarizes as follows⁸⁸: ‘The doctors of law make a distinction between *contractus bonae fidei* and *contractus stricti iuris*. If deceit lies at the basis of the former, they are said to be void. The latter remain valid despite the underlying deceit and can still produce an action in the external court. This action can be resisted, however, by means of an exception of deceit’. Lessius tried to get both regimes closer to one another as follows. In the case of a *bona fides* contract, he argues, mistake which has given rise to the contract results not in absolute but rather in relative nullity in favour of the mistaken party. Through a reinterpretation of Dig. 4,3,7 and C. 8,38,5, Lessius seeks to demonstrate that Roman law itself would not consider a *contractus bonae fidei* to be absolutely void but rather void in favour of the mistaken party⁸⁹. He criticizes Jean Feu, Jean Faure and Pierre de Belleperche for having intended to blur the distinction between the two regimes, too, but without having produced a sufficiently appropriate and corresponding argumentation. At the same time, Lessius seeks to demonstrate that pretorian Roman law, on account of equity, had already recognized that in a *contractus stricti iuris* an action of rescission lies with the deceived party⁹⁰. To conclude, Lessius

dell'età moderna, I: *Il cinquecento*, [Il Diritto nella Storia, 5], Torino 1997, p. 31–94. A thoroughgoing analysis of Medieval contract law has been made by 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.

⁸⁶ Lessius, *De iustitia et iure*, 2,17,3,14.

⁸⁷ A discussion of Lessius's view on *dolus* and *contractus bonae fidei* is included in M.F. Cursi, *L'eredità dell'actio de dolo e il problema del danno meramente patrimoniale*, Napoli 2008, p. 187–191.

⁸⁸ Lessius, *De iustitia et iure*, 2,17,5,31, p. 199.

⁸⁹ Lessius, *De iustitia et iure*, lib. 2, cap. 17, dubit. 5, num. 31, p. 199: ‘Itaque [C. 8,38,5] insinuat contractum bonae fidei non esse omnino nullum, sed posse rescindi’.

⁹⁰ Lessius, *De iustitia et iure*, 2,17,5,31, p. 199: ‘Notandum est contractus stricti iuris, quibus dolus causam dedit, iure civili dici validos, quia mero iure civili (ut distinguitur a iure praetorio) non datur actio ad talis contractus rescissionem (...). Iure tamen praetorio (quod est moderatio quaedam iuris civilis) etiam datur actio ad rescissionem contractus stricti iuris, cui dolus causam

claims that there is a general regime of relative nullity, implying that the deceived party has the ability to rescind the contract at his own will, whereas no new consent of the fraudulent party is needed in the event the deceived party wants the contract to remain valid. The final motivating factor behind this advocacy for an equal treatment of the formerly distinguished types of contract is that the common good (*bonum commune*) demands it. For along these new lines a contract is still binding, in case the mistaken party disclaims his right to nullify the contract, for instance because he actually benefits from it. In this way, the legal system could frustrate the attempts made by unscrupulous gamblers who first by fraudulent means entice the other party into a contract only to defend themselves against the action of the winner upon losing the game by claiming that the contract was void. This formed a massive problem in his time, as Lessius explains further on in a chapter on gambling and contracts of chance⁹¹.

Still another, obvious discrepancy between Roman law, canon law, statutory law and natural law regards the question whether a ‘nude pact’ is binding. By the time Lessius was writing his treatise, this question had actually been settled. In practice, all courts recognized the enforceability of naked promises, and by the mid-sixteenth century scholars like Ulrich Zasius (1461–1535), Matthias van Wesenbeke (1531–1586), and Charles Dumoulin (1500–1566) had managed to re-interpret Roman law so as to make it compatible with actual practice (*pacta quantumcumque nuda sunt servanda*), despite the resistance of authoritative humanists like Andreas Alciato (1492–1550) and François Connan (1508–1551). It is all the more significant of Lessius’s scholastic attitude, then, that he faithfully repeats the *ius commune* principle that according to civil law naked pacts are not binding, although he insists on its binding character as a matter of natural and canon law. Nevertheless he makes sure to quote the usual rationale behind the *ius commune* principle of non-enforceability in order to demonstrate that original Roman law is not wholly at variance with the natural law regime: traditional Roman law does not resist naked pacts, but merely refuses to assist them, lest the judicial system is overloaded and the promisor has only a limited right to revoke his promise⁹². He further points out the extraordinary treatment of the *pacta legitima*, and the natural obligations that in Roman law were nonetheless deemed to ensue from a naked pact. From a methodological point of view, this is interesting. Lessius’s need to show here as elsewhere that Roman law is not going against natural law principles attests to the theoretical authority the *Corpus Iustinianicum* still enjoyed with the early modern theologians. On the other hand, Lessius, unlike the civilians, does not feel the need to prove at any cost that Roman

dedit, et ita iure praetorio etiam hic contractus est simili modo invalidus. Aequitas enim postulat ut possit rescindi⁷.

⁹¹ Lessius, *De iustitia et iure*, 2,26,2,11.

⁹² Lessius, *De iustitia et iure*, 2,17,4,21, and 2,19,3,26.

law is entirely in accordance with contemporary practice and other normative sources like canon or natural law. What is more, Lessius occasionally dismisses Roman law as an authoritative source of positive law altogether⁹³: ‘Laws and customs differ from place to place. Nowhere is the law of the Code or the Digest preserved’. In a similar vein, Lessius’s master Francisco Suárez had already relegated Roman law to academia, denying it to have any normative value as positive law outside the territories under immediate control by the Pope or the Holy German Emperor. He was not even willing any more to consider it to be a useful ‘law of last-resort’ in Spain and Portugal, contrary to what Antonio Gomez (1501–1562) had envisaged in his commentary on the *Leyes de Toro*⁹⁴. In a certain sense, then, it is not entirely mistaken to call the late scholastic movement a critique of the *ius commune*⁹⁵, although one should not turn a blind eye to the ubiquitous presence of Roman, let alone canon law, as both an analytical tool and a model legal system in the Jesuits’ manuals on justice and law. The scope of their argument was different, however, as is testified by the Spanish Jesuit Pedro de Oñate (1567–1646) in one of the opening chapters of his volume on general contract doctrine⁹⁶: ‘A vast number of irritating and useless disputes and lawsuits have been removed thanks to the conformity of natural law, canon law and Iberian law with regard to the enforceability of naked pacts. In the most sensible way, *liberty* has been restored to the contracting parties, so that whenever they want to enter into whatsoever a contract in whatever way, their freely made agreement will be enforced before any court they want’. Liberty, again.

Conditional consensualism

Departing from the civil law tradition, the moral theological approach of contract law would radicalize the consensualist approach championed by canon law⁹⁷. Equating the court of conscience with the court of truth, the theologians would not even require the explicit expression of ‘*causa*’ as a necessary element for a naked pact to become enforceable⁹⁸. For the expression

⁹³ Lessius, *De iustitia et iure*, 2,19,4,49, p. 242: ‘Nam in variis locis sunt variae leges et consuetudines, nec ubique servatur ius codicis vel digestorum’.

⁹⁴ Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 8, num. 1–5.

⁹⁵ Cf. M. Bellomo, *L’Europa del diritto comune*, Roma 1989, p. 235–236.

⁹⁶ Pedro de Oñate, *De contractibus*, Romae 1646, tom. 1, disp. 2, sect. 5, num. 166, p. 40 [italics are mine]. I. Birocchi, *Saggi*, p. 54 rightly remarks that Oñate expresses a view which runs counter to the traditional explanation of the rationale behind the non-enforceability of naked pacts in Roman law (*ne lites multiplicarentur*).

⁹⁷ See X 1,35,1. A most interesting contribution to the medieval canon law doctrine of contract is P. Landau’s *Pacta sunt servanda, Zu den kanonistischen Grundlagen der Privatautonomie*, in: M. Ascheri e.a. (eds.), *Ins Wasser geworfen und Ozeane durchquert*, Festschrift für Knut Wolfgang Nörr, Köln–Weimar–Wien 2003, p. 457–474.

⁹⁸ In addition to I. Birocchi’s reference work *Causa e categoria generale del contratto*, a lot of interesting contributions on the history of the doctrine of ‘*causa*’ from Antiquity to present

of the reason why a promise was made (*causa*) was needed in the ecclesiastical court, but to remove a presumption of involuntariness or lack of seriousness, according to Lessius⁹⁹. Yet, as a rule, presumptions are not to be taken into consideration in the court of conscience¹⁰⁰. Before the court of conscience, then, the sole source of obligation is mutual consent¹⁰¹: ‘However naked the contract, if it is freely and spontaneously entered into by parties with the capacity to contract, then it entails a natural obligation in the court of conscience. Consequently, you cannot rescind the contract unless the other party agrees, or unless relative or absolute nullity of the contract follows from positive law’.

Interestingly enough, the Jesuits recognize that freedom of contract in the court of conscience can be limited by formal conditions (*certae formulae et conditiones*) decreed by positive, secular as well as ecclesiastical authorities. After the contractual conferring of original *dominium iurisdictionis* upon the political authorities, they do have the power to limit contractual freedom, indeed, for the sake of protection of a particular group of people, or the common good, or the spiritual well-being in a Catholic society, just as the contracting parties themselves have the power to make conditions to their agreement¹⁰². These conditions imposed by positive law first and foremost concern the formalities of contract. As Suárez remarks, these laws inducing the nullity of a contract (*leges irritatoriae*) do entail an obligation in the court

day law are collected in L. Vacca (ed.), *Causa e contratto nella prospettiva storico-comparatistica*, [Atti del Congresso Internazionale ARISTEC, Palermo, 7–8 giugno 1995], Torino 1997. A fresh outlook on the meaning of *causa* in Roman law is offered in L. Waelkens, *Causa in D. 44,4,2,3*, TR 75 (2007), p. 199–212.

⁹⁹ Lessius, *De iustitia et iure*, 2,17,4,22–23, p. 198: ‘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 exprimat causa cur sit promissum. (...) Alioquin non praesumit serio et libere promissum’.

¹⁰⁰ Compare Valero, *Differentiae*, s.v. *lex*, diff. 11, num. 1, with Lessius, *De iustitia et iure*, 2,7,6,30, p. 79: ‘nos loquimur in foro interiori, ubi praesumptio non habet locum’.

¹⁰¹ Lessius, *De iustitia et iure*, 2,17,4,19, 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 possit rescindere, nisi iure positivo sit irritus vel detur irritandi potestas’.

¹⁰² Lessius, *De iustitia et iure*, 2,17,4,20, p. 197: ‘Ratio est, quia sicut duo homines privati seposito omni iure positivo possunt inter se statuere certas formulas et conditiones, sine quibus contractus eorum in posterum non ceaseantur validi, nec obligationem naturalem possint inducere, ita respublica, quae naturaliter est superior singulorum seu cui naturaliter competit potestas in singulos potest constituere huiusmodi conditiones, et consequenter principes saeculares, in quos suam potestatem respublica transtulit, multoque magis principes Ecclesiae, in iis quae ipsorum gubernationi subsunt, id possunt quatenus necesse est vel expedit ad bonum spirituale subditorum; hanc enim potestatem habent a Christo qui naturaliter supremus est omnium dominus’. We cannot afford to discuss the conditions the parties themselves are allowed to add to their agreement – there was a most interesting and heated debate about this issue in early modern scholasticism, which is apparent from the mere observation that Lessius’s text of *De iustitia et iure*, 2,18,15 (‘utrum promissio vel donatio conditionalis sit valida, et quam vim habeant conditiones appositae’) considerably differs from one edition to another.

of conscience, indeed¹⁰³: 'If you enter into a contract which is void according to human law, then you are ipso facto held in conscience not to retain the good any more, or to give up your right to performance, or to abstain from any other effect the contract would have entailed absent nullity'. However, these sanctions imposed by positive law and mostly geared towards the protection of a particularly weak group of persons can be lifted by the protected party itself, through an oath, for example¹⁰⁴. And one could wonder from the following discussion about testamentary succession whether formal conditions imposed by human law ultimately do matter at all before the court of conscience.

Is it lawful for a beneficiary of a testate succession that fails to meet the formal requirements to retain the testator's property instead of rendering it to the inheritor ab intestato? In fact, it was commonly acknowledged in Lessius's time that the absence of the normally required solemnities would not affect the natural obligations ensuing from a testament *ad piam causam*. Even before the external, ecclesiastical court, formalities had already been reduced to a minimum by Pope Alexander III – an intervention Lessius defends on account of the indirect secular power of the Church¹⁰⁵. The crux of the debate, however, was the question of whether testaments *ad causam non piam* could also produce a natural law obligation. Put differently, whether a general principle of non-formality in testamentary dispositions existed in the court of conscience? Diego de Covarruvias y Leyva had taken the view that a purely informal testament could only create a natural obligation in an improper sense, that is, as a matter of morality (*ex honestate*). As a consequence, the testate possessor could not defend himself against the claims of the heirs-at-law, not even in the court of conscience, since a valid contract able to confer a right on the inheritance had never existed. Re-analyzing canon law by means of the equity-principle and the teleological interpretation method, however, Lessius rejected Covarruvias's view. The solemnities had merely been introduced as a means of proof, and not as a means of validity: consequently, a purely informal testament does obligate as a matter of natural law and hence produces a natural obligation in its proper sense (*ex iustitia*), according to Lessius, meaning that it does confer a right on the testate possessor. Therefore, the latter could claim and retain the inheritance before the court

¹⁰³ Suárez, *De legibus*, lib. 3, cap. 22, num. 9, p. 264: 'Nam qui fecit contractum jure humano irritum, ipso facto conscientia tenetur vel rem apud se non retinere, vel alium non obligare, vel denique non uti illo contractu ad alios effectus quos haberet si irritus non fuisset'.

¹⁰⁴ As Lessius notes, this is a very tricky question, however, if only because it is difficult to determine whether a condition has been imposed for the sake of a particular group of persons ('droit impératif') or for the political community as a whole ('droit impératif d'ordre public'), see Lessius, *De iustitia et iure*, 2,17,7, 55–59.

¹⁰⁵ Lessius, *De iustitia et iure*, 2,19,2 4.

of conscience, though in theory he could not in a secular court. Even if doubts would arise as to the true will of the testator after the testament had been executed, the testate inheritor would keep his right of retention on account of the '*melior est conditio possidentis*'-rule¹⁰⁶.

To explain the distinction between the different courts, Lessius expressly draws a parallel with naked pacts here. They too confer a right. They are not merely binding on the grounds of honesty, despite the reluctance of Roman law to protect them with an action. Again, Lessius seeks to demonstrate that despite its divergence from natural law, the *ius civile* regime had had legitimate grounds (*iustae causae*) to require formalities. Roman law had rightly envisaged the relief of the courts, the damming up of fraud and manipulation, and the protection of the family, who by the mere loss of the life of their relative had already been struck with enough sorrow¹⁰⁷. However, the ultimate intention of the lawgiver had been to protect the will of the testator by introducing a presumption of involuntariness in the event solemnities were lacking. If the will of the testator could be derived from another source, then, the legislator could not have meant to miss the aim of the law in order to safeguard the formal means. That would go pretty much against reason, as Lessius tries to prove amongst other things by quoting from the *Letters* of one of the luminaries of classical literature, Pliny the Younger (61–113)¹⁰⁸. Lessius is hesitant, however, to approve of an extension of the principle of informality to all kinds of contracts, elections, or appointments¹⁰⁹. Only if the formalities are introduced purely as a means of proof does he agree on that¹¹⁰: 'It is more in line with the law to say that those acts and contracts that lack the solemnities required by the law under penalty of absolute nullity, do not entail a natural obligation, unless the law indicates elsewhere that the solemnity in case is only required as a matter of proof in the court, as is the case with testamentary succession'.

All in all, Lessius recognizes the power of positive law to modify the natural freedom of contract, although he does not omit to state elsewhere that custom often supersedes the will of the legislator, notably with regard to formal

¹⁰⁶ Lessius, *De iustitia et iure*, 2,19,3,21.

¹⁰⁷ Lessius, *De iustitia et iure*, 2,19,3,26.

¹⁰⁸ Plinius Minor, *Ep.* 2.16 (ad Annianum); *Ep.* 5.7 (ad Calvisium).

¹⁰⁹ Nevertheless, he had made a convincing case for a general principle of consensualism before expressing the more safer view. What is more, he calls it justifiable (*probabilis*), attributes it to a vague set of authorities (*quidam*), and supports it by reference to custom (*usus*) – a strategy Lessius often follows for introducing his novel viewpoints. In addition, one of those indeterminate authorities Lessius refers to should be Bañez, but the very precise reference he gives to the latter's *De iustitia et iure* appears to be entirely false.

¹¹⁰ Lessius, *De iustitia et iure*, 2,19,3,35, p. 240: 'Nihilominus contrarium est iuri conformius et verius, nimirum huiusmodi actus et contractus, quibus deest solemnitas, sine qua lex illos absolute irritos decernit, non inducere obligationem naturalem, nisi forte alibi explicetur in iure, illam solemnitatem solum requiri ad probationem in iudicio, sicut in testamentis'.

requirements in contract law¹¹¹. It should not be forgotten, however, that in Suarezian and Lessian political thought, human authority itself is derived from a free, contractual transfer in the state of nature of the sovereignty and liberty originally resting with the entire community (see my article mentioned in note 17). Incidentally, the very contractual relationship between the prince and his people is determined by certain ‘conditions’ that were stipulated in the political compact, itself described by Lessius in terms of an employment contract¹¹².

Subjective will as the measure of all things

Apart from the positive conditions that can surround a contract on account of the will of the parties themselves or through the application of human law, a contract is also bound by conditions that automatically or implicitly follow from its very natural law definition. Accordingly, these implied or tacit conditions (*tacitae conditiones*) immediately bear upon the volitional and consensualist nature of contract. Given that contractual obligation fundamentally derives from the will, any factor vitiating the voluntariness of the will is deemed to suspend or annul the validity of contract completely. No contract is binding, for example, if it amounts to a fictitious contract in which despite of his external consent, a party to the contract did not internally consent to make a binding promise, but rather to enter into an informal agreement. In this case, the aggrieved party cannot claim performance by virtue of the contract, since, by definition, the contract did not come into existence at all. He is entitled, however, to demand damages by virtue of a wrongful act¹¹³. More importantly, ‘according to the law of nations every dissoluble contract contains the tacit condition that a contracting party is

¹¹¹ Lessius, *De iustitia et iure*, 2,24,11,66, p. 333: ‘Cum forma illa sit iure positivo humano introducta, potest contraria consuetudine aboleri, etsi aliqui canonistae contrarium sentire videantur (...) quia in foro animae sufficit contractum tenere secundum limites iuris naturalis seu gentium: ad quod sufficit adesse praedictum consensum’.

¹¹² Cf. Suárez, *De legibus*, lib. 3, cap. 9, num. 4, and Lessius, *De iustitia et iure*, 2,1,3,13.

¹¹³ Pedro de Oñate, *De contractibus*, tom. 2, tract. 9, disput. 29, sect. 7, num. 85, p. 112. Lessius rules that the promisor who consents fictitiously is bound to perform his contractual obligation; cf. *De iustitia et iure* 2,18,8,59–61. It is likely, though, that Lessius is assuming here the intention of deceit on the part of the fictitious promisor, since he considers a contract based on fictitious consent to be invalid until fictitious consent is replaced by real inner consent, cf. 2,17,11,72. In this manner there is no conflict between his thought and Oñate’s, given that Oñate also rules that performance is due in a fictitious contract, in which someone expresses the intention to bind himself (*animo obligandi*) with the inner intention to default on it (*animo non implendi*); cf. *o.c.*, tom. 2, tract. 9, disput. 29, sect. 1, num. 11, p. 88. This is a good counter-example to the thesis which holds that a will theory of contract has difficulties in denying the lawfulness of *reservatio mentalis* in contract law; cf. R. Zimmermann, *The law of obligations, Roman foundations of the civilian tradition*, Oxford 1996, p. 644–646.

bound to the contract unless he finds himself to have been so seriously deceived, that this mistake (*error*) has been the ultimate ground (*causa*) for him to enter into this contract¹¹⁴. As a result, the doctrine of error is directly related to the concept of tacitly implied conditions in a contract. Given that personal intent is the measure of contractual obligation, and that you cannot intend anything that is unknown to you, you are not deemed to be bound in a situation in which you would not have wished yourself to be bound had you had full knowledge of that situation. Repeating a common maxim, Lessius holds that the will cannot be deemed to intend what it does not know¹¹⁵. For the sake of industriousness and economic prosperity, the Jesuits were eager to add to this that only invincible mistake or ignorance could entail the unenforceability of a contract¹¹⁶. Yet the basic tenet in their analysis of contractual obligation remained that you are not bound to what you could not have known. The Portuguese Jesuit Manuel de Sá (1528–1596) leaves no doubt about it: ‘Everything you did not intend, falls outside the scope of obligation, even if this obligation was strengthened by an oath. If I say ‘everything’ I mean all you would have excluded from the obligation had you been able to think about it’¹¹⁷. Elaborating on the contract-as-private-law metaphor, Lessius maintains that a ‘a law which has been constituted absolutely is not binding in those cases which the legislator explicitly or implicitly excluded; and given that a promise is a kind of private law you impose upon yourself, it will not bind in those cases which the promisor can be deemed to have excluded explicitly or implicitly according to the interpretation of prudent men’¹¹⁸.

What is more, from the perspective of implied conditions the doctrine of changed circumstances and the doctrine of error are but two sides of the same

¹¹⁴ Lessius, *De iustitia et iure*, 2,17,5,29, p. 199: ‘Unde omnis contractus solubilis iure gentium videtur habere hanc tacitam conditionem, quod contrahens stabit contractui nisi deprehenderit se graviter deceptum, id est, tali errore qui sit causa contractus’.

¹¹⁵ Lessius, *De iustitia et iure*, 2,17,11,74, p. 214: ‘voluntas non fertur in incognitum’.

¹¹⁶ Hence their unwillingness to grant relief to the party who had consented to a highly disadvantageous sale purchase contract because of his ignorance about the future market conditions – a case known as ‘the merchant of Rhodes’ and discussed by W. Decock and J. Hallebeek in their forthcoming article *Pre-contractual duties to inform in early modern scholasticism*, *Tijdschrift voor Rechtsgeschiedenis*, 78 (2010).

¹¹⁷ Manuel de Sá, *Aphorismi confessoriorum ex doctorum sententiis collecti*, Antverpiae 1599 [Editio princeps: Venetiae 1595], s.v. *obligatio*, num. 2, p. 239–240: ‘In obligatione generali, etiam cum iuramento, non veniunt ea quae non intendeas. Talia autem videntur esse quae si tunc cogitasses ad ea te non obligasses’. For biographical details on Sá, who taught theology at Alcalá and at the Collegio Romano, see A. Leite, s.v. *Sá* in C. O’Neill / J. Domínguez (eds.), *Diccionario histórico de la Compañía de Jesús biográfico-temático*, vol. 4, Roma–Madrid 2001, p. 3454.

¹¹⁸ Lessius, *De iustitia et iure*, 2,18,10 72, 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 suis sponte imponit, ergo non obligabit in illis casibus, quos expresse vel tacite ex prudentum interpretatione censetur exceptisse’.

picture. In both cases, the decisive reason for entering into a contract is a lack of knowledge of a certain circumstance (*causa*) beyond inexcusable ignorance. It does not matter from the point of view of will whether the causal circumstance you ignore, already exists before you enter into the contract (*causa praecedens ignorata*), or only supervenes once you have concluded the contract (*causa superveniens ignorata*): in both cases your will would have taken another course of action under the assumption of full knowledge. As Thomas Sánchez remarks with regard to a prenuptial agreement¹¹⁹: ‘an engagement to marry implies the following tacit condition: *if things remain the same*, that is, unless a new circumstance supervenes or a preceding circumstance comes to light which, as a cause to the contract, is legitimately acknowledged to constitute a ground for rescission’. Lessius, who regularly transferred ideas from Sánchez’s doctrine on marriage to general contract doctrine, defends the relative nullity ensuing from mistake by making reference to the principle of changed circumstances¹²⁰: ‘If such things would happen after the conclusion of contract, you would not be obliged to perform any more, since circumstances have notably changed. Consequently, you will neither be obliged to perform any more if such things that were already hidden from the outset come to light only during the contract. For it makes no difference whether something happens just now, is brought to light right now, or only comes to be known now’. There is no doubting the interconnectedness of the doctrine of changed circumstances and the doctrine of error in the eyes of the early modern scholastics, then.

Instead of giving a comprehensive overview of all circumstances in which the early modern scholastics allowed for changed circumstances, two general remarks and two typical examples should suffice here. First, Oñate later claimed the principle of changed circumstances to be a universal principle of contract law (*regula semper universalis*) based on equity and the idea of contractual obligation as a private law¹²¹: ‘Just as under those changing

¹¹⁹ Sánchez, *Disputationum de sancto matrimonio sacramento libri tres*, Antverpiae 1617, tom. 1, lib. 1, disput. 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’. It remains to be seen, however, whether or not Sánchez was willing to recognize the doctrine of changed circumstances as a general principle applicable to all contracts, cf. *o.c.*, lib. 1, disput. 62, num. 3.

¹²⁰ Lessius, *De iustitia et iure*, 2,17,5,33, 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’. Medina had brought forward precisely this argument to condemn the merchant of Rhodes. Nevertheless, Lessius did not accept it in his solution of that case; cf. 2,21,5,41–42.

¹²¹ Oñate, *De contractibus*, tom. 2, tract. 9, disput. 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 ipsi privati imponunt’.

circumstances equity is to be applied to the laws and constitutions of the political authorities, so will it be equitable to apply equity to the promises made by private persons. For promises are like laws which private persons impose upon themselves'. The early modern theologians did claim, indeed, that in the court of conscience a rule of positive law could be abrogated on account of its incompatibility with changed circumstances. A legal price, for instance, could be ignored without danger for the soul if it was blatantly out of touch with market reality, although the political authorities were given the benefit of the doubt¹²². Secondly, just as need or necessity (*necessitas*) could sometimes overthrow the state of private ownership established through the political compact only to re-install the state of nature wherein goods were collectively owned, it could also overrule a contract between private individuals. Lessius acknowledges, for instance, that a lender has a right to claim back his goods before the loan for use contract (*commodatum*) expires, in case it become indispensable (*necessaria*) to him again and he has an urgent need (*egestas*) of getting his property back, for instance because his wife is dying¹²³. In Lessius's view, the borrower is supposed to have sufficient knowledge about the tacit condition of changed circumstances underlying any contract. Furthermore, he could have protected himself against it through adding a special clause to the contract. The same holds true for a tenant, who always runs the risk of being chased in the event the landlord suddenly needs the house for his own 'survival', although once more it is possible for the parties to exclude the principle of changed circumstances prior to their agreement¹²⁴.

Deifying the private legislator

By definition, a further natural element of contract is mutual or reciprocal consensus. Accordingly, the early modern theologians discussed yet another condition tacitly implied in any binding contract: acceptance. Lessius maintains

¹²² Lessius, *De iustitia et iure*, 2,21,2,14, p. 276: 'Adverte tamen, si mutatis circumstantiis copiae, inopiae et similibus magistratus esset notabiliter negligens in pretio legitimo mutando, posset res vendi pretio vulgari, nam lex censeretur iniqua (...)'

¹²³ Lessius, *De iustitia et iure*, 2,27,5,19, p. 350: 'Debet enim commodatarius ab initio, quando illud acceptat, cogitare, posse talem eventum supervenire, ac proinde paratus esse tunc ea re privari cum suo incommodo et damno, vel pacisci expresse, ut quidquid eveniret, non teneatur ante certum tempus restituere'.

¹²⁴ Cf. Lessius, *De iustitia et iure*, 2,24,7,34, p. 329: 'Secunda est, casus improvisus, per quem domus, quam elocasti, tibi incipit esse necessaria ad habitandum, ut si prior quam inhabitabas corruiat vel comburatur, vel cogaris migrare propter hostes'.

As Robert Feenstra has shown, Grotius's treatment of the principle of changed circumstances heavily draws on Lessius's practical applications of it, cf. 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.

that ‘a promise or another binding onerous offer has a tacit condition, namely, *if the other party is in his turn prepared to enter into an obligation*, just like a liberal promise and a donation have the tacit condition, *if they will be accepted*’¹²⁵. Acceptance is required as a *conditio sine qua non* of obligation. Although the offer of the promisor is the direct cause of the contract, a personal right to performance is conferred upon the promisee but through his acceptance. For a flame is not sufficient to heat a bowl of water: someone needs to put the water on the fire first¹²⁶. Actually, Lessius had a hard job refuting the counterarguments brought forward by luminaries such as Covarruvias and Molina against the requirement of acceptance in the court of conscience. According to a long-dated tradition, Roman law had recognized the enforceability of unilateral promises (*pollicitationes*) in a few cases, one of which is the unilateral promise to pay money to the municipality (*pollicitatio civitati*). Applying the common maxim that a civil obligation cannot exist unless at the same time there is a natural obligation lying behind it, Molina had inferred from those special cases that as a general rule natural law recognizes the enforceability of a unilateral promise, absent consent of the promisee. Unable to attack the common maxim underpinning Molina’s logic, Lessius had to deny that Roman law was actually saying what it was held to say according to tradition. He interpreted the passages in Dig. 50,12 to mean that civil law only prohibited the promisor from revoking his promise¹²⁷. In his view, even a civil law obligation could only come into existence, however, from the moment the municipality did accept the promise. Roman law had not attributed an obligating force to the unilateral promise, then. Therefore, Lessius could claim that there was no natural obligation either. Having countered this solid argument based on Roman law, Lessius could simply quote his definition of pactum as *conventio*, or the meeting (*con-venire*) of two distinct wills, to demonstrate that consent of both parties to the contract was required. Though this case brilliantly illustrates that uniformity of doctrine was not an objective easily reached within the early modern Jesuit order, Lessius could draw on Sánchez for a defence of his view¹²⁸. The motivating factor behind their view was the protection of liberty. For if no acceptance were required, there would be no room for a right of revocation (*ius poenitentiae*),

¹²⁵ Lessius, *De iustitia et iure*, 2,18,6,39, p. 220: ‘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*’.

¹²⁶ Lessius, *De iustitia et iure*, 2,18,6,41.

¹²⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 18, dubit. 6, num. 40, p. 220: ‘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 tit. (...) Itaque ex pollicitatione omni nascitur quaedam obligatio veluti conditionata et suspensa, donec acceptetur vel revocetur, quam revocationem ius positivum potest impedire’.

¹²⁸ Cf. Sánchez, *De matrimonio*, lib. 1, disp. 3, num. 6, p. 6: ‘Fateor totam obligationis radicem esse promittentis voluntatem, desideratur tamen acceptatio alterius ut conditio sine qua non’.

since upon pronouncing his promise a promisor would have been immediately bound forever. Now this would have run counter to Lessius's and Sánchez's view that a promise was like an act of private legislation¹²⁹: 'Every absolute and sovereign superior who induces an obligation through law can revoke this law ad libitum to impede its obligatory force to take effect. Now man freely imposes an obligation upon himself through promise. Accordingly, he can freely revoke his self-imposed obligation as long as he is absolutely sovereign, that is, as long as the promisee has not accepted'.

Equally typical of Lessius's concern to limit the room for burdensome obligations is his insisting, once more against Molina, on the requirement of the exteriorization of an offer in order for it to become binding. A parallel could be drawn here with the requirement of sufficient promulgation for any law to become effective, especially in Suárez theory of law, just as acceptance or actual reception of the law in a particular region had also been considered indispensable for a law's validity. Lessius did not believe that an uncommunicated unilateral promise could entail a natural obligation, just as he did not accept the validity of a rule of positive law in a region where it had not been received in practice¹³⁰. Locked up in our brains, a promise regarding a gratuitous or onerous act towards another human being cannot possibly bring forward any natural obligation on either side. Lessius thinks only an exterior act, namely speech or another external sign, is able to effectuate the interior intent which it signifies¹³¹: 'external signs are not only required to indicate your will to donate to the promisee, but for the very donation and promise to come into existence altogether'. Or to put it in the terms of Ferdinand De Saussure, signifier and signified are mutually dependent on each other with regard to their existence (see Addendum 1). Sánchez would acknowledge that you can lose ownership over a good through the sole internal act of not willing to own it any more, but that the conferring of your right on another person necessarily requires a moment of communication, given that contracts entail obligation in a way proper to man (*more humano*) and not to the angels or God¹³². As to the extent of the obligation thus brought about by an exteriorized and accepted promise, Lessius would think it to be determined by objective

¹²⁹ Cf. Sánchez, *o.c.*, lib. 1, disp. 3, num. 5, p. 6: 'Quicumque superior absolutus et independens ab alio inducens obligationem per aliquam legem potest pro libito valide revocare, ita ut iam non obliget. Sed homo libere inducit in seipso obligationem promissionis, ergo quamdiu superior absolutus est, quia alter nondum acceptavit, poterit libere revocare'.

¹³⁰ The most salient example being his refusal to accept the obligating force of ecclesiastical legislation in Antwerp regarding *census*, amongst other things: cf. Lessius, *De iustitia et iure*, 2,22,13.

¹³¹ Lessius, *De iustitia et iure*, 2,18,5,33, p. 219: 'Non tantum ideo requiruntur externa signa, ut alteri significetur voluntas donandi, sed etiam ut ipsa donatio et promissio per illa fiat'.

¹³² Cf. Sánchez, *De matrimonio*, lib. 1, disp. 3, num. 5, p. 7: 'Unus non obligatur alteri, nisi per modum sibi connaturalem et humanum, qui est verbis vel signis externis'.

criteria of justice (*omnis obligatio contractuum est obligatio iustitiae*)¹³³. As a consequence, every (serious) promise entailed an obligation in the court of conscience under pain of mortal sin. Promises merely made for the sake of showing your benevolence or loyalty, however, merely bound as a matter of morality and on the pain of venial sin. Again, Lessius's juridical analysis of the binding force of serious promises in the court of conscience as a matter of justice was not obvious. Moral theologians up to Cajetan had claimed that promises were merely binding before the court of conscience on account of morality (*ex honestate*) and on pain of venial sin. Others, like Molina, had argued that the extent of obligation depended on the will of the promisor: if he wanted to be bound on account of justice, he could, but he could also merely want to be bound morally and not legally, even in serious affairs. Within the context of a serious, exteriorized and accepted promise, however, Lessius claimed that a universal obligation on account of justice existed¹³⁴: 'A promise does not merely affirm your willingness to give or to do something, but to commit and bind yourself towards somebody, and hence confer upon him a right to enforcement. Therefore we say that *promise creates debt*'. He wanted this rule to apply to contracts in general, regardless of their onerous or lucrative nature.

Symptomatic of the liveliness of this discussion within the Jesuit order, is Pedro de Oñate's attempt to revive Molina's idea that the extent of obligation should ultimately depend on the will of the promisor. A look at his argumentation reveals the basic preoccupation shared by all early modern Jesuits, however, regardless of the solution they ultimately considered as the best means of guaranteeing it: freedom. *Pace* Sánchez and Lessius, Oñate holds against them that the extent of obligation should be determined by the promisor himself¹³⁵. If he were to be in doubt about his own original intention to be bound either by virtue of justice or by virtue of honesty, then we should give him the benefit of the doubt. On account of the '*lex dubia non obligat*-rule' a promisor doubting about his intention, and hence about the law he imposed upon himself as a private legislator, should be absolved from the heavier obligation. In line with the '*id quod actum est*-principle' of Roman law (Dig. 50,17,34), however, the act of promising itself should be presumed to have taken place. In the event knowledge about the intention of the promisor in performing this action is lacking, the extent of obligation should be derived from his declarations, regional customs, or presumptions in respective order of hierarchy. Oñate criticizes Lessius and Sánchez for having stated, presumably, that contracts are binding as a matter of justice in grave matters

¹³³ Lessius, *De iustitia et iure*, 2,18,8,55, p. 224.

¹³⁴ Lessius, *De iustitia et iure*, 2,18,8,52, 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*'.

¹³⁵ Oñate, *De contractibus*, tom. 2, tract. 9, disput. 29, sect. 8, num. 101.

and as a matter of morality in less serious affairs – a rule he deems far too strict and absolutely hateful. Instead, he argues that you are bound by virtue of contract only if you want to, at the moment you want to, and only to the extent you want to be bound (*nemo ex contractu se obligat nisi qui vult et quando vult et quantum vult*). He declares this to be the basic principle underlying the whole of contract doctrine (*cardo et basis totius materiae contractuum*)¹³⁶. It remains to be seen whether Oñate's view is indeed that much different from his earlier colleagues, but it is all the more telling about how far he wanted to go in order to stress the principle of contractual liberty that he showed himself willing to create an apparent opposition with his predecessors. It is true, however, that, although we have seen Lessius and Sánchez stress the need to anchor contractual obligation in the will of the promisor, too, it is Oñate who evokes at greatest length the philosophical reasons behind it.

For one thing, he affirms, of course, that you can bind yourself as a matter of justice. Starting from a well-known principle of Roman property law, Oñate holds that not only is everybody the moderator and arbiter of his goods, but also the moderator and arbiter of the rights and obligations connected to those goods¹³⁷. As a result, you cannot only transfer your goods themselves to somebody else, but also the right to those goods and your obligation to transfer them in due time¹³⁸: 'A promise is like a donation, not of the promised thing itself, however, since it is not present or transferred immediately, but of an obligation which replaces the things itself and is of equal value as the promised thing. This obligation, which is donated and transferred through the acceptance of the other party, is like a substitute or vicar, so to speak, for the thing promised'. The unlimited freedom to enter into all obligations and contracts through promise and contract is thus immediately rooted in an equally liberal conception of private property. Yet that does not mean that all promises should by definition be enforceable as a matter of justice. For the ultimate criterion of obligation should lie with the private lawgiver himself. Created in God's image, man is capable of *dominium* over the goods of the world and over his will and actions. So the measure of obligation should be the extent to which a private lawgiver wanted to bind himself¹³⁹: 'God left man the freedom to take care of himself, as is

¹³⁶ Oñate, *De contractibus*, tom. 2, tract. 9, disput. 29, sect. 6, num. 93, p. 114.

¹³⁷ See C. 4,35,21, and C. 4,38,14: 'quisque in rebus suis est moderator et arbiter'.

¹³⁸ Oñate, *De contractibus*, tom. 2, tract. 9, disput. 29, sect. 7, num. 86, p. 112: 'Quia 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'.

¹³⁹ Oñate, *De contractibus*, tom. 2, tract. 9, disput. 29, sect. 6, num. 74, p. 108: 'Reliquit Deus

expressed in Eccles. 15,14, one of the reasons being, no doubt, that He left it to man's will to bind himself when he wanted. 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 the fundamental Jesuit belief in genuine freedom of contract, he goes on to add¹⁴⁰: 'Otherwise man would not be the true and perfect owner (*dominus*) of his goods, that is, unless he can transfer them when he wants, to whom he wants, and in whatever way he wants, and unless he has the additional capacity to enter into a contractual obligation when he wants and in whatever way he wants'. It would be hard to find a more concise and clear formulation of contractual liberty.

Liberty found – which liberty?

The two movements contained in early modern Jesuit moral and legal thought could be summarized in Isaiah Berlin's terms understood in a wide sense as a subjective turn towards both negative and positive freedom (see Addendum 2). Through the transformation of Romano-canon law, and in the wake of the Salamancan scholastic tradition, the Jesuits consistently elaborated a system of moral philosophy geared towards the liberation of the individual from external obligations in the court of conscience – an evolution described in the first part of this paper. The philosophical view of man as the owner of both his goods and his will entails the possibility, then, for him to engage in freely chosen courses of action and interactions with other people in view of the exchange of goods and services (*libertas contractuum*). Consistently elevating the individual to the position of a personal legislator able to bind himself towards others through contractual obligation, the Jesuit moral philosophers have formulated a doctrine of contract – the basics of which have been presented in the second part of this paper – that, in turn, might not without reason be said to have left its mark on the legal tradition itself. At any rate, it is striking to note that a host of features usually associated with the so-called liberal and individualist doctrine of contract contained in the French Civil Code are remarkably present also in the 15th and 16th century scholastics', and a fortiori in the Jesuits' vast treatment of contract: its embeddedness in property law, the idea of contract as an act of private legislation, the consensualist principle, etc¹⁴¹. But there are marked differences,

hominem in manu consilii sui Eccles. 15,14 sine dubio inter alia, quia reliquit Deus in voluntate eius ut se obligaret, quando vellent, et sicut actiones agentium non operantur ultra voluntatem et intentionem eorum, ita operantur iuxta voluntatem et intentionem eorum'.

¹⁴⁰ Oñate, *l.c.*, 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'.

¹⁴¹ Compare R. Kruithof, *Leven en dood van het contract*, Antwerpen–Apeldoorn 1987, p. 9–14 and I. Birocchi, *Alla ricerca dell'ordine*, p. 560–570.

too, between the early modern scholastic concept of contract, and contemporary ones. The Jesuits, like the other scholastics before them, put much more emphasis on contractual equilibrium and justice in economic exchange than Napoleon, or the nineteenth century voluntarists would like. More importantly, there remains an irreconcilable discrepancy in scope between Jesuit legal thought and contemporary legal systems. The Jesuits primarily aimed at easing consciences, freeing men on their pilgrimage to heaven from all too heavy and demoralizing a burden of obligations. The national Codes, on the other hand, seek to provide citizens of a secular state with a minimalistic code of conduct, thereby considering freedom of contract from the angle of the innerworldly struggles between the different classes in society rather than from the struggle of man with sin. For the citizens of a secular state, it has become difficult to conceive of the enforceability of a law that is not backed up by the coercive power of the State altogether. Yet the basic dissimilarity in scope need not have prevented a Jesuit legal science that was firmly rooted in the *ius commune* and the earlier scholastic tradition from being adopted and adapted in other, multiform contexts. As Michel Villey has pointed out¹⁴², it is not unlikely that the legal science of our age, which takes pride in a self-proclaimed laicism, unconsciously carries on – amongst many other vibrant intellectual traditions – one of the most clerical moments of genius our globe has ever seen.

Addenda

1. – *Addendum ad p. 454*: For an introduction to the philosophy of language espoused by the early modern scholastics, see the introduction to *Tractatus de signis, The semiotic of John Poinset*, interpretative arrangement by J.N. Deely in consultation with R. Austin Powell, Berkeley 1985. In his *Poinset trilogy*, Scranton 2008–2009, John Deely compares early modern scholastic semiotics with the philosophy of language of Augustine, Descartes, and Peirce respectively.

2. – *Addendum ad p. 457*: A recent contribution on the development of the concepts of ‘negative’ and ‘positive’ freedom in early modern scholastic authors like Suárez and Godenius is C. Schäfer, ‘Freedom’ oder ‘liberty’?, *Der freie Mensch in der (spät-)scholastischen Deutung von ‘De Anima’*, in: M. Kaufmann / R. Schnepf (eds.), *Politische Metaphysik (supra, n. 30)*, p. 85–106.

¹⁴² 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. 56.