**A Historical Perspective on the Protection of Weaker Parties: Non-State Regulators, Colonial Trade, and the Market for Junk Bonds (16th-17th Centuries)**

By Wim Decock (Aspirant F.W.O. – K.U.Leuven – Roma III)

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Future rules of private law will increasingly be determined by factors that lie beyond the power of the sovereign nation-state. This evolution has been subject to careful analysis in recent work by eminent scholars in the fields of global governance as well as European contract law. New, non-state, private institutions step in to fill the regulatory gaps on the global market, for instance in regard to food safety regulations[[1]](#footnote-1). New ways in which European contract law is being shaped, particularly by academic experts, challenge traditional views about the democratic legitimation of rules of private law[[2]](#footnote-2). Consequently, we are in a process of rethinking the sources and the foundations of rules of private law on a global, European and national level[[3]](#footnote-3). The turn toward rule-making beyond the nation-state undoubtedly explains the increasing interest in historical antecedents of non-state regulation in matters related to private law[[4]](#footnote-4).

The historical role played by legal academia rather than national legislators in the creation of legal rules is sufficiently well-known, for instance in the period of the late medieval *ius commune* (ca. 1100-1500)[[5]](#footnote-5). It has been sharply noted that the history of substantive doctrines of private law – which are currently undergoing a process of ‘*Ent-staatlichung*’ – can be understood also as a history which started with the ‘*Ver-staatlichung*’ in modern times of doctrines originally developed by actors other than the State[[6]](#footnote-6). It is important to stress the plurality of actors other than the State who contributed to the development of substantive doctrines of private law. From a historical point of view, it were not only jurists, but also academic theologians who had a decisive impact on the formation of those doctrines[[7]](#footnote-7). Particularly in the field of contract law, theologians living in the deeply religious European cultures of the past played a role that bears striking similarities to the advisory role played by Muslim scholars in Islamic legal cultures of the present[[8]](#footnote-8).

The aim of this paper is to give a historical illustration of how the protection of contracting parties was dealt with by an early modern academic from the Southern Netherlands. It should be recalled that no specific rules on consumer protection existed as such at the time. Consumer law as a special protection regime is a relatively recent phenomenon. It goes hand in hand with European market integration, which only developed over the last four decades[[9]](#footnote-9). However, the problem of protecting contracting parties against fraud and one-sided bargains is age-old. To guarantee a sufficient degree of precision, the scope of this short paper is limited to the analysis of how the Antwerp Jesuit Leonardus Lessius (1554-1623) dealt with two cases that touch upon questions of duties to inform and protection of weaker parties[[10]](#footnote-10). Lessius’ treatise *On Justice and Right* had a lasting impact on the legal as well as the moral theological tradition. Hugo Grotius (1583-1645) heavily drew on Lessius for his work *On the Law of War and Peace*. The importance of Lessius for the development of the law of contract is a well-established fact among legal historians[[11]](#footnote-11).

1. Two Cases for a New World

On 12 October 1492, Christopher Columbus reached the Bahamas after a five-week voyage across the Ocean. It was the beginning of a New World. The discovery of the Americas upset the existing patterns in political and legal thought. It urged European societies to rethink basic concepts such as power, property and contract[[12]](#footnote-12). The Spanish monarchs who were in command of the expeditions called upon theologians and jurists from the University of Salamanca to reflect upon the changes that were taking place, for instance at the *Junta de Burgos* (1512) and at the *Junta de Valladolid* (1550-1551). The following questions needed to be addressed in order to make sure that the conquest of American territory could be deemed legitimate: Were the Indians human beings? Was it possible for the indigenous people to exercise lordship (*dominium*), in the sense both of power over other people (political power) and power over things (property rights)? Was it possible to apply the common legal rules of Europe based on Roman law, namely the *ius commune*, to commercial exchange with the Indians? One of the most renowned treatises that documents these controversies is the *Relectio de Indis* (1532) by the Spanish theologian Francisco de Vitoria (ca. 1483/93-1546)[[13]](#footnote-13).

The New World urged the Old World to rethink the meaning of traditional legal categories. The old legal framework used by academics rested considerably upon the *ius commune*, that is the common law of Europe, which was based on Roman legal texts enriched by provisions from canon law[[14]](#footnote-14). Since the indigenous people were neither Europeans nor Christians, an alternative source of law had to be found that could govern the exchange between the colonialists and the Indians. Theologians fiercely defended the view that the indigenous people were human beings just as the Europeans[[15]](#footnote-15). Indians were rational human beings possessing reason and free will. Hence, they could be considered as the real owners and as the legitimate political leaders of their territories. Also, if Indians were rational human beings, the rules applicable to commercial exchange between them and the Europeans could be determined by the law of reason, that is natural law (*ius naturale*). It became the task of theologians to spell out those rules of natural law. Not surprisingly, modern ideas of natural, subjective and human rights are said to be indebted to theologians’ grappling with the problems created by the discovery of the New World[[16]](#footnote-16).

To fill the gaps in the regulation of international trade with the Indies, theologians stepped in. In fact, they laid the theoretical foundations of a capitalistic world order centered around the notions of property and contract. It has been argued that the legacy of the Spanish theologians to legal thought primarily consists in that they were the ‘articulators and ideologists of a global structure of horizontal relationships between holders of the subjective rights of *dominium* – a structure of human relationships that we have been accustomed to label “capitalism”’[[17]](#footnote-17). It makes sense, indeed, to see the theologians of the sixteenth and early seventeenth centuries as the main articulators of a system of global governance and commercial capitalism. To employ Koskenniemi’s vocabulary, they were the architects of an ‘empire of private law’. In their analysis of concrete cases, theologians carefully distinguished between the regulations that applied as a matter of natural law (the new paradigm), and the provisions laid down as a matter of civil law (the old paradigm). The natural law perspective offered the possibility of developing new legal categories to address the challenges ensuing from the discovery of the New World.

Two specific cases will be examined in sections five and six. They are directly taken from discussions in Lessius’ *On Justice and Right*: 1) is it allowed to receive gold or precious gems in exchange for pieces of glass, rattles, or other kinds of toys?; 2) is it allowed to sell junk bonds? Those cases are closely connected to the problems of duties to inform and the protection of weaker parts. Moreover, they reveal historical problems that gained increasing relevance in the wake of the discovery of the Americas. Apparently, the Indians were crazy for everything that made noise and that allowed them to stare at themselves in a mirror. Yet, should one consider it to be problematic that they were prepared to receive such worthless stuff – at least in the eyes of a European – in exchange for gold and precious stones? As regards the second case, banking and finance were flourishing in sixteenth century Antwerp. Since bankers and rich people were often demanded by authorities to lend them money, a market was created where sovereign debt and other forms of bonds could be sold. Yet, should one consider it problematic that one was allowed to sell toxic credits at their market price without further notice of the insolvency of the debtor?

1. Freedom, Fairness and General Contract Law

In the theologians’ opinion, the solution of particular cases regarding the specific contracts must depend on general rules that govern the law of contract. Moreover, it is precisely to the credit of those theologians to have spelled out the general principles of contract law in a systematic way[[18]](#footnote-18). Given the historical upheavals they were facing, they were forced to rethink *ius commune* contract law from the point of view of natural law. The upshot of this transformation of traditional contract law can be summarized as follows. There is a general law of contract that rests on two fundamental pillars. The first principle of contract law theologians derived from natural law was that all agreements are binding by voluntary consent (*pacta quantumcumque nuda sunt servanda*). The second principle was considered to be the prohibition on unjust enrichment, i.e. the principle of justice in exchange (*iustitia commutativa*).

It is essential to understand what theologians meant by *pacta nuda sunt servanda*. The idea of the bindingness of all agreements and ‘freedom of contract’ went back to late medieval canon law[[19]](#footnote-19). However, the theory of the autonomy of the will in contract law was not elaborated upon in a very systematic manner until the sixteenth century[[20]](#footnote-20). The systematic elaboration of a principle of freedom of contract was the consequence, precisely, of the moral transformation of the medieval *ius commune* in the treatises of moral theologians. To quote the Spanish Jesuit Pedro de Oñate (1567-1646)[[21]](#footnote-21): ‘To the contracting parties, liberty has very wisely been restored (*contrahentibus libertas restituta*), so that whenever they want to bind themselves through concluding a contract about their goods, this contract will be recognized by whichever of both courts before which they will have brought their case and it will be upheld as being sacrosanct and inviolable. Therefore, canon law and Hispanic law correct the *ius commune*, since the former grant an action and civil obligation to all bare agreements, while the latter denied them just that.’

Henceforward, the will of the parties was considered to be the basis of contractual obligation. This idea that the will of the parties is the ultimate source and standard of contractual obligation derived from a specific, religious view of man. ‘Freedom of contract’ relied on a Christian anthropology. To quote Oñate again[[22]](#footnote-22): ‘God left man the freedom to take care of himself, as is expressed in *Ecclesiastes* 15:14, one of the reasons being, no doubt, that He left it to man’s will to bind himself when he wanted. Now, actions do not operate beyond the will and the intention of the agents, but in accordance with their will and intention. (…) Otherwise man would not be the true and perfect owner of his goods, that is, unless he could give them when he wants, to whom he wants, in whatever way he wants, and unless he has the additional capacity to enter into contractual obligation when he wants and in whatever way he wants.’ In other words, man can only be a creative individual, just like his own Creator, if he is granted private property and freedom of contract as a means to freely dispose of private property. In the works of the theologians of the sixteenth century, the idea of the contracting parties as individual legislators (which still lives on, for instance in article 1134 of the Belgian civil code) is fully developed.

One must recognize not only the theologians’ role in expounding a theory of contract based on the autonomy of the will, but also their advocating the principle of *iustitia commutativa*[[23]](#footnote-23). Justice in exchange means that contracts should not enrich one party at the expense of the other. In other words, justice in exchange is tantamount to the prohibition on unjust enrichment. The theologians derived this second principle from a plurality of sources: Roman law, Aristotelian moral philosophy, and the Bible. The first title of the Roman Digest explained, indeed, that the purpose of law was to prevent people from harming each other (*neminem laedere*). Aristotle taught that voluntary exchange should not be unduly one-sided. The Bible contained the prohibition on theft and the principle that you should do unto others as you would have them do unto you. To quote the famous Spanish theologian Luís de Molina[[24]](#footnote-24): ‘What has been introduced for the sake of common utility must not be to the detriment of one party rather than another. Natural law demands this, prescribing that you do not unto others what you would not reasonably have them do unto you. However, what you do would be to the detriment of one party rather than another unless equality (*aequalitas*) were observed.’

Since this ‘fairness’-principle was present in all of these rules coming from different cultures across places and time, the theologians thought that equality in exchange was a principle of contract law that derived from natural law[[25]](#footnote-25). Hence, it could form the basis of a new theory of contract that could be applied in international trade. Also, it could never be abolished by a positive legislator. In practice, the principle of justice in exchange meant that one could not receive more than one gave. The theologians spoke of ‘equilibrium’ (*aequalitas*) between the goods exchanged, or, in the case of sale-purchase, between the price and the good exchanged. This equilibrium was guaranteed by the competitive market price, which was called the ‘just price’. The just price must not be thought of as some kind of fixed, metaphysical value. As the Salamancan canonist Diego de Covarruvias (1512-1577) explained, the just price is never based either on the nature of the thing or on the labour of the seller[[26]](#footnote-26). The measure of economic value is utility. According to Covarruvias, the common estimation by the people, which consitutes the just price, is the yardstick of justice in exchange, even if that estimation were insane.

1. Case 1: Trading Gold for Toys

Let us consider the consequences of this theory of contractual obligation for the solution of the cases at hand. The first case is the following: Is it allowed to exchange gold or precious gems for pieces of glass, rattles, or other kinds of toys without saying anything to the Indians about the extremely high value of gold in Europe?[[27]](#footnote-27) If contractual obligation is purely a matter of voluntary consent, then it would seem that the solution of the first case is easy: if the Indians truly assented to the exchange of gold for pieces of glass or rattles, then a binding contract was concluded. However, whether the Indians’ consent was entirely voluntary could be questioned. For example, was not their consent vitiated by lack of knowledge? Moreover, were the Indians not to be considered as weaker parties who were in need of special protection through duties to inform? Last but not least, was the exchange of gold for pieces of glass, rattles or other kinds of toys just and fair?

At first, Lessius seemed to suggest that this type of exchange was invalid, or at least inequitable, both from the point of view of the voluntary nature of the contract and of justice in exchange. In the sentence preceding his solution of the case of the exchange of gold for toys, Lessius explained that if a precious gem was sold as if it were a piece of glass, or, more generally, if a precious thing was sold as if it were only of lesser value, the equality of the transaction was distorted[[28]](#footnote-28). Hence, the barter was inequitable, even if the individual seller really thought that the precious thing was worth nothing. According to Lessius, a seller could not be presumed to want to make a donation in doing business. A seller intended to alienate his good at a price that guaranteed equality in exchange. Also, Lessius had argued that if a precious thing was sold as if it were only of lesser value, there was lack of substantial consent[[29]](#footnote-29). Since the vendor was mistaken about the substance of the thing he sold, voluntary consent was substantially vitiated. Consequently, the buyer had to make restitution of the thing or pay an additional sum of money as soon as he found out that the glass was, in fact, a gem. Since voluntary consent is vitiated by mistake, the contract could also be rescinded at the option of the mistaken party.

However, Lessius eventually refused to apply this analysis to the case of the Indians exchanging gold for glass with the Spanish merchants. The reason is that this type of exchange is not vititated by mistake, according to Lessius. Basically, what Lessius argued is that there is a market typical of the colonial world where gold is always exchanged for seemingly worthless things like rattles, glass and toys. Lessius reasoned that if in a particular region, a certain good, for instance gold, is always estimated to be of low value, than it can be bought for a low price[[30]](#footnote-30). The reason thereof is that the market price is the criterion for justice in exchange. The market prices guarantees that no one is enriched at the expense of another. So if in the Indies, gold is regularly sold at cheap prices, then it is lawful to give rattles, glass, little knives, and other kinds of stuff in exchange for gold. This response might strike a modern audience as being immoral, certainly in light of the fact that it was expressed by a moral theologian. And yet, this truly is Lessius’ answer. One could ask the question, then, if this pretty straightforward advocacy of the market was balanced by duties to inform.

As regards duties to inform, the answer must be nuanced[[31]](#footnote-31). On the one hand, Lessius pointed out that a seller is under a natural duty to explain the condition of his merchandise, certainly if the buyer enquires about the condition of the good. Lessius said that this duty to explain the condition of the good pertains to the office of the vendor (*ex officio*), because he is the one who best knows his merchandise[[32]](#footnote-32). On the other hand, Lessius indicated that it would be far too burdensome to demand sellers always to explain the condition of their goods. A general and large duty to inform would be too ‘rigid’, Lessius literally said[[33]](#footnote-33). In fact, he insisted on the buyer’s duty to enquire about the state of the merchandise rather than on the vendor’s duty to disclosure. If a buyer failed to enquire and ask explicit questions about the quality of the good, and the vendor charged the regular market price, than the vendor did not have to disclose anything, according to Lessius. If a buyer failed to equire into the state of the good, then he had only himself to blame if he discovered that the good was of poorer quality than he had expected.

Clearly, Lessius’ standpoints came closer to the principle ‘*caveat emptor*’– the buyer purchases at his own risk – than to present-day consumer contract law[[34]](#footnote-34). Generally speaking, he expected contracting parties, whether buyer or seller, to be prudent, watchful and assertive[[35]](#footnote-35). Lessius emphasized that it was custom among businesmen (*consuetudo mercatorum*) on the market for sellers not to inform the buyer about the exact state of the merchandise[[36]](#footnote-36). The buyer was expected to know this, so he had to proceed carefully. The buyer had to ask the seller explicitly about possible defects in the merchandise. However, there is one important qualification to be made to this general picture. Interestingly, Lessius emphasized that this was common practice among businessmen. Lessius added that it was a matter of personal morality for the seller to disclose the state of the good to buyers who could be considered as ignorant (*simplices*), that is to people who are not capable of acquiring the same knowledge about the good as the vendor[[37]](#footnote-37).

Probably, the category of persons known as weak and ignorant people (*simplices*) would now be called ‘consumers’. In Lessius’ opinion, they included people who lacked full intellectual capacities, widows, and the poor. So, if it is allowed to use modern juristic vocabulary in interpreting authors of the past, then one might say that, up to a certain extent, Lessius did recognize that there was a distinction between B2B and B2C contracts. However, he thought that if a merchant failed to inform a ‘weak’ buyer, then he commited a sin, not against the principles of justice, but against the moral virtue of charity (*charitas*). In other words, the duty to inform ‘weak parties’ was not enforceable as a matter of justice. Moreover, to come back on the case of the exchange of gold for stupid little things, Lessius did not consider the Indians to belong to the category of ‘weak parties’. Consequently, Lessius’ solution of the case as a matter of natural law was clearly in favor of the colonialists. Still, Lessius would also recommend people to practise the virtue of charity on an individual basis. Yet, the spheres of (personal) charity and (universal) justice did not coincide.

1. Case 2: Trading Subprime Debt

The second case leads us to the bond market. This market was booming in sixteenth century Antwerp, not in the least because of new financial regulations that fostered the negotiability of bills of exchange and letters of credit in general[[38]](#footnote-38). Assume that a bond has an instrinsic worth of 100 guilders. However, due to uncertainty about the creditworthiness of the debtor or due to other difficulties to obtain payment, the bond is put for sale at half its worth. Is it allowed for someone to buy such a junk bond for half or less than half of its intrinsic value? Is it allowed for the seller of a junk bond to sell his bond without further notice of its toxicity in the first place? The answer to these specific questions will depend, again, on the application of the basic principles of contract law. This might strike a modern jurist as unusual, because the issue of toxic credits and the issue of the sale of pieces of glass in exchange for gold would now be subsumed under different fields of the law. However, the compartmentalization that characterizes contemporary legal systems was absent until fairly recently. So, back in the early modern period, both cases were dealt with in the context of the law of obligations, particularly the law of sale contracts.

The first question is whether the sale and purchase of junk bonds (toxic credits / subprime debt) at less than half of their intrinsic value is allowed. Put differently, is the market price necessarily a juridically and morally ‘just’ price? This was a matter of debate among the theologians[[39]](#footnote-39). In Lessius’ view, the sale-purchase of bonds at prices much lower than the intrinsic value of those bonds was unproblematical. For one simple reason: there is a market for the sale of such bonds, and from experience we know that the market values liquidity much more than a right to payment in the future[[40]](#footnote-40). This liquidity preference often drives prices of bonds very low, because supply is high and demand low. Lessius obviously had a strong belief in the moral outcome of market processes. Indeed, his opinion that junk bonds can be sold at ridiculously low prices if the market imposes that price, relied upon moral concerns. What theologians in general, and Lessius, in particular, cared about was the requirement of fairness in exchange. Their primary concern in contractual exchange was the avoidance of exploitation of need (*necessitas*). They thought that competitive market prices were the best guarantee against such exploitation.

The theologians’ moral approval of the market mechanism, even in financial markets, might require some explanation. If you accept that need is what determines value in economic change, then, in theory, you can sell a bread to a poor man for a much higher price than to a rich man, since a poor man is more in need of food than a rich man. In order to avoid this from happening, the theologians argued that economic value should be determined by common need, by the need of many people, i.e. by the price as established on a competitive market. The theologians thought that markets guaranteed the protection of weak parties because they were based on the estimation of common need, thus excluding the exploitation of individual need[[41]](#footnote-41). Therefore, the just price, that is the price which best guaranteed that no one was enriched at another’s expense, was thought to be the competitive market price. As was sharply observed[[42]](#footnote-42), ‘Any market price is to an individual seller or buyer an objective price independent of his peculiar wishes and wants. This paradox, by which a price determined subjectively by all becomes objective to each, is true of any market.’

It should be stressed that Lessius’ quite liberal endorsement of the market is driven by his concern for the second principle of contract law, namely fairness in exchange. Consequently, moral motives remain the backbone of his theory of just pricing. The autonomy of the will is not sufficient in contract law. Theologians rejected the Roman maxim that ‘a good is worth as much as it can be sold for’. A theology student from Maastricht defending his doctorate at Leuven university summarized the entire theory about just pricing as follows[[43]](#footnote-43): ‘To prevent you from harming the other party, willing though he is, it is not sufficient that he is absolutely voluntary and involuntary only in a relative sense. Now assume I part with something for the sake of the other party through an onerous contract. It is not licit for me to estimate the utility the other party will procure from this by reason of circumstances that have specifically to do with him ; for in regard to goods I give or award to another party through sale-purchase or another onerous contract, it is not licit for me to estimate the value of those goods in regard to their value to the person who concludes the contract with me, but only in regard to their common value or, surely, in regard to their special value for me insofar as I deprive myself of those goods for his sake.’

The second question related to the case of subprime debt is the following: Is it allowed for someone to buy such a junk bond for half or less than half of its intrinsic value on the market, even if he is sure that he, in particular, will not experience difficulties to obtain payment, for instance because he is on very good terms with the original debtor? For example, if you can buy Turkish sovereign debt at a cheap price on the financial markets, knowing that you will be able to recover the entirety of the debt because you are a personal friend or a frequent business partner of the sultan, then that is all right. According to Lessius, the value of a bond is entirely determined by common estimation. All participans in the market are bound by this common estimation or market price, even if one market participant’s particular estimation of the bond put for sale is different[[44]](#footnote-44). Lessius thinks that the market is a game. Hence, it is either a matter of industry or of good luck (*bona fortuna*) if one prudent buyer in particular can make profits by taking advantage of the common estimation[[45]](#footnote-45).

It would be too rash a conclusion to infer from this that Lessius was a market-fundamentalist. The purpose of his defence of the market was the very protection against exploitation of individual need. Consequently, Lessius added to his general answer, that, sometimes, namely when the market price clearly did not protect people from being exploited, it was uncharitable for market participants to rely on the market price. For example, the military were often paid by means of rights to future payment; but since most governments found themselves in financial troubles once the war was over, the only way for the military to obtain their money was to sell these rights on the market[[46]](#footnote-46). The military were clearly driven by great need to put their rights to payment for sale on the bond market. Therefore, Lessius, said, other market participants needed to be charitable and pay more for the rights than their market price. Still, the buyers could not be forced to do so as a matter of strict justice. Charity (*charitas*) was called upon in such cases. Charity, then, seems to have played for theologians the role special protection regimes play in modern legal systems.

The role of charity becomes even more clear as we move to the final question regarding the case of the market for junk bonds: Is the seller of subprime debt obliged to disclose the toxic nature of his bond, or can he remain silent? Interestingly, Lessius indicates that this case occurs very frequently in practice[[47]](#footnote-47). His argument is nuanced. He first claims that it is allowed to sell a junk bond as if it were not a toxic, as long you charge its market price[[48]](#footnote-48). The market price is the just price, so you can charge it without doing wrong to anyone. From the point of view of justice, strictly speaking, it is difficult to criticize the sale of subprime debt without further notification by the seller. However, Lessius goes on to argue that the moral stakes are too high to accept this traditional, market-based argument. First, he thinks it goes against charity (*contra charitatem*) to sell junk bonds as if they were trustworthy, certainly if doing so would bring serious harm to a weaker person[[49]](#footnote-49). Second, he thinks junk bonds are intrinsically defect, just as rights to the production of lands that are actually infertile[[50]](#footnote-50). Hence, the seller is obliged even as a matter of justice to inform the buyer about the insolvency of the debtor.

1. Concluding Observations: From Morality to Economics

The protection of weaker parties has been of constant concern in the history of contract law. From a historical point of view, it would seem that the so-called classical account of ‘freedom of contract’ as it can allegedly be found in the *Code Napoléon* (1804) is the exception rather than the rule[[51]](#footnote-51). Incidentally, legal historians are in serious doubt whether the drafters of that *Code* really intended to promote a principle of ‘autonomy of the will’ that was devoid of any social or moral considerations[[52]](#footnote-52). It seems that it was not until the end of the nineteenth century that a spirit of economic individualism and the autonomy of the will were artificially read into the French *Code Civil*[[53]](#footnote-53). In any case, it is beyond doubt that over the course of the twentieth century the classical paradigm of ‘freedom of contract’ gradually evolved into a new paradigm that also takes into account social and moral principles[[54]](#footnote-54). For example, in Belgian contract law the idea of equilibrium in exchange and the *a posteriori* control of one-sided bargains have regained force[[55]](#footnote-55). Rules on consumer protection are another manifestation of this trend, which seems to be opposed to the ‘classical’ paradigm of contract law[[56]](#footnote-56).

If the concern about protection of weaker parties against one-sided bargains has remained relatively unchanged, the concrete ways to address the issue have altered over the centuries. In this respect, a close-reading of Leonardus Lessius’ analysis of two specific cases has revealed a couple of things. As a preliminary remark it is important to notice that, in the past, actors other than the state, too, created rules to regulate contracts. Particularly, the discovery of the Americas and the emergence of global commercial and financial capitalism in the sixteenth century created regulatory gaps that were filled by theologians as well as academic jurists. Moreover, those theologians developed a general law of contract based on two principles, freedom of contract (*pacta sunt servanda*) and fairness in exchange (*iustitia commutativa*) – which is a positive way of expressing the prohibition on unjust enrichment. It might be briefly noted that this generaly theory of contract was very influential[[57]](#footnote-57). Freedom of contract and the prohibition on unjust enrichment remained the twin pillars of contract law until the age of condification[[58]](#footnote-58). Today, both principles are named as general principles of EU-law derived from private law[[59]](#footnote-59).

Theologians such as Lessius thought that the consideration of the principle of equilibrium in exchange, more specifically the just price, was the best guarantee against exploitation of weaker parties. Strange though it may seem to a modern audience, the just price, which guaranteed fairness in exchange, was considered to be the price established by common estimation on the market. Hence, the market, characterized by free competition through the presence of a plurality of buyers and sellers, was thought to have a moralizing function. The market was thought to protect people from individual exploitation, because the price established on the market does not take into consideration individual need. Lessius argued that one could exchange gold for toys, because everywhere, local, Indian markets estimated pieces of glass or toys to be worth as much as precious stones or gold. By the same token, one could buy junk bonds at a low price even if, personnally, one could find a way to obtain payment, since a market price was based on common knowledge about the solvency of the debtor and not on the personal knowledge of one particular market participant.

The emphasis on the market as the guarantor of fairness in exchange comes across as surprising to the modern reader. Today, mechanisms to protect weaker parties against exploitation often seem to coincide with measures that correct the allegedly anti-social outcome of free markets. Clearly, the reality and the conception of markets have changed. In the eyes of the theologians of the early modern period, the best way to protect weaker parties in contractual exchange was to guarantee the proper functioning of the market, for instance through anti-trust law. It is no surprise to find that the theologians were very critical of monopolies[[60]](#footnote-60). They considered a competitive market as the best means to obtain fairness in exchange. However, if the market could not out of itself guarantee the protection of weaker parties, then the individual’s personal moral responsability (*charitas*) was called upon to protect weaker parties. From a functionalist perspective, it seems that the role played by the individual person’s responsilibity to be charitable when weaker parties risked to be exploited has been transferred to the State legislator in modern times.

A close-reading of Lessius’ treatment of concrete cases reveals that not only the legal framework to address the issue of weaker parties has changed over time. It also shows that the motivation behind the protection of weaker parties can be quite variegated. Theologians’ emphasis on the role of personal virtues such as charity reveals the moral motivation behind their concern for the protection of weaker parties[[61]](#footnote-61). At the same time, the historical prevalence of moral considerations reveals that the main policy consideration behind contemporary EU consumer law is quite different. It has frequently been noted that European rules try to attain a goal that is external to law itself, namely the economic goal of stimulating growth and cohesion in the internal market[[62]](#footnote-62). Particularly, European consumer directives are the outcome of an economic cost-benefit analysis. Fairness and consumer protection, then, seem to have become primarily instruments to boost consumer confidence rather than being the legal expression of an authentic concern for justice and morality[[63]](#footnote-63).

1. A. Marx – M. Maertens – J. Swinnen – J. Wouters, *Private standards and global governance, An introduction*, in: A. Marx – M. Maertens – J. Swinnen – J. Wouters (eds.), Global governance and private standards, Interdisciplinary perspectives, Cheltenham 2012 [forthcoming]. [↑](#footnote-ref-1)
2. J.M. Smits, *Private law 2.0, On the role of private actors in a post-national society* (November 30, 2010), Hague Institute for the Internationalisation of law and Eleven international publishing, 2011, Maastricht Faculty of Law, Available at SSRN: http://ssrn.com/abstract=1779042; J.M. Smits, Codification without democracy? On the legitimacy of a European (Optional) Code of contract law, in: Ch. Joerges – T. Ralli (eds.), European constitutionalism without private law – private law without democracy?, ARENA Report No. 3/11 and RECON Report No. 14, Oslo 2011, p. 127-140, available on-line at www.reconproject.eu. [↑](#footnote-ref-2)
3. See the contributions in N. Jansen – R. Michaels (eds.), *Beyond the State, Rethinking private law*, Tübingen 2008. [↑](#footnote-ref-3)
4. N. Jansen, *The making of legal authority, Non-legislative codifications in historical and comparative perspective*, Oxford-New York 2010; F. Cafaggi, *Private regulation in European private law*, in: A.S. Hartkamp – M.W. Hesselink – E.H. Hondius – Ch. Mak – C.E. du Perron (eds.), Towards a European civil code, Alphen aan den Rijn 20114, p. 94. [↑](#footnote-ref-4)
5. Ch. Donahue, Jr., *Private law without the State and during its formation*, in: N. Jansen – R. Michaels (eds.), Beyond the State, Rethinking private law, Tübingen 2008, p. 121-144. For a compelling discussion of the differences as well as the parallels between the contemporary ius commune and the late medieval ius commune, see A.A. Wijffels, *Qu'est ce que le ius commune?*,in: A.A. Wijffels (ed*.),*Le Code civil entre ius commune et droit privé européen, Bruxelles 2005, p. 643-661. [↑](#footnote-ref-5)
6. R. Zimmermann (ed.)*, Globalisierung und Entstaatlichung des Rechts, Teilband II: Nichtstaatliches Privatrecht, Geltung und Genese*, Tübingen 2008, p. vi. [↑](#footnote-ref-6)
7. J. Gordley, *Philosophical origins of modern contract doctrine*, Oxford 1991; J. Gordley, *Foundations of private law, Property, tort, contract, unjust enrichment*, Oxford 2006; W. Decock, *Theologians and contract law, The moral transformation of the ius commune (ca. 1500-1650)*, Leuven 2011 [unpublished doct. diss.]. [↑](#footnote-ref-7)
8. H.J. Berman, *The religious sources of general contract law, An historical perspective*, in: Faith and order, The reconciliation of law and religion, [Emory studies in law and religion, 3], Grand Rapids-Cambridge 1993, p. 187-208 [=reprint from Journal of law and religion, 4 (1986), p. 103-124. [↑](#footnote-ref-8)
9. For a brief historical overview of European regulatory initiatives concerning consumer protection since the 1970s, see J. Stuyck – E. Terryn – T. Van Dyck, *Confidence through fairness? The new directive on unfair business-to-consumer practices in the internal market*, Common market law review, 43 (2006), p. 109-113. [↑](#footnote-ref-9)
10. For biographical information concerning the Jesuit theologian Leonardus Lessius, see T. Van Houdt – W. Decock, *Leonardus Lessius, Traditie en vernieuwing*, Antwerpen 2005. Lessius was praised by the lawyers of his time as the greatest expert on financial matters related to the practice of the Stock Exchange in Antwerp. He was also an adviser to the Archdukes Albert and Isabel. In his work *On Justice and Right* (*De iustitia et iure*), which was meant to help confessors and judges decide cases, he developed a systematic treatment of the law of property, the law of torts, and the law of contracts; cf. W. Decock, *La transformation de la culture juridique occidentale dans le premier ‘tribunal mondial’*, in : B. Coppein – F. Stevens – L. Waelkens (eds.), Modernisme, tradition et acculturation juridique, Actes des Journées internationales de la Société d'histoire du droit tenues à Louvain, 28 mai - 1 juin 2008, [Iuris scripta historica, 27], Brussel 2011, p. 125-135. [↑](#footnote-ref-10)
11. E.g. M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen*, [Forschungen zur neueren Privatrechtsgeschichte, 6], Köln-Graz 1959, p. 82sq; 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 *Fata iuris romani*, Leiden 1974, p. 338-363], p. 377-402; M.J. Schermaier, *Mistake, misrepresentation and precontractual duties to inform, The civil law tradition*, in: R. Sefton-Green (ed.), Mistake, fraud and duties to inform in European contract law, The Common Core of European Private Law Series, Cambridge 2005, p. 56; N. Jansen, *Seriositätskontrollen existentiell belastender Versprechen, Rechtsvergleichung, Rechtsgeschichte, und Rechtsdogmatik*, in: H. Kötz - R. Zimmermann (eds.), Störungen der Willensbindung bei Vertragsabschluss, Tübingen 2007, p. 136-137. [↑](#footnote-ref-11)
12. Cf. A.A. Cassi, *Ultramar, L’invenzione europea del Nuovo Mondo*, Roma-Bari 2007, p. 3-27. [↑](#footnote-ref-12)
13. For an English translation of the *Relectio de Indis*, see A. Pagden – J. Lawrance, *Vitoria, Political thought*, [Cambridge Texts in the History of Political Thought], Cambridge 20015, p. 231-292. [↑](#footnote-ref-13)
14. A.A. Cassi, *Ius comune tra vecchio e nuovo mondo, Mari, terre, oro nel diritto della conquista (1492-1680)*, Milano 2004. [↑](#footnote-ref-14)
15. See several contributions in F. Grunert – K. Seelmann (eds.), *Die Ordnung der Praxis, Neue Studien zur Spanischen Spätscholastik*, [Frühe Neuzeit, 68], Tübingen 2001; K. Pennington, *Bartolomé de las Casas and the tradition of medieval law*, in: Popes, canonists and texts, 1150-1550, [Variorum collected studies, 412], Aldershot 1993, Chapter 13. [↑](#footnote-ref-15)
16. B. Tierney, *The idea of natural rights, Studies on natural rights, natural law and Church law, 1150-1625*, [Emory University Studies in Law and Religion, 5], Atlanta 1997, p. 255-315. [↑](#footnote-ref-16)
17. M. Koskenniemi, *Empire and international law, the real Spanish contribution*, University of Toronto Law Journal, 61 (2011), p. 32. [↑](#footnote-ref-17)
18. P. Cappellini, *Sulla formazione del moderno concetto di ‘dottrina generale del diritto’* (a proposito di Martin Lipp, *De Bedeutung des Naturrechts für die Ausbildung der allgemeinen Lehren des deutschen Privatrechts*, [Schriften zur Rechtstheorie, 88], Berlin 1980), Quaderni fiorentini per la storia del pensiero giuridico moderno, 10 (1981), p. 323-354. [↑](#footnote-ref-18)
19. P. Landau, *Pacta sunt servanda*, *Zu den kanonistischen Grundlagen der Privatautonomie*, in: M. Ascheri et al. (eds.), Ins wasser geworfen und Ozeane durchquert, Festschrift für Knut Wolfgang Nörr, Köln-Weimar-Wien 2003, p. 457-474. [↑](#footnote-ref-19)
20. Th. Duve, *Kanonisches Recht und die Ausbildung allgemeiner Vertragslehren in der Spanischen Spätscholastik*, in : O. Condorelli – F. Roumy – M. Schmoeckel (eds.), Der Einfluss der Kanonistik auf die Europäische Rechtskultur, Band 1: Zivil- und Zivilprozessrecht, [Norm und Struktur, 37], Köln-Weimar-Wien 2009, p. 389-408. [↑](#footnote-ref-20)
21. Pedro de Oñate, *De contractibus* (*On contracts*), Romae 1646, Volume 1, Treatise 1, Disputation 2, Section 5, Number 166, p. 40 : ‘Unde (…) et contrahentibus consultissime libertas restituta ut quandocumque de rebus suis voluerint contrahere et se obligare, id ratum sit in utroque foro in quo convenerint et sancte et inviolabiliter observetur. Quare ius canonicum et ius Hispaniae corrigunt ius commune, concedentes pactis nudis omnibus actionem et obligationem civilem, quam illud negabat.’ [↑](#footnote-ref-21)
22. Oñate, *De contractibus* (*On contracts*), Volume 2, Treatise 9, Disputatio 29, Section 6, Number 74, p. 108 : ‘Reliquit Deus hominem in manu consilii sui Eccles. 15, 14 sine dubio inter alia, quia reliquit Deus in voluntate eius ut se obligaret, quando vellet, et sicut actiones agentium non operantur ultra voluntatem et intentionem eorum, ita operantur iuxta voluntatem et intentionem eorum.’ [↑](#footnote-ref-22)
23. J. Gordley, *Equality in exchange*, California Law Review, 69 (1981), p. 1587-1656. [↑](#footnote-ref-23)
24. Luís de Molina, *De iustitia et iure* (*On justice and right*), Volume 2 (*On contracts*), Treatise 2, Disputatio 350, Column 405, Number 6: ‘Quod autem pro communi utilitate est introductum, esse non debet in gravamen unius potius quam alterius, iure naturali id efflagitante, quod praescribit, ut, quod tibi rationabiliter non vis fieri, alteri non facias ; esset autem in gravamen unius potius quam alterius nisi aequalitas servaretur.’ [↑](#footnote-ref-24)
25. Oñate, *De contractibus* (*On contracts*), Volume 1, Treatise 1, Disputatio 1pr., Number 10, p. 2: ‘Given the division of things, natural law suddenly sneaked in again, ordering that natural equity be observed in these exchanges. It prescribed, not only that you should not do unto others what you would not have them do unto you, but also that equality be observed between the objects of these exchanges, as is required by commutative justice. Natural law further prescribed that equality must be restored through restitution if it has been violated; also, that agreements, once concluded, must be performed with great fidelity, and that infringers must be restrained through appropriate penalties.’ [↑](#footnote-ref-25)
26. Covarruvias, *Variarum resolutionum libri quattuor* (*Four books containing various solutions*), Book 2, Chapter 3, Number 4, in: Opera omnia, Augustae Taurinorum 1594, tom. 1, p. 244: ‘Primum, in contractibus emptionum et venditionum similibusque permutationibus, nequaquam attendi, ne constitui iustum pretium ex natura rei, sed ex hominum aestimatione, tametsi insana sit aestimatio. (…) Secundo, hinc apparet in pretii iusti aestimatione non esse considerandum quanti res ipsa empta fuerit nec quot labores pro eius acquisitione venditor fuerit perpessus, sed tantum habendam esse rationem communis hominum aestimationis.’

    Covarruvias’ typically scholastic theory of just pricing is also treated in R. Zimmermann, *The law of obligations*, *Roman foundations of the civilian tradition*, Cape Town – Wetton – Johannesburg 1990, p. 265-266, n. 190-192. [↑](#footnote-ref-26)
27. Cf. Lessius, *De iustitia et iure* (*On justice and right*), Antverpiae 1621, Book 2, Chapter 21, Dubitatio 11, Num. 84, p. 285. [↑](#footnote-ref-27)
28. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 11, Number 84, p. 285: ‘Pari modo iniquum est, emere rem vitio carentem pro vitiosa et pretiosam pro vili, ut gemmam loco vitri, etiamsi venditor ob ignorantiam eam non pluris indicet quam si vitiosa aut vilis esset. Ratio est, quia non servatur aequalitas. Non enim venditor intendit rem donare, qua parte excedit, sed totam uti est, vendere et iusto pretio commutare.’ [↑](#footnote-ref-28)
29. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 17, Dubitatio 5, Number 27, p. 198: ‘Quando contingit in altero contrahentium esse errorem circa substantiam rei, contractus iure natura est irritus. Est communis sententia doctorum. Ratio est, quia deest substantialis consensus. Nam non consentit in illam rem, sed in aliam, quam putat subesse istis accidentibus. Ut si venditor gemma putet esse vitrum, et pro tali vendat, emptor re comperta tenetur ad restitutionem gemmae vel ad iustum eius pretium, prout de novo inter eos convenerit, quia venditor non consentit in alienationem gemmae sed vitri.’ [↑](#footnote-ref-29)
30. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 11, Number 85, p. 285: ‘Si tamen in aliqua regione res illa passim parvi aestimaretur, eo quod ignorent alibi eam magni fieri, posset ibi parvo emi. Sic apud Indos licitum erat contra aurum aliasque res pretiosissimas commutare specula, tintinnabula, cultellos et similia crepundia.’ [↑](#footnote-ref-30)
31. For a detailed analysis of Lessius’ and other theologians’ opinions on duties to inform, see W. Decock – J. Hallebeek, *Pre-contractual duties to inform in early modern scholasticism*, Tijdschrift voor Rechtsgeschiedenis/The Legal History Review, 78 (2010), p. 89-133. [↑](#footnote-ref-31)
32. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 11, Number 86, p. 285: ‘Probatur, quia tenetur ex officio explicare conditionem rei suae, quam vendendam exponit, praesertim si rogetur ab emptore; alioquin maximae contingerent fraudes, quae non possent ab emptoribus vitari. Ordinarie enim nemo novit melius rei conditiones, quam ipse venditor.’ [↑](#footnote-ref-32)
33. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 11, Number 89, p. 285: ‘(…) nimis durum esset tale genus hominum tam stricte obligare ad omnium vitiorum detectionem, quod maxime verum est, quando emptor expresse non rogat de vitiis, sed petit rem bonam et utilem sibi exhiberi.’ [↑](#footnote-ref-33)
34. Cf. Decock – Hallebeek, *Pre-contractual duties to inform in early modern scholasticism*, p. 132. [↑](#footnote-ref-34)
35. See W. Decock, *Lessius and the breakdown of the scholastic paradigm*, Journal of the History of Economic Thought, 31 (2009), p. 57-78. [↑](#footnote-ref-35)
36. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 11, Number 89, p. 285: ‘(…) haec fere est consuetudo mercatorum quae passim ab emptoribus scitur.’ [↑](#footnote-ref-36)
37. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 11, Number 93, p. 286: ‘Secundo, etiamsi non sit contra iustitiam non monere emptorem dum suo iudicio fidit, tamen potest esse contra charitatem; ut si videat emptorem ex simplicitate decipi et putet rem ei fore inutilem, quamvis aliis inutilis non sit.’ [↑](#footnote-ref-37)
38. H. Van der Wee, *Anvers et les innovations de la technique financière aux XVIe-XVIIe siècles*, Annales, Economies, Sociétés, Civilisations, 5 (1967), p. 1067-1089; D. De ruysscher, *Innovating financial law in early modern Europe, Transfers of commercial paper and recourse liability in legislation and ius commune (sixteenth to eighteenth centuries)*, European Review of Private Law, 19 (2011), p. 505-518. [↑](#footnote-ref-38)
39. W. Decock, *L’usure face au marché, Lessius (1554-1623) et l'escompte des lettres obligataires*, in: A. Girollet (ed.), Le droit, les affaires et l’argent, Célébration du bicentenaire du code de commerce, Dijon 2008, p. 221-238. [↑](#footnote-ref-39)
40. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 8, Number 66, p. 282: ‘Quia talia iura, dum proponuntur venalia instar mercis communi hominum iudicio minoris aestimantur quam pecunia praesens, ut experientia patet, eo quod haec multarum rerum facultatem praebeat quam iura illa non tribuunt, ergo minoris emi possunt.’ [↑](#footnote-ref-40)
41. O.I. Langholm, *The legacy of scholasticism in economic thought, Antecedents of choice and power*, Historical perspectives on modern economics, Cambridge 1998, p. 83. [↑](#footnote-ref-41)
42. J.T. Noonan, *The scholastic analysis of usury*, Cambridge Mass. 1957, p. 87. [↑](#footnote-ref-42)
43. Leonardus Ignatius Thisius Mosae-Trajectinus, *Theses theologicae quibus exhibentur quaedam observationes circa aliquot propositiones de furto, compensatione occulta et restitutione inter lxv a Innocentio condemnatas* [praeses: Gummarus Huygens Lyranus; defensio in collegio Adriani VI die 7 decembris 1684], Lovanii 1684, concl. 2, par. 6 [s.p.] : ‘Ut injuriam non inferas alteri volenti, non sufficit quod sit voluntarius simpliciter et involuntarius secundum quid. Nec licit in iis quibus nos privamus in gratiam alterius per contractum onerosum pretio aestimare utilitatem quam alter inde accipiet ob circumstantias quae singulariter se tenent parte illius. Siquidem non licet nobis in iis quae per contractum emptionis et venditionis aut alium onerosum alicui damus vel addicimus aestimare valorem quem ista habent respectu illius cum quo contrahimus, sed solummodo valorem communem, vel certe specialem quem habet respectu nostrum, quatenus nosmetipsos in alterius gratiam illis rebus privamus.’ [↑](#footnote-ref-43)
44. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 9, Numbers 75-76, p. 283-284: ‘Dices, etsi aliis solutio difficilis sit impetratu, Petro tamen, eiusque sodalibus, ob favorem principis vel officialium, vel ob contractus quos cum illo ineunt, non est difficilis nec incerta, ergo ipsi non poterunt illud tam modico pretio emere, nam ratio illa detrahendi de pretio in illis cessat. (…) Sed contraria sententia est probabilis et veriori, posse emi tali pretio absque iniustitia. (…). Ratio est, quia dum hae libranciae offeruntur venales, earum pretium non pendet ex commodo unius vel paucorum, sed ex publica aestimatione, quae aestimarentur si publice in foro, sub voce praeconis, concurrente tota civitate, proponerentur.’ [↑](#footnote-ref-44)
45. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 9, Numbers 76, p. 284: ‘Unde si princeps Turcarum tibi debeat 1000 aureos, nullaque vel parva sit spes obtinendae solutionis vel non nisi magnis sumptibus aut laboribus, fas est hoc debitum emere parvo pretio, v.g. 100 vel 50 aureis, etiamsi emptor peculiarem aliquam rationem norit, qua facile integram solutionem obtinere queat. Hoc enim ad bonam ipsius fortunam pertinere existimandum est.’ [↑](#footnote-ref-45)
46. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 9, Numbers 76, p. 284: ‘Saepe tamen fit ut mercatores illi peccent contra charitatem, si miseris militibus, qui per magnam inopiam coguntur eas vendere, rationabile pretium dare nolint, cum ipsi tam ingens lucrum inde reportent.’ [↑](#footnote-ref-46)
47. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 10 (*Utrum si sciam occulte debitorem meum non esse solvendo, possim iis qui id nesciunt vendere illud debitum pretio ordinario?*), Number 79, p. 284: ‘Iste casus est frequens inter mercatores.’ [↑](#footnote-ref-47)
48. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 10, Number 79, p. 284: ‘Videri possit non esse contra iustitiam, modo mendaciis vel fraudibus non alliciam emptorem. Primo, quia vendit rem quanti communiter aestimatur, non facit emptori iniuriam (nam hoc censetur iustum rei pretium), atqui iste sic vendit, ergo, etc.’ [↑](#footnote-ref-48)
49. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 10, Number 81, p. 284: ‘Verum quidquid sit de ratione iustitiae, mihi videtur absolute illicitum, quia saltem est contra charitatem, maxime quando alicui tenuiori esset occasio gravis damni.’ [↑](#footnote-ref-49)
50. Lessius, *De iustitia et iure* (*On justice and right*), Book 2, Chapter 21, Dubitatio 10, Number 81, p. 284: ‘Deinde videtur esse contra iustitiam, sicut enim ius fructuum agri sterilis in se est parvi momenti, nec potest vendi eo pretio, quo ius in agro fertili, ita ius in illum, qui non est solvendo. Unde hoc vitium videtur intrinsecum rei, ac proinde manifestandum.’ [↑](#footnote-ref-50)
51. For a systematic account of ‘classical’ contract law, see S. Stijns, *Verbintenissenrecht*, Boek 1, Brugge 2005, p. 37-42. [↑](#footnote-ref-51)
52. D. Deroussin, *Histoire du droit des obligations*, Paris 2007, p. 492-499. [↑](#footnote-ref-52)
53. V. Ranouil, *L’autonomie de la volonté, Naissance et évolution d’un concept*, [Travaux et recherches de l’Université de droit, d’économie et de sciences sociales de Paris, Série sciences historiques, 12], Paris 1980, p. 17-18. [↑](#footnote-ref-53)
54. A.L.M. Keirse, *Epiloog, Het contractenrecht van morgen: de uitzonderingen op het beginsel van de partijautonomie gepromoveerd tot regel*, in: I. Samoy (ed.), Evolutie van de basisbeginselen van het contractenrecht, Antwerpen – Oxford 2010, p. 263-268. [↑](#footnote-ref-54)
55. S. Stijns – E. Swaenepoel, *De evolutie van de basisbeginselen in het contractenrecht, geïllustreerd aan de hand van het contractueel evenwicht*, in: I. Samoy (ed.), Evolutie van de basisbeginselen van het contractenrecht, Antwerpen – Oxford 2010, p. 26-40. [↑](#footnote-ref-55)
56. E. Hondius, *The protection of the weak party in a harmonised European contract law, A synthesis*, Journal of Consumer Policy, 27 (2004), p. 246. It is worthwhile noting that other authors have tried to highlight the continuity between present-day consumer law and the classical law of obligations, e.g. P. Van Ommeslaghe, *Les relations entre le droit de la consommation et le droit commun des obligations*, Droit de la consommation – Consumentenrecht, 84-85 (2009), p. 245-268. [↑](#footnote-ref-56)
57. For a systematic and detailed explanation, see Decock, *Theologians and contract law, The moral transformation of the ius commune (ca. 1500-1650)*, p. 97-183 and p. 410-485. [↑](#footnote-ref-57)
58. K. Luig, *Vertragsfreiheit und Äquivalenzprinzip im gemeinen Recht und im BGB, Bemerkungen zur Vorgeschichte des § 138 II BGB*, in: Aspekte europäischer Rechtsgeschichte, Festgabe für Helmut Coing zum 70. Geburtstag, [Ius Commune, Sonderhefte, Texte und Monographien, 17], Frankfurt am Main 1982, p. 171-206. [↑](#footnote-ref-58)
59. A.S. Hartkamp, *The general principles of EU law and private law*, Rabels Zeitschrift für ausländisches und internationales Privatrecht, 75 (2011), p. 255-257. [↑](#footnote-ref-59)
60. R. De Roover, *Monopoly theory prior to Adam Smith, A revision*, Quarterly Journal of Economics, 65 (1951), p. 492-524. [↑](#footnote-ref-60)
61. For the same, moral reason, canon law had always insisted that cases involving certain categories of persons, the so-called *miserabiles personae*, for instance widows, peasants and the poor, require equitable judgment. On the historical role played by the Church to protect *miserabiles personae*, see Th. Duve, *Sonderrecht in der Frühen Neuzeit, Studien zum* *ius singulare und den privilegia miserabilium personarum, senum und indorum in Alter und Neuer Welt*, [Studien zur europäischen Rechtsgeschichte, 231], Frankfurt am Main 2008. [↑](#footnote-ref-61)
62. J.M. Smits, *Contractenrecht als meergelaagde rechtsorde, Uitdagingen voor de komende tien jaar*, Contracteren, 11 (2009), p. 112. [↑](#footnote-ref-62)
63. J. Stuyck – E. Terryn – T. Van Dyck, *Confidence through fairness? The new directive on unfair business-to-consumer practices in the internal market*, Common market law review, 43 (2006), p. 148-149. Compare the critical observations in M.W. Hesselink, *European contract law, A matter of consumer protection, citizenship or justice?*, European Review of Private Law, 15 (2007), p. 323-348. [↑](#footnote-ref-63)