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# *Usus theologicus pandectarum*

## Roman Law in Early Modern Christianity

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### ABSTRACT – RÉSUMÉ

Cet article vise à mettre en évidence l'une des « réutilisations » les plus fructueuses de la tradition juridique romaine dans un contexte religieux, à savoir dans les sources théologiques du début de la période moderne (XVI–XVIII<sup>e</sup> siècles). Avides d'apporter des réponses à des cas concrets de conscience, les théologiens moraux, également connus sous le nom de « scolastiques », se sont fortement inspirés des textes juridiques de Justinien, en essayant de les concilier avec des principes plus larges dérivés de l'éthique de la vertu ancienne et médiévale. Cela a donné naissance à un large et dynamique mouvement d'utilisation théologique des Pandectes (*Usus theologicus pandectarum*). Ce dernier peut être considéré comme faisant partie du phénomène contemporain plus large de la réappropriation du *Corpus iuris civilis* de Justinien (*Usus modernus pandectarum*). Tout en rappelant brièvement quelques-unes des caractéristiques plus générales de cette rencontre entre traditions juridiques et théologiques, cet article fournit un exemple spécifique des riches débats qui ont résulté de cette rencontre. Grâce à la réinterprétation de la tradition juridique romaine à la lumière d'autres traditions normatives (dont la philosophie aristotélicienne, le droit canonique et le droit naturel), il sera démontré que l'*Usus theologicus pandectarum* a eu un impact durable sur la tradition civile.

**Mots-clefs :** *Usus theologicus pandectarum*, consentement dans les contrats, nullité, annulabilité, *pacta sunt servanda*.

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This article seeks to highlight one of the most fruitful “re-uses” of the Roman legal tradition in a religious context, namely in theological sources of the early modern period (16–18<sup>th</sup> centuries). Eager to provide answers to concrete cases of conscience, moral theologians, also known as the “scholastics”, heavily drew on Justinian’s legal texts, trying to reconcile them with larger principles derived from ancient and medieval virtue ethics. As a result, a vast and dynamic movement of “theological use of the Pandects” (*Usus theologicus pandectarum*) emerged. It can be seen as an integral part of the wider contemporary phenomenon of re-appropriation of Justinian’s *Corpus iuris civilis* (*Usus modernus pandectarum*). While briefly recalling some of the more general features of this encounter, this article offers a specific example of the rich debates that ensued from the encounter between legal and theological traditions. Through the re-interpretation of the Roman legal tradition in light of other normative traditions (including Aristotelian philosophy, canon law and natural law) it will be shown that the *Usus theologicus pandectarum* had a lasting impact on the civilian tradition.

**Keywords:** *Usus theologicus pandectarum*, consent to contracts, nullity, annulability, *pacta sunt servanda*.

## 1. INTRODUCTION: THE “THEOLOGICAL USE OF THE PANDECTS”

To some, it may come as a surprise to find that, for almost a millennium and a half, Roman law and Christianity have been intricately bound together in the European legal tradition. However, to friends of the Société internationale Fernand De Visscher pour l’histoire des droits de l’Antiquité the symbiosis of Roman law and the Christian religion in pre-modern times may sound like a self-evident truth. From the first moments Fernand De Visscher gathered scholars around him to investigate the legacy of ancient legal systems, he arranged for some of the greatest historians of the Church to join him in Brussels. During the first international session of the Société in December 1945, Gabriel Le Bras, the famous jurist and Church historian, delivered a lecture “On the relationship between the Church and the laws of Antiquity<sup>1</sup>”. In 1947, Jean Gaudemet, Roman lawyer and rising star in the field of Church history, was one of a select group of scholars privileged enough to attend the second session of De Visscher’s private assembly<sup>2</sup>. Needless to say, Gaudemet soon became a major authority for those studying the impact of Roman legal culture on the Church’s power structures<sup>3</sup>. An expert on Christianity and the Roman empire in the 4<sup>th</sup> and 5<sup>th</sup> centuries, he ushered in a tradition of scholars studying the role of Roman law in the conceptualization

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1. See Gerken (2023).

2. Apparently, based on his experience during this and further meetings, Gaudemet was full of praise for De Visscher’s hospitality, see Gerken (2023).

3. See, for example, Gaudemet (1958) or (1980).

of Christian doctrine during the patristic era<sup>4</sup>. Furthermore, both Le Bras and Gaudemet made medievalists aware of the seminal role that Roman law had played in the later Middle Ages, especially regarding the formation of classical canon law texts such as Gratian's *Decretum*<sup>5</sup>. At the same time, they raised awareness among Roman lawyers that, throughout the ages, Christianity had influenced the very way we have come to understand, today, large parts of Justinian's *Corpus iuris civilis*<sup>6</sup>.

From its earliest beginnings, then, Christianity has had an almost existential relationship with the law of Rome<sup>7</sup>. The intensity of the interplay between legal and theological traditions within the Church quickly reached proverbial status. Indeed, according to a famous adage reaching back to post-classical texts such as the seventh-century *Lex ribuaria*, "the Church lives by Roman law" (*ecclesia vivit lege romana*<sup>8</sup>). And yet, however much attention has been paid to the symbiosis of Roman law and the Christian religion in late Antiquity and the Middle Ages, relatively little attention has been paid to the intensification of the use of Roman legal texts in Catholic theology from the sixteenth through the eighteenth centuries. Still, major legal scholars such as James Gordley have noticed at least since the 1990s that, especially in the field of contract law, the Roman legal tradition underwent a major reinterpretation in a decidedly religious context during the early modern period, particularly through the works of "late scholastic" theologians such as Domingo de Soto, Luis de Molina and Leonardus Lessius. In Gordley's opinion, they achieved a remarkable synthesis between Roman law and Aristotelian-Thomistic ethics, leading to a new understanding of Justinian's texts on contract law<sup>9</sup>. Historians of moral theology, for their part, have noticed, often with a sense of disapproval, that the rise of Catholic moral theology as a fully-fledged academic discipline was marked by a strong reliance on the technical vocabulary and grammar of Roman law<sup>10</sup>.

This is not the place to dwell on all the intricacies of the reinforcement of the symbiosis between law and theology in the early modern Catholic world<sup>11</sup>. In response to the Protestant reformers, who preferred theologians

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4. For a recent example, see Faitini (2019). The influence of Roman law on Christian theology is certainly not a coincidence, considering the prominent role that bishops played in the resolution of conflicts in the late Roman empire; see Sirks (2013).
  5. See, for instance, Legendre (1964); Winroth (2008); de Miramon (2020).
  6. Compare Waelkens (2011) and Waelkens (2019).
  7. Compare Zimmermann (2022).
  8. Thier (2007).
  9. Gordley (1991), 3.
  10. e.g. Theiner (1970); Pinckaers (2012).
  11. For further details, see Decock (2011).

to focus on the Bible rather than the *Corpus iuris civilis*, Catholics emphasized the need for founding sound moral doctrine on expert knowledge of Roman and canon law even more strongly than before<sup>12</sup>. Priests, in particular, were expected to have sound knowledge of Roman law and canon law not only for their tasks as administrators but also as spiritual counsellors. In his famous *De locis theologicis* (Salamanca, 1563), a major work on the sources and methodology of theological scholarship, Melchor Cano (1509–1560), a Dominican friar, explained that the authority of the Roman legal tradition should be self-evident to any theologian. He was of the opinion that, in discussing issues of justice and law, a theologian would appear to be totally ignorant if he dared to neglect the provisions of Roman law, especially in matters related to contracts, property, testaments, donations, proof and procedure<sup>13</sup>. Justinian’s *Pandects*, in particular, deserved special praise in the eyes of Cano. He agreed with the late Roman emperor that these fifty books should be considered a most sacred temple of wisdom and justice (C.1.17.1.5). The “Theological use of the Pandects” (*Usus theologicus pandectarum*), then, was a substantial part of spiritual and temporal governance in the early modern Catholic Church.

The involvement of priests in the daily business of saving souls and governing Church institutions increased demand for literature that could help them to analyze the normative issues at stake in solving practical issues regarding family, business and the administration of justice in general. This led to the production of thousands of treatises at the crossroads of law and theology, destined to be shipped to all corners of the Catholic world, which had become truly global in the sixteenth century, following the expansion of Spanish empire. The explosion of theological-literature in the early modern period is often associated with the so-called “late scholastics” or the great masters of the “School of Salamanca” such as Francisco de Vitoria (c. 1483/1492–1546), Domingo de Soto (1494–1560) and Martín de Azpilcueta<sup>14</sup> (1492–1586). As the example of Melchor Cano illustrated,

12. Decock (2018); Decock (2023). I do not mean to say here that Protestant theologians did not use Roman law at all, but they clearly gave priority to Biblical arguments; see, for instance, Astorri (2019). Needless to say, jurists of Protestant faith showed great interest in Roman law, as did their Catholic counterparts in the early modern period; see, for instance, Schmoeckel (2004) and Strohm (2008). However, for reasons of space and expertise, the present article focuses on the relationship between Catholic theologians and the Roman legal tradition.

13. Cano (2006), lib. 10, cap. 7–9, p. 545–550.

14. For recent bio-bibliographical accounts of these towering figures of the “School of Salamanca” (Vitoria, Soto, Azpilcueta), see the articles in *Great Christian Jurists in Spanish History* (2018). The most complete introduction to the School of Salamanca in general remains Belda Plans (2000). For new perspectives on the School of Salamanca inspired by new paradigms in the humanities, see *The School of Salamanca* (2021).

Salamanca was a major center for the renewal of scholastic theology. It remains important to realize, though, that these Spanish authors were part of a wider phenomenon that saw theologians recycling the texts of Justinian's *Pandects, Code and Institutes* all across the globe<sup>15</sup>. Some of these non-Spanish authors, such as Thomas Cajetan (1469–1534), a Dominican theologian, are famous in their own right. But others have fallen completely into oblivion, especially those theologian-jurists who did not belong to one of the bigger religious orders or whose work was merely meant for local use. A case in point is the treatise *Jus et Justitia juridico-theologicæ tractata*, published in 1697 by Augustinus Liebhart Michel (1662–1751). A theologian and jurist by training, Michel belonged to the order of the canons regular of Saint-Augustin (CRSA) and lived in the monastery of Indersdorf in Bavaria. His work covers about seven hundred pages dealing with the entire civil law as contained in the four books of Justinian's *Institutiones*<sup>16</sup>.

The sheer size of this kind of legal-theological treatises, their omnipresence in all corners of the early modern Catholic world and their intense engagement with Roman legal texts warrants their designation as true examples of the “modern use of the Pandects”. Put more precisely, they can be considered as examples of an intense “Theological use of the Pandects” (*Usus theologicus pandectarum*) which, strangely enough, has often been omitted in standard accounts of the reception of Roman law. Incidentally, German “pandectists” of the early modern period such as Samuel Stryck—the initiator of the *Usus modernus pandectarum* in the strict sense of the word—were familiar with the works of the Catholic theologian-jurists, often citing them explicitly. Having said that, there is also another way to look at the presence of Roman law in the work of Catholic moral theologians. That is by seeing them as continuators of the medieval *ius commune* tradition, which, despite the growing space for national legal traditions from the sixteenth century onwards, remained very much the basis of legal education until the end of the ancient regime<sup>17</sup>. As a matter of fact, the early modern theologians read Justinian's texts through the prism of late medieval and early modern representatives of the *ius commune* such as Accursius, Bartolus, Abbas Panormitanus, Paolo de Castro, Fortunius Garcia and Antonio Gómez.

15. For an overview of the primary sources and an attempt to embed the “School of Salamanca” in a wider revival of scholastic thought, see Decock and Birr (2016), including references to further secondary literature.

16. This is clear from the complete title of the work, which reads *Jus et Justitia juridico-theologicæ tractata, in qua praeter materias a theologis speculativis de Justitia tractari solitas succincta, nova, clara ac solida methodo pertractantur omnes materiae juris civilis, quatuor Institutionum imperialium libris comprehensae*.

17. Bellomo (1995), 224–226.

## 2. BY WAY OF ILLUSTRATION: THE DEBATE ON COERCED CONSENT IN FREE CONTRACTS

For reasons of space, the objective of this paper is not to introduce scholars to the *Usus theologicus pandectarum* in an all-comprehensive way. Too much research remains to be undertaken with regards to the use of Roman law in these treatises before any definitive conclusions could be made. This article will limit itself to merely giving a glimpse of the potential of studying these sources from the perspective of the reception of Roman law by focusing on a specific issue in contract law, namely the problem of coerced consent. This was an issue of growing concern to the early modern theologians, since most of them adhered to a view of contract that was marked by adherence to the canon lawyers' consensualist principle (*pacta sunt servanda*) as well as by a theological anthropology that required respect for the autonomy of the will (*voluntas*) of the parties. In fact, looking back upon early modern scholastic engagements with contract law, Pedro de Oñate (1567–1646), a Jesuit theologian who authored an impressive multi-volume treatise *De contractibus*, considered that “freedom” (*libertas*) had been the foundation ground from which his colleagues had started to re-build the Roman law of contract<sup>18</sup>. For that is a general characteristic of the *Usus theologicus pandectarum*, indeed: while borrowing from Justinian, the theologians also took a critical stance towards the *Corpus iuris civilis*, often considering that its provisions were not in line with superior rules from reason or natural law<sup>19</sup>.

As James Gordley has already shown, the early modern theologians were indebted to ancient and medieval philosophical-theological traditions as much as they were to Roman law. And as far as the specific topic of this article is concerned, these traditions had something very important to say about consent and coercion. More specifically, a seminal passage from Aristotle's (384–322 BC) *Nicomachean Ethics* will deserve special attention, as well as its reception in late medieval and early modern scholasticism—especially in Thomas Aquinas's (1225–1274) *Summa theologiae* and Leonardus Lessius's (1554–1623) commentary on the first part of the latter work. We will have a look at this tradition first before going on and investigating major legal texts drawn from Roman law and canon law, namely Justinian's *Corpus iuris civilis* and the so-called ‘classical’ texts of canon law (*Decretum Gratiani*, 1140; *Liber Extra*, 1234; *Liber Sextus*, 1298). Rather than focusing on the question how Roman law on duress evolved from Republican to Imperial times, we will ask ourselves how Justinian's texts were creatively interpreted by

18. Decock (2013), 163–164.

19. For concrete examples, see Decock (2013), 145–146, 155, 160.

the great jurists of the Middle Ages—interpretations that the early modern theologians were highly familiar with. Last but not least, we will investigate the reception of these traditions in the *Disputationes de sancto matrimonii sacramento* (1602–1605) by Tomás Sánchez (1550–1610), a Jesuit influenced by the School of Salamanca and—despite the fact that he has received only scarce attention in the secondary literature—one of the most influential theologian-jurists ever<sup>20</sup>. In the framework of his discussions on marriage, he was of course especially concerned with the effect of coercion on marital consent<sup>21</sup>.

Again, for early modern theologians, it was not just legal texts of imperial Rome that enjoyed authoritative status, but also the writings of the ancient Greek philosophers. This is especially clear when dealing with the problem of coerced consent in free contracts. Even before taking a look at the reception of Digest passages in the *ius commune* and *the Usus modernus pandectarum*, we must therefore recall a basic text from Aristotle on what it means to act freely. Importantly, Aristotle did not consider coerced actions to be entirely involuntary. At the outset of the third book of the *Nicomachean Ethics*, he pointed out that man is responsible for his actions only to the extent that he acts freely, that is in the absence of ignorance or compulsion<sup>22</sup>. Accordingly, a person could be blamed or praised only for actions that he performed voluntarily. Aristotle indicated that this was an insight for legislators to remember well as they distributed honor and punishment. The question was, however, whether ignorance and compulsion had the same effect upon the voluntariness of an action. Ignorance prevents you from choosing the right course of action since your rational insight into the circumstances of the action is hampered. Put differently, you are mistaken. Compulsion, on the other hand, does not seem to result in involuntary choices automatically.

To make his point, Aristotle advanced the famous example of a captain who threw his goods overboard in a storm in order to save the crew<sup>23</sup>. At the moment of action, the captain definitely wished to jettison cargo, but he would not have wished to do so under other circumstances. Aristotle concluded that there was a category of actions that are mixed, in the sense that they are constituted both by voluntary and involuntary elements. In

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20. On Sánchez, see Alfieri (2010) and Domingo (2018), 225–239.

21. As a preliminary remark, it should be mentioned that much of what follows draws on my book Decock (2013), especially chapter 4 (Natural Limitations on ‘Freedom of Contract’), p. 215–328; this book can now be accessed for free online through Brill’s website.

22. Aristotle (1894), 3, 1, 1109b30–34, p. 40.

23. Aristotle (1894), 3, 1, 1110a4–19, p. 40–41.

the end, Aristotle thought that such mixed acts were more voluntary than involuntary. His explanation ran as follows. True compulsion occurs when the cause of your action is external to you, as when you are carried away by a hurricane. In the case of the captain, however, the cause of his action comes from within himself. True, if circumstances had not been as they were, the captain would have chosen a different course of action. Yet in the circumstances as they occurred to him, he would not have wished to choose any other course of action than to jettison cargo<sup>24</sup>.

Aristotle's notion of mixed involuntariness had a major impact. As we will see, Roman law became famous for the notion that compulsion and consent are not entirely opposite (*coactus volui*). As eminent scholars have argued, Aristotle's influence on jurists in the late Roman republic and early empire may well provide an explanation for that<sup>25</sup>. Incidentally, property related issues following from jettisoning are largely debated in Justinian's Digest<sup>26</sup>. But regardless of the question whether Aristotle really had an impact on Roman law in ancient times, theologians in the early modern period, following the *ius commune*, certainly did interpret Roman law in light of Aristotelian moral philosophy<sup>27</sup>. They may well have become familiar with Aristotelian's philosophy of agency not just by reading Aristotle's *Nicomachean Ethics*, but rather by analyzing Thomas Aquinas' interpretation of Aristotle's case of the captain jettisoning cargo in their commentaries on Aquinas' *Prima Secundae*. That part of Thomas Aquinas' *Summa theologiae* is entirely dedicated to the philosophy of human action, with question 6 treating specifically of the voluntary and the involuntary in human agency.

In line with Aristotle, Thomas Aquinas, naturally a major authority for the scholastic theologians, insisted that the origins of the action must lie in the person himself for it to be voluntary. If an action of the will proceeds from an exterior force, then it falls short of voluntariness. A clear case is violence (*violentia*<sup>28</sup>) —a notion which jurists would subsequently refer to as *vis praecisa*. But, again, the difficulty concerns actions that come from

24. Aristotle (1894), 3, 1, 1110b5–9, p. 42.

25. Hartkamp (1971), p. 84 and p. 124.

26. e.g. D.14.2.2.1–8. For further analysis, see Mataix Ferrándiz (2022), 96–100.

27. As far as the *ius commune* is concerned, see the explicit references to third book of Aristotle's *Nicomachean ethics* in the late medieval glosses: *Corpus Iustinianaei Digestum vetus*, Lyons, 1604 [= 1588] (hereafter: Ed. Gothofredi), vol. 1, col. 478 (*glossa ad D.4.2.4*) and in *Decretales Gregorii IX*, Romae, 1582 (hereafter: Ed. Gregoriana), col. 480 (*glossa ad X 1.40.2*).

28. Aquinas (1891), quaest. 6, art. 5 (*Utrum violentia causet involuntarium*), concl., in: *Opera omnia iussu impensaue Leonis XIII edita*, tom. 6: *Prima Secundae Summae Theologiae a quaestione 1 ad quaestionem 70*, p. 60.

within the person himself and are both voluntary and involuntary—cases that involve fear or duress (*metus*). Thomas recalled the case of the captain who jettisoned cargo in order to save his life and that of his crew<sup>29</sup>. Since the principle of action came from within the captain himself, his action could not be considered entirely involuntary. The action did not proceed from an external cause. Still, there were external circumstances that triggered the internal motivation of the captain. Therefore, Thomas believed that the captain acted voluntarily simply (*simpliciter*), that is, here and now, and involuntarily in a comparative sense (*secundum quid*) only, that is compared to a normal situation where the ship is not hit by a storm.

The impact of this Aristotelian-Thomistic account of human action on the subsequent philosophical, theological and juridical traditions has been massive. It should be recalled that the theologians who wrote about contract law in their commentaries on the *Secunda Secundae* of Thomas (in treatises such as *De iustitia et iure*, *De restitutione*, or *De contractibus*) simultaneously wrote extensive commentaries on Thomas' *Prima Secundae*. A case in point is Leonardus Lessius (1554–1623), one of the most important Jesuit theologians from the Southern Netherlands, who is famous for his seminal contributions to contract law and economic thought<sup>30</sup>. In his posthumously published commentary on the *Prima Secundae*, Lessius adopted the conclusions of Aristotle and Thomas with regards to free agency: things done under duress are a mix of voluntary and involuntary elements, so that they are voluntary simply (*simpliciter*), but involuntary in a comparative sense (*secundum quid*). Referring to the case of the jettisoned cargo, Lessius concluded that actions under compulsion were to be deemed absolutely voluntary under the circumstances at hand, but displeasing to the will if considered in the abstract<sup>31</sup>. The difference between violence and duress consists in the fact that violence brutally imposes its effect upon the will, whereas duress inclines the will into wishing, out of its own, what it actually dislikes<sup>32</sup>.

Lessius, who showed himself to be a fine psychologist next to being an expert in law and theology, gave an insightful account of the process of so-called 'se-duction' to which the will is exposed as it is confronted with a fearful event. The process of consenting through compulsion consists of four

29. Aquinas (1891), quaest. 6, art. 6 (*Utrum metus causet involuntarium simpliciter*), concl., p. 61.

30. Van Houdt (2021), p. 64–79. See also *Leonardus Lessius on Sale* (2016) and Decock (2019), with references to further literature.

31. Lessius, (1645), 45–46.

32. Lessius, (1645), 45: *Violentia non inclinet voluntatem, sed illa omnino repugnante, suum effectum ponat. Metus vero inclinet voluntatem, ut ipsamet aliquid velit et faciat quod per se consideratum illi displicet, idque ad vitandum maius malum.*

stages, Lessius explained by referring to the case of the captain jettisoning cargo<sup>33</sup>. He argued that none of them was characterized by involuntariness, with the fourth and last stage being entirely voluntary. Firstly, there is the fear of the greater evil: shipwreck. This fear is not wholly involuntary, since fearing an imminent evil is the opposite of desiring a good. Both proceed from the inclination of the will. Secondly, there is the will to pursue a certain course of action: throwing off cargo. This is definitely not an involuntary action, since it is willed as such. The third stage consists of a negative experience towards that same course of action considered on its own, because it is unpleasant and damaging. The experience of displeasure, however, is not opposite to the will, so it is not involuntary. Finally, the operation is externalized and effectively takes place. This is a voluntary course of action, since the operation pleases the will, at least under the present, dramatical circumstances.

From this psychological analysis of the effects of compulsion on the will, Lessius inferred that contracts affected by coerced consent were not void *ab initio*<sup>34</sup>. They do not suffer from lack of consent, since from an absolute point of view, the intimidated party assents voluntarily to the contract. This does not mean that the victim of coercion is left alone. Along with other jurists and theologians of his age, Lessius was of that opinion that a judge may eventually grant relief to the party who suffered from coerced consent. Yet, following the Aristotelian-Thomistic account of mixed involuntariness, Lessius argued that the legal foundation of that remedy could not be sought in vitiated consent. Moreover, he cited passages from Justinian's *Digest* and *Code* to the effect that duress cannot be considered as resulting in automatic nullity as a matter of positive law<sup>35</sup>. The remedy, then, had to be based on extra-contractual liability rather than on a presumed lack of consent to the agreement itself. The person who exerted duress could be considered as having harmed the victim of that coercion. This legal debate urges us to have a closer look to the Roman and canon legal texts on duress, which figure in Lessius' and other theologians' analysis.

33. Lessius, (1645), 45–46.

34. Lessius, (1645), 46: *Secundo sequitur, contractum metu initum non esse irritum defectu voluntarii, ut multi docent, quia est absolute voluntarius: absoluta autem voluntas sufficit ad efficiendum validum contractum, modo debita materia interveniat.*

35. D. 4.2.21.5 and C. 2.19.12, see Decock (2013), 270.



### 3. THE TWIN LEGACY OF ROMAN AND CANON LAW: COERCED CONSENT IS CONSENT (EXCEPT IN MARRIAGE)

The impact of coercion on the validity of contracts and the violation of rights more generally is the subject of several texts in Roman and canon law. It falls outside the scope of this article to try and explain the development of legal rules on violence and duress in Roman Antiquity itself<sup>36</sup>. Since the civilian tradition drew on Justinian's collection of Roman legal materials in his *Corpus iuris civilis*, we can limit ourselves to discussing some of the major passages in Justinian's *Digest* that deal with the problem of coerced consent. In terms of defining duress and determining the extent to which it could give rise to specific remedies, book 4, title 2 of the *Digest* turned out to be very influential. It shaped not only the civilians' but also canon lawyers' understanding of compulsion and the will. Of particular importance for the canon law tradition were the canons included in book 1, title 40 of the *Liber Extra* (*De his quae vi metusve causa fiunt*) and the cases on marital consent in book 4, title 1 (*De sponsalibus et matrimoniis*). Once again, in the age of the *Usus theologicus pandectarum*, both the civilian and canon law tradition were relevant, as, together, they formed the *ius commune* or *utrumque ius* which was the basis of legal education at the universities.

Roman law has been largely understood by its later interpreters to adhere to a view on the relationship between duress and consent that is quite similar to the one we discovered in Aristotle: coerced consent remains consent. A phrase of major importance in this regard, extracted from the jurist Paul's discussion on the validity of the acceptance of an inheritance, was the following: 'even though, if it had been entirely free, I would not have wanted to do it, I still wanted to do it, despite being coerced (*coactus volui*<sup>37</sup>)'. While the translation and exegesis of this passage is subject to debate until today, the medieval and early modern jurists quite unanimously inferred from D. 4.2.21.5 that coerced consent is ultimately to be regarded as voluntary consent. The ordinary gloss, which offered the standard interpretation of this passage for centuries to come, captured the wisdom of the *Digest* text as follows: 'a coerced will is nevertheless will' (*coacta voluntas voluntas*

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36. One of the clearest overviews remains Zimmermann (1996), 651–662. The late medieval conception of duress also formed the subject of thorough analysis in Kuttner (1935), 299–314.

37. D. 4.2.21.5 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 500: *Si metu coactus adii hereditatem, puto me heredem effici, quia quamvis si liberum esset noluissem, tamen coactus volui; sed per praetorem restituendus sum, ut abstinendi mihi potestas tribuatur.*



*est*<sup>38</sup>). This maxim was cited time and again by jurists and theologians in the Middle Ages and the early modern period. Part of the explanation of the success of this adage might be that D. 4.2.21.5 and its medieval interpretation did match very well with the Aristotelian account of compulsion and the will.

The civilian tradition was not just considered to provide a general rule about the (limited) impact of duress on voluntary consent. In the very first provision in title 2 of book 4 of the Digest, called Law *Ait praetor*, the Roman praetor was understood to have introduced a remedy, available at the option of the party who suffered the coercion, to grant relief against agreements entered into under duress, the so-called *actio quod metus causa* (D. 4.2.1<sup>39</sup>). The scope of application of this remedy was then neatly circumscribed in the remainder of the text. Law *Ait praetor* defined duress as the perturbation of the mind because of an imminent or future threat (*instans vel futurum periculum*<sup>40</sup>). This threat must concern a major evil (*major malitas*<sup>41</sup>). Moreover, lawful forms of duress (*iustus metus*), such as those rightfully exercised by judges or authorities within the limits of their mandate, could not give rise to a remedy<sup>42</sup>. Law *Metum autem* (D. 4.2.6) further restricted the availability of a remedy against duress by pointing out that only duress that could throw off balance even the most constant man (*homo constantissimus*) could be considered relevant<sup>43</sup>. Every single Latin word in these definitions would become subject to intense and divergent interpretations among medieval and early modern jurists and theologians. The same holds true for the casuistry that was meant to determine which kind of evil could be deemed to

38. Glossa *Volui* ad D. 4.2.21.5 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 500: *Et sic nota quod coacta voluntas, voluntas est.*

39. For an in-depth analysis of this remedy in ancient Roman law, see Calore (2011).

40. D. 4.2.1 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 477: *Ait praetor: Quod metus causa gestum erit, ratum non habebō. Olim ita edicebatur: quod vi metusve causa: vis enim fiebat mentio propter necessitatem impositam contrariam voluntati: metus instantis vel futuri periculi causa mentis trepidatio. Sed postea detracta est vis mentio ideo, quia quodcumque vi atroci fit, id metu quoque fieri videtur.*

41. D. 4.2.5 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 478: *Metum accipiendum Labeo dicit non quemlibet timorem, sed maioris malitatis.*

42. D. 4.2.3 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 478: *Sed vim accipimus atrocem et ea quae adversus bonos mores fiat: non eam quam magistratus recte intulit, scilicet iure licito et iure honoris quem sustinet.*

43. D. 4.2.6 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 478: *Metum autem non vani hominis, sed qui merito et in homine constantissimo cadat, ad hoc edictum pertinere dicemus.*

intimidate a man of a steadfast character: fear of death, torture, imprisonment, rape, etc<sup>44</sup>.

The Roman remedy against duress (*actio quod metus causa*) was a real action (*actio in rem scripta*<sup>45</sup>). Because of the ‘real’ character of the remedy, the defendant could be either the other party to the contract or any other person who had acquired the object that had been transferred by virtue of coerced consent. While the action *quod metus causa* was principally aimed at restoration, there was also a penal element to it<sup>46</sup>. For, if one did not return a good obtained through a coerced transaction, one could be condemned to paying damages four times as big as the actual worth of the good<sup>47</sup>. What mattered was the restoration of the wrong done to the intimidated party. At the same time, what the discussions about the *actio quod metus causa* show, is that Roman law did not consider duress to be a ‘vice of the will’ in the modern sense of the word. It also did not use categories that became central to medieval and early modern jurists’ debates to determine whether agreements affected by duress should be considered as ‘void’ (that is null from the very moment the agreement was reached, since there was no full consent) or ‘voidable’ (that is null at the option of the victim only, who would then have to ask a judge to pronounce the nullity). Ancient Roman law did not reach that level of abstraction which, it should be noted, became the hallmark of the discussions in the work of theologian-jurists such as Tomás Sánchez<sup>48</sup>.

Justinian’s *Digest* contained one well-known passage that was later to become central to authors claiming that the Romans did consider coercion to be entirely opposite to voluntariness and actually result in agreements being null *ab initio*. As a matter of fact, one of the rules of law in the last book of Justinian’s *Digest* provided that ‘nothing is so contrary to consent as violence or duress’ (D.50.17.116<sup>49</sup>). The medieval jurists realized that this statement was at odds with their interpretation of Digest 4.2. They solved

44. See D.4.2.3.1; D.4.2.7.1; D.4.2.8.2. It should be noted that infamy did not fall into this category, cf. D.4.2.7.

45. Cf. D.4.2.9.8. Compare D.4.2.9.1 in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, cols. 481–482: *Animadvertendum autem, quod praetor hoc edicto generaliter et in rem loquitur nec adicit a quo gestum*. For further discussion on the ‘in rem’ character of the remedy, see Calore (2011), 299–363.

46. Calore (2011), 168–259.

47. See the discussion in Zimmermann (1996), 656–657.

48. On the seminal contribution of Sánchez to making these distinctions, see Decock (2013), 254–259.

49. D.50.17.116 in *Corporis Iustinianaei Digestum novum* (ed. Gothofredi), tom. 3, col. 1901: *Nihil consensui tam contrarium est, qui ac bonae fidei iudicia sustinet, quam vis atque metus, quem comprobare contra bonos mores est*.

the problem by drawing a distinction between ‘spontaneous’ consent and ordinary consent, limiting the scope of application of D.50.17.116 to situations where duress had been so important as to destroy this higher, spontaneous form of consent<sup>50</sup>—this concept of ‘spontaneous consent’ (*consensus spontaneus*) turned out to be of major relevance to the canon lawyers, who sought for stricter remedies against coercion in the specific cases of marital agreements and religious vows. In fact, in explaining away the difficulty posed by D.50.17.116 the glossators may have drawn inspiration from the canon lawyers in the first place<sup>51</sup>.

The civilians’ rule that ‘coerced will is nevertheless will’ (*coacta voluntas voluntas est*) quickly gained popularity not just among specialists of Roman law, but also among the canon lawyers. The decretists (the first interpreters of the *Decretum Gratiani*) regularly cited the principle *coacta voluntas voluntas est*. For example, in a discussion on the validity of an oath taking under duress, the gloss referred several times to the principle that ‘coerced will is nevertheless will’ as an argument in favor of the opinion that the oath was valid in principle<sup>52</sup>. However, the same gloss refused to apply this general rule to issues of coercion in marital consent<sup>53</sup>. What is more, the *Decretum Gratiani* contained many canons explaining that no one should be compelled to marry. For example, canon *Tua sanctitas* (C.31 q. 2 c. 2) forbade a father to arrange the marriage of his adult son without the latter’s consent. The next canon extended this prohibition to fathers trying to marry their daughters to someone against their will. ‘Not only the spouses’ bodies’, canon *De neptis* (C.31 q. 2 c. 3) explained<sup>54</sup>, ‘but also their minds must be one’. Indeed, while accepting that the Roman law adage ‘coerced will is nevertheless will’ could be considered as a general rule, canon lawyers insisted that there was a small category of juridical acts that were exempted from

50. Gl. *Nihil consensui* ad D.50.17.116 in *Corporis Iustinianaei Digestum novum* (ed. Gothofredi), tom. 3, col. 1901: *Sed respondeo, coactus consensus est contrarius spontaneo, non simpliciter*; see also *l.c.*, col. 1902: *Vel dic, spontaneo consensui nil plus contradicit quam coactus*.

51. This would certainly not be an isolated case of civilians changing their understanding of Justinian’s texts under the influence of new ideas coming from medieval canon law, see Hallebeek (1996).

52. See gloss *Vult* ad C.15 q. 1 c. 1 and gloss *Absolvimus* ad C.15 q. 6, c. 2 in *Decretum Gratiani emendatum et notationibus illustratum una cum glossis, Gregorii XIII iussu editum*, Romae 1582 (=ed. Gregoriana), cols. 1419–1420 and 1441–1442, respectively.

53. See gloss *Vult* ad C.15 q. 1 c. 1 in *Decretum Gratiani emendatum et notationibus illustratum una cum glossis, Gregorii XIII iussu editum*, Romae, 1582 (=ed. Gregoriana), col. 1420.

54. C.31 q. 2 c. 3 in *Decretum Gratiani* (Ed. Gregoriana), cols. 2089–2090: *Quorum enim unum corpus est, unus debet esse et animus*.



this general rule, and that marriage agreements belonged to it<sup>55</sup>. A gloss to canon *Excommunicationis* in Pope Boniface VIII's *Liber Sextus* (1298) neatly summarized the position of medieval canon law in this regard<sup>56</sup>:

In certain cases in which spontaneous and free consent is required, as in the case of marriage, this reasoning [sc. that coerced will is nevertheless will] is not applicable. If one is compelled to contract a marriage, that marriage is void. For even if there is a will there—a coerced will being a will—that will is not spontaneous.

In other words, according to the canon lawyers, 'spontaneous consent' as a higher form of consent was required in marital agreements. This insight was often formulated in the context of commentaries on book 4, title 1 (*De sponsalibus et matrimoniis*) of the *Liber Extra*, a collection of papal decretals by Pope Gregory IX promulgated in 1234. It contained many provisions emphasizing the consensual character of marriage and the special quality of the liberty required to enter into a marital agreement. For example, canon *Cum locum* (X 4.1.14) provided that coercion and consent were incompatible, inferring from this that a young lady who was under pressure by many suitors, some of whom she feared would become violent, should be granted security (*securitas*) and transferred to a safe place (*locus tutus*) where she could decide for herself whom she really wanted to marry to<sup>57</sup>. Canon *Veniens ad nos* (X 4.1.15) extended the rule that marital consent should be entirely free to formal engagements in the present (*sponsalia de praesenti*), explaining that duress avoided these engagements provided that it met the constant man test<sup>58</sup>. Last but not least canon *Gemma* (X 4.1.29) expressly stated that 'marriages must be free' (*libera matrimonia esse debeant*<sup>59</sup>). The gloss to canon *Gemma* affirmed that this liberty was to be understood in terms of the absence of any form of coercion (*ab omni coactione*), whether

55. For a complete list of exceptions, also including religious vows and transactions about ecclesiastical goods, see gloss *Coactus* ad X 1.40.2 in *Decretales Gregorii IX* (Ed. Gregoriana), col. 480.

56. See gloss *Casus* ad VI 1.20 in *Liber sextus decretalium*, Romae 1582 (= Ed. Gregoriana), col. 296: *Fallit in certis casibus, in quibus requiritur consensus spontaneus et liber, ut in matrimonio, quia cum quis compellitur ad matrimonium contrahendum, matrimonium est nullum: quia licet ibi sit voluntas: quia coacta voluntas est voluntas, non tamen est voluntas spontanea.*

57. See X 4.1.14 and gloss *Donec* ad X 4.1.14 in *Decretales Gregorii IX*, Romae, 1582 (Ed. Gregoriana), cols. 1429–1430.

58. X 4.1.15 in *Decretales Gregorii IX* (Ed. Gregoriana), cols. 1430–1431.

59. X 4.1.29 in *Decretales Gregorii IX* (Ed. Gregoriana), col. 1442.



exercised by other persons, or induced by financial considerations or punitive measures<sup>60</sup>.

Marriage contracts, then, were thought to require a higher degree of liberty than other contracts. This idea remained part and parcel of the canon law tradition. It is also strongly present in the seminal commentary on the fourth book of the *Liber Extra* by Diego de Covarrubias y Leyva (1512–1577), a famous canon lawyer belonging to the School of Salamanca. He was a staunch defender of marital freedom (*libertas matrimonii*), affirming that marriage contracts required a higher form of liberty than other agreements<sup>61</sup>. In the context of debates on the validity of national laws, which were based on Justinian's *Novella* 115 and allowed parents to disinherit children (*exhaereditio*) in case of disobedience, Covarrubias made it clear that the mere fear of this kind of sanction would avoid a son's or a daughter's consent to marrying the partner suggested by its parents<sup>62</sup>. Contemporary theologians such as Domingo de Soto (c. 1495–1560) and Pedro de Aragón (d. 1592) would explain that there are two fundamental reasons for the higher degree of liberty required in marriage contracts.<sup>63</sup> The first is a sacramental one. Marriage is a sacrament representing the faithful covenant between Christ and his bride. The second reason is of a more general nature. Freedom of marriage is considered to be the only guarantee that marriage lasts for a life time, which in turn is the best guarantee for the good upbringing of the children.

To sum up, while remaining faithful to the Roman legal tradition, canon law also brought about a major shift in thinking about the effect of coercion on contractual consent. In the context of specific agreements such as marriage, a higher, 'free and spontaneous' degree of consent was said to be required on pain of nullity *ab initio*. This paved the way for the understanding—now common in many jurisdictions—that duress truly is a 'vice of the will', just like mistake or error. At the same time, medieval canon law provided that, as a rule, coercion did not automatically result in invalid agreements. Contracting parties who suffered from coercion should seek relief with the judge on the basis of a specific remedy devised by the Romans, the *actio quod metus causa*. The influential canon *Abbas* (X 1.40.2) was adduced to argue that canon law, just like Roman law, did not recognize

60. Glossa *Casus* ad X 4.1.29 in *Decretales Gregorii IX* (Ed. Gregoriana), col. 1442: *Nota quod matrimonia sive sponsalia libera debent esse ab omni coactione personae vel pecuniae, et si poena fuerit apposita, non tenet promissio sive stipulatio poenae*. See also gloss *Libera debeant* on the same page.

61. Decock (2013), 225–231.

62. Chiodi/Decock (2018), 271–335 (313–315).

63. Decock (2013), 219.

the automatic nullity of agreements entered into through coercion. It held that ‘those things which occur through duress and violence must, by law, be declared void’ (*quae metu et vi fiunt de iure debent in irritum revocari*). As we will see in the work of Tomás Sánchez, far into the modern period canon *Abbas* would continue to constitute one of the most authoritative arguments to defend a general regime of voidability in all contracts affected by duress, except in the case of marriage.

#### 4. TOMÁS SÁNCHEZ: TOWARDS A GENERAL REGIME OF VOIDABILITY

As explained in the introduction, in the early modern Catholic world, an ever-closer exchange took place between the Romano-canon legal tradition and the Aristotelian-Thomistic philosophical tradition. In the *Usus theologicus pandectarum*, that is the work of the early modern scholastic theologians, this symbiosis reached a peak. While it goes beyond the scope of this paper to give a detailed account of how contract law was transformed in the voluminous writings of dozens of great scholars in law and theology, often but not exclusively linked to the University of Salamanca, one important element of this transformation deserves attention here. In the writings of these early modern Catholic theologians and canon lawyers, we see a major effort to define contractual obligation in general terms as the result of a meeting of wills between free, consenting individuals who want to bind themselves towards each other in a morally and legally enforceable way<sup>64</sup>. More technically speaking, contract becomes a matter of offer and acceptance (*promissio acceptata*), with the will of the contracting parties determining the substance and form of the agreements—within certain limits, of course, set by the authorities for the sake of the common good (*bonum commune*) or imposed by natural law principles such as the virtue of justice in exchange (*justitia commutativa*).

In light of the central role played by the will in the scholastics’ doctrine of contract, mistake and duress were increasingly being reinterpreted as ‘natural’ limits to freedom of contract, or ‘vices of the will’, because they vitiate consent, the natural source of contractual obligation.<sup>65</sup> More than anything else, these new perspectives on contract mattered to canon lawyers and theologians specializing in marriage law. As we have seen before, the canon law required a higher, ‘spontaneous’ form of free consent in marriages than in any other contract. Yet, at the same time, contracts were now

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64. Decock (2013), 105–214.

65. Decock (2013), 215–327.

generally regarded as relying on a notion of free consent that had not been theorized as expressly and systematically in the ancient Roman law. More particularly, all agreements were now said to be binding by virtue of mutual consent. Distinctions made in Roman law between nominate and innominate contracts, or between *contractus re, consensu, verbis* or *litteris*, were felt no longer to make sense. In the eyes of theologians such as Luis de Molina (1535–1600), the Roman law of contract was riddled with formal subtleties that needed to be abolished because they were not in line with the law of nature<sup>66</sup>. So how were these doctrines on the canon law of marriage and the Aristotelian and Roman texts on the (lack of) impact of coercion on contractual consent to be reconciled?

A theologian and canon lawyer to whom this question was more urgent than to anyone else was Tomás Sánchez, a Jesuit from Cordoba whose voluminous *Disputationes de sancto matrimonii sacramento* (1602–1605) remained the global standard work on Catholic marriage law until at least the early twentieth century. In fact, Pietro Gasparri (1852–1934) still based himself on Sánchez to draft the canons on marriage law for the Code of Canon Law of 1917<sup>67</sup>. At the same time, Sánchez's work had a deep impact on other authors of the *Usus theologicus pandectarum* such as Leonardus Lessius, or, for that matter, on jurists belonging to the *Usus modernus pandectarum* such as Samuel Stryck.<sup>68</sup> Since canon law traditionally considered duress to be a major obstacle to free consent in marriage, it is small wonder that Sánchez dedicated the entire fourth book of his *Disputationes de sancto matrimonii sacramento* to the issue of coerced consent (*De consensu coacto*). It is difficult to find any such substantial treatment of coerced consent in free contracts in any other contemporary source, whether written by a jurist or a theologian.

Another interesting feature of Sánchez's work is that it shows the increasingly close relationship between discussions on marriage law and general contract law in the *Usus theologicus pandectarum*. It allowed theologians to reason by analogy from the one to the other. Stricter rules around consent that had been developed primarily in the context of marriage were now being applied by analogy to contracts in general. In the volume on coerced consent Sánchez first systematically expounded the impact of coercion on 'contractual freedom' in general (disputations 1–11), before going on and applying this general theory of coerced consent to marriage contracts in particular (disputations 12–27). At the same time, he highlighted divergences

66. Decock (2013), 142.

67. Fantappiè (2008), 447–458.

68. See Charles Donahue (2014), 45–62 (54).

between the legal consequences of coerced consent in marital agreements and other contracts, respectively. In fact, one of the strengths of Sánchez's analysis was that he tried to think contract law in terms of general principles, while still trying to account for the differences in treatment between marital agreements and other contracts that he observed in legal practice.

As pointed out in the section on Roman law, the technical difference between 'voidness' or 'voidability' as a sanction for coerced agreements did not emerge as such until after the reception of Justinian's legal texts in the late Middle Ages<sup>69</sup>. It became a major bone of contention among the early modern legal and theological scholars. For example, Luis de Molina argued that not just marital agreements but any contract entered into by coercion was to be considered automatically null, since consent had been fundamentally vitiated. Molina refused the conventional interpretation of the above-mentioned canon *Abbas* (which was usually read as an argument for a regime of voidability<sup>70</sup>). In Molina's view, the wrongdoer did not have to be taken to court and the judge did not have to pronounce the nullity of the contract for that nullity to become effective. However, Molina's seems to have remained the minority opinion, and Tomás Sánchez was a major author who did not accept it. In fact, Sánchez argued that, at least as a matter of *natural law* (this must be emphasized, for positive law is a different matter, as we will see below), all agreements, including marital agreements, are *not void ab initio* but voidable at the option of the coerced party. Influenced by Roman law and the Aristotelian-Thomistic tradition, Sánchez claimed that 'consent extorted by duress is nevertheless true consent and true will' (*in consensu metu extorto est verus consensus veraque voluntas*<sup>71</sup>).

One of the reasons that the difference between "voidness" and "voidability" of coerced agreements mattered so much to the theologian-jurists, is that they did not want wrongdoers to profit from their wicked behavior. Assume that a real estate magnate exerts pressure on a buyer to accept a bad deal for a building construction in a place where the buyer actually does not want to live. If coerced consent resulted in voidness *ab initio*, the seller could at any moment withdraw from the contract—for instance if he learned about the possibility of entering into a more lucrative business—by proving that he had coerced the buyer into accepting the deal. A buyer, on the other hand, who, on second thoughts, actually began to like the deal

69. The problem of the rise of the distinction between 'voidness' (*nullité*) and 'voidability' (*annulation*) has been the subject of a PhD thesis by Florian Reverchon (*Les Origines de la théorie des nullités [XII<sup>e</sup>–XIX<sup>e</sup> siècle]*). It was defended on 15 December 2022 at the University of Lyon 3 under the supervision of David Deroussin and Franck Roumy.

70. Decock (2013), 231–234.

71. Sánchez (1620), tom. 1, lib. 4, disp. 8, num. 4, p. 345.

which he initially entered into by force, would not be able to enforce the agreement. In other words, a regime of voidness *ab initio* can take away the rights of the victim of coercion, while unduly allowing the wrongdoer to profit from his misbehavior. Following the principle that ‘the law must come to the rescue of the defrauded and not to the defrauders’ (*deceptis non decipientibus opitulatur*) a legal maxim based on both Roman and canon law texts<sup>72</sup>—Sánchez and many of his fellow-theologians and canonists therefore thought that voidability (at the option of the coerced party, who should seek relief in court) must be the right answer to coerced consent.

At the same time, Sánchez needed to be able to admit that, despite this general rule of contract, coerced marriages should be treated differently. Otherwise he would have been obliged to go against the common opinion among the canon lawyers, made explicit at least since the *Decretum Gratiani*, that marriages should not be affected by the slightest form of coercion. Sánchez solved the conundrum by explaining that, in the specific case of matrimonial agreements, ecclesiastical law—that is positive law—had introduced an exception to the general, natural law regime of voidability applicable to coerced agreements. Anyway, abuse of the regime of voidness *ab initio* could be prevented in marriage cases because ecclesiastical law simultaneously provided that a marriage which is void *ab initio* could be retroactively confirmed by a judge as a way of punishing the wrongdoer at the request of the coerced party. Sánchez concluded that marriage contracts were a different thing altogether and that, because of positive law, duress did not entail the same results in marriage as in other agreements<sup>73</sup>:

The logic is different. Other contracts that have been extorted through duress are legally valid. Only the coerced party is granted a right to rescind the contract. A marriage extorted through duress, however, is totally void.

## 5. CONCLUDING REMARKS: *USUS THEOLOGICUS* *PANDECTARUM* AND THE ENCOUNTER BETWEEN ROMAN LAW AND THE NATURAL LAW TRADITION

The preceding paragraphs have tried to give a glimpse of the rich juridical debates developed by theologians in the early modern period on subjects such as the legal consequences of coercion on the validity of contractual consent. Consistent with the general observations already made by James

72. D.16.1.2.3 and X 3.19.8.

73. Sánchez (1620), tom. 1, lib. 4, disp. 15, num. 6, p. 366: *Dispar est ratio, nam caeteri contractus metu extorti sunt validi ipso iure, et solum metum passo datur ius ad rescindendum. At matrimonium metu extortum est prorsus nullum.*

Gordley and other experts in early modern scholastic contract law, these debates betray a remarkable understanding, on the part of theologians, of the Roman legal tradition and a genuine attempt to reconcile Justinian's texts, especially taken from the *Digest* (or *Pandects*), with those of other authorities such as Aristotle, Gratian and Thomas Aquinas. Moreover, as is equally obvious from the above account, reason and natural law, even more so than textual authorities, determined, for Jesuit theologians such as Molina, Sánchez and Lessius, the outcome of debates on all kinds of issues related to contract law, including the problem of the nullity or annullability of agreements entered into by force. The phenomenon of an *Usus theologicus pandectarum*, grown out of theologians' re-use of the *Corpus iuris civilis*, could therefore also be approached through the lens of the development of natural law in the early modern period. As a matter of fact, specialists have already suggested to do so<sup>74</sup>.

Despite the inadequacy of attempts to try and put the rich complexity of historical sources into neatly defined categories, adding the natural law perspective to the *Usus theologicus pandectarum* allows us to discover yet another fascinating aspect of the encounter between theology and Roman law in the early modern age. That is its impact, not just on the *Usus modernus pandectarum* and its authors such as Samuel Stryck, but also on the subsequent natural law tradition, and, hence, its contribution to transmitting (a transformed) Roman law all the way to the age of codifications. Eminent legal historians such as Robert Feenstra have already shown how Northern natural lawyers such as Hugo Grotius (1583–1645) heavily drew on the early modern scholastic tradition, particularly through the influence of Leonard Lessius, to rethink large parts of private law, for instance regarding the problem of the impact of mistake on contractual consent<sup>75</sup>. But the story goes further than that. It becomes apparent through a close reading of the complete title of famous works such as Robert-Joseph Pothier's (1699–1772) treatise on obligations: *Traité des obligations, selon les règles tant du for de la conscience que du for extérieur* (*Treatise on obligations, according to the rules both of the court of conscience and the external court*). In other words,

74. Merio Scattola, *Das Naturrecht vor dem Naturrecht. Zur Geschichte des ‚ius naturae‘ im 16. Jahrhundert*, Tübingen, Niemeyer, 1999; Jansen (2015), 29–81. See also Decock (2016), 393–412. It should be recalled, of course, that the natural law component in theological reasoning reaches back to the earliest encounters of the *ius commune* and theology in the late Middle Ages, see, for instance, Condorelli (2022): «(Non) tutto si trova nel corpo del diritto». *Voluntas, consensus, fides: la prima scienza civilistica di fronte ai problemi del matrimonio* (a proposito di una sequenza di sentenze teologiche copiate in un ms. del Codex, Vat. Lat. 1427).

75. Feenstra (1973), 377–402.

Pothier, who had been a student at the Jesuit college in Orléans, was clearly aware of the existence of the “court of conscience”<sup>76</sup>, and of the theological literature that provided answers on how to judge legal problems from the perspective of conscience.

Interestingly, in his treatise on marriage law, Pothier regularly cited Tomás Sánchez, sometimes signalling a critical distance to ‘the Jesuit who was seen as a lax casuist’, even when, in fact, he adopted his viewpoints<sup>77</sup>. But to stick to the example discussed in this paper, regarding the effects of coercion on contractual consent, Pothier borrowed the ideas of Lessius, probably through Grotius<sup>78</sup>. Following the medieval civilians as well as the Aristotelian-Thomistic tradition, they agreed that duress could not be considered as automatically voiding a contract, since, to repeat the words of the glossators, ‘a coerced will is nevertheless will’ (*coacta voluntas voluntas est*). Therefore, expressly following Grotius—who had relied on Lessius—Pothier reasoned that relief should be granted, not by virtue of contractual obligation, but on account of torts law (*damnum iniuria datum*)<sup>79</sup>. The person coercing the other party into the contract inflicts damage on the other party, therefore exposing himself to the risk that the victim of coercion asks to free himself of the obligation to execute the contract, not by virtue of contract law, but by way of compensation for the injustice done to him. The *Usus theologicus pandectarum*, then, was part of a conversation between different strands of normative thought that left an indelible mark on the way we have come to understand the Roman legal tradition.

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76. On the concept (and reality) of the “court of conscience”, see Decock (2013), 69–104.

77. Robert Joseph Pothier, *Traité du contrat de mariage*, Paris/Orléans, 1771, vol. 1, part. 2, ch. 1, art. 7, par. 3, p. 67: ‘(...) le jésuite Sanchez, qui passe pour un casuiste relâché (...) La décision du jésuite me paraît sans difficulté (...)’.

78. Decock (2013), 272–274.

79. Pothier (1777), part. 1, sec. 1, art. 3, par. 2, p. 27: ‘(...) on ne peut pas dire comme dans le cas de l’erreur, qu’il n’y ait point eu absolument de contrat; il y en a un, mais il est vicieux (...) l’injustice que vous avez commise envers moi, en exerçant cette violence, vous oblige de votre côté à m’indemniser de ce que j’en ai souffert; et cette indemnité consiste à m’acquitter de l’obligation que vous m’avez obligé de contracter; d’où il suit que mon obligation, quand on en supposerait une, ne peut être valable selon le droit naturel; c’est la raison que donne Grotius.’



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Les articles proposés à la revue pour publication sont systématiquement soumis à *peer reviewing*.

## Sommaire

### Droit romain

John SCHEID, *Imperium, ius et religiones. Pouvoir, droit et obligations religieuses dans la Rome antique*; Wim DECOCK, *Usus theologicus pandectarum. Roman Law in Early Modern Christianity*; Elio DOVERE, *Intellectus fidei e ricerca storico-giuridica*; Jonatan GEBHARDT, *Christlich motivierte Kalumnieneide? Studien anhand von Just. C. 2.58.2.pr.-1 und § 6-8 (531)*; Anna NOVITSKAYA, *Ius dicere und verba praeire. Einige Anmerkungen über die Beteiligung der römischen Priester am Gerichtsverfahren der republikanischen Zeit*; Marlene PEINHOPF, *Sacerdos Martis damnatum liberet. Gedanken zu religiösen Normen in den rhetorischen Corpora*; Jacek WIEWIORSKI, *Christian symbolism in the insignia of the Notitia Dignitatum*; Federica BERTOLDI, *La cretio nelle fonti romane*; Michael BINDER, *Zur optionalen exceptio doli bei wechselseitigen Klagemöglichkeiten*; Stefan SCHMATZBERGER, „Pyrrhussieg“ apud iudicem? *Sachverlust trotz erfolgreicher Klage*

### Droit chinois

Geoffrey MACCORMACK, *Offences Committed by Buddhists in Tang and Pre-Tang China (ca 300-907 CE). A Contribution to the Discussion of the Legal Relationship between the Buddhist Church and the Chinese State*

### Chroniques

*Chronique de la rencontre de Budapest*

Gergely DELI, *A Fresh Take on Roman Law, or New Perspectives on Certain Disputed Fragments*; Thomas FINKENAUER, *The Study of Roman Law in Germany*; András FÖLDI, *Reflections on the Mission ("Beruf") of Romanists of our Time*; Aleksander GREBIENIOW, *Teaching Roman Law in the 21st Century. Some Remarks from Warsaw*; Aldo PETRUCCI, *Roman Law in the 21st Century. The Experience of the University of Pisa*; Javier RODRÍGUEZ DIEZ, *Roman Law, ius commune and the Civil Code of Andrés Bello. Methodological Notes for Tracing the Sources*; Philipp SCHEIBELREITER, *Gedanken zur Methode des Unterrichts im Römischen Recht in Österreich*; Philip THOMAS, *A Romanist Dilemma: Adapt or die?*

Jean-François GERKENS, *The 80th Anniversary of the SIHDA on its 75th International Conference*

Francesco Saverio TAVAGLIONE, *Chronique de la 75<sup>e</sup> session de la Société Internationale Fernand De Visscher pour l'Histoire des Droits de l'Antiquité à Bruxelles*

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