# 1 Some perennial problems

A basic difference between modern civil law and Roman law is supposed to be that in modern law, in principle, contracts are enforceable upon consent. In Roman law, when they were enforceable depended on the type of contract in question. A basic difference between the modern common law and civil law is supposed to be that the common law requires a contract to have 'consideration'. The civil law does not. This study is concerned with the extent to which these characterizations are true, and how these and other differences affect the enforceability of promises.

The method is that of the Trento Common Core of European Private Law Project. Experts from different legal systems have been asked how their law would resolve a series of hypothetical cases. Because of the larger purposes of the Project, and because one has to draw the line somewhere, the legal systems are those of member states of the European Community. Sometimes, the expert's opinion about a case is conjectural, and the experts were asked to note when it is. In these instances, admittedly, another expert from the same legal system might decide the case differently. But the value of the expert opinions is not that they tell us how the case will come out. It is that they tell us which cases are clear, which are troublesome, the reasons why they are troublesome, and the doctrines that might be applied to resolve the difficulties. That is all one can hope to know, and enough for us to see how different legal systems approach the same problems.

This method focuses less on rules and doctrines than on the results that are reached by applying them. The reason for doing so is not scepticism about whether rules and doctrines matter. They do. Courts look to them for guidance and use them to explain what they are doing. Nevertheless, when the courts of different legal systems reach similar results, it may be that their underlying concerns are the same even though they are

reflected in different rules and doctrines. When they reach different results, it may be that their rules and doctrines are similar but that the courts applying them have conflicting concerns. Thus the method helps to identify the underlying concerns.

The questions were chosen to illustrate problems which have arisen. The first part of this study will describe these problems and their historical significance. In the second part, the experts will describe how these problems would be resolved in their legal systems. The third part will try to identify similarities, differences, and underlying concerns.

## I. The architecture of contract law

### *A. Civil law*

In Roman law, when a contract became enforceable depended on which contract it was. Some contracts, the contracts *consensu*, were binding on consent. They included sale, lease, partnership, and *mandatum*, a gratuitous agency. Other contracts, the contracts *re* or 'real contracts', were binding only on delivery of the object with which the contract was concerned. They included contracts to loan goods gratuitously for consumption (*mutuum*) or use (*commodatum*), to pledge them (*pignus*), and to deposit them gratuitously for safekeeping (*depositum*). Other contracts were enforceable only when a formality was completed. Large gifts required a formality called *insinuatio*. A document describing the gift was executed before witnesses and officially registered. *Stipulatio* was an all-purpose formality that could be used to make almost any promise binding. Originally it consisted of an oral question and answer. Eventually, it became written, and in medieval and early modern Europe, the accepted formality was to execute a document before a member of the legal profession called a notary. Promises that fell into none of these categories, such as informal agreements to barter, were called 'innominate' contracts, contracts without a name, as distinguished from 'nominate' or 'named contracts' such as the contracts *consensu* and *re*. Initially they were not enforceable. Later, they became enforceable after one party had performed. That party could either reclaim his performance or insist that the other party perform as well.[1] The Roman jurists did not explain why, in theory, these distinctions among contracts made sense. They were not interested in theorizing but in working out rules pragmatically.

[1] See generally R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 508–58; A. Watson, *The Law of the Ancient Romans* (1970), 72–3; M. Kaser, *Roman Private Law*, 3rd edn (1980), 196–258.

In medieval and early modern times, in much of continental Europe and in Scotland, the Roman law became a law *in subsidium*, applicable when there was no local statute or custom in point. The medieval jurists preserved the distinctions just described although some found them puzzling. Iacobus de Ravanis noted:

> If I agree that you give me ten for my horse there is an action on the agreement. But if I agree that you give me your ass for my horse there is no action on the agreement. If a layman were to ask the reason for the difference it could not be given for it is mere positive law. And if you ask why the law was so established the reason can be said to be that the contract of sale is more frequent than that of barter. And more efficacy is given to sale than barter.[2]

The greatest medieval jurists, Bartolus of Saxoferrato and Baldus degli Ubaldis, thought they had found a reason, but it was not a very satisfactory one. Bartolus grasped at the term the Roman jurists had used to describe the contracts: they were 'nominate' or 'named' contracts. He thought that the distinction between them and the 'innominate' contracts was not a mere matter of positive law. The nominate contracts, he claimed, derived their name from the *ius gentium* which, according to the Roman texts, was a law 'established among all men by natural reason'.[3] One Roman text said that 'nearly all contracts' belong to the *ius gentium*. According to Bartolus, the 'name' made these contracts actionable, for 'nominate contracts give rise to an action by this alone, that they exist and have a name'.[4] Contracts *consensu* are binding on consent and contracts *re* upon delivery, he said, because of a difference in their names. Consensual contracts such as sale took their names from an act that a party performs by agreeing: I can sell you my house today by agreeing even if I do not deliver it to you until next month. Contracts *re* take their names for an act a party performs by delivering: I cannot say I deposited my goods with you or loaned them to you today if you are not to receive them until next week.[5] Baldus agreed. He concluded that since these rules were not mere matters of Roman positive law, innominate contracts should not be enforceable even in Canon law.[6]

A modern reader is not likely to find this explanation plausible. It appealed to Bartolus and Baldus because it fitted together the Roman texts

[2] Iacobus de Ravanis, *Lectura Super Codice* (publ. under the name of Petrus de Bellapertica) (Paris, 1519, repr. *Opera iuridica rariora*, vol. I, Bologna, 1637), to C. 4.64.3. On the authorship, see E. M. Meijers, *Etudes d'histoire du droit*, vol. III *Le droit romain au moyen âge* (1959), 72–7.

[3] I. 1.2.1; see Dig. 1.1.9.

[4] Bartolus de Saxoferrato, *Commentaria Corpus iuris civilis*, to Dig. 12.14.7 no. 2, in *Omnia quae extant opera* 10 (Venice, 1615).

[5] *Ibid.*

[6] Baldus de Ubaldis, *Commentaria Corpus iuris civilis* (Venice, 1577), to C. 2.3.27.

that spoke of 'nominate contracts', those that spoke of the *ius gentium*, and the Roman rules. While these jurists occasionally borrowed ideas from the Aristotelian philosophical theory that was then popular, for the most part, like the medieval jurists before them, they were not interested in theorizing but in fitting together their Roman texts.

Consequently, a major change took place in the sixteenth century when a group of philosophers and jurists, centred in Spain and known to historians as the late scholastics or Spanish natural law school, tried to synthesize Roman law with the philosophy of their intellectual heroes, Aristotle and Thomas Aquinas.[7] Leaders of the school were Domingo de Soto, Luis de Molina, and Leonard Lessius. They were the first to look systematically for theoretical justifications of the Roman rules. In the seventeenth century, many of their conclusions were borrowed by the founders of the northern natural law school, Hugo Grotius and Samuel Pufendorf. Paradoxically, these conclusions were disseminated throughout northern Europe while the philosophical ideas that had inspired them fell from favour and their roots in this philosophy were forgotten.

The late scholastics explained contract law in terms of three Aristotelian virtues: fidelity, liberality, and commutative justice. For Aristotle, the virtue of fidelity or truth-telling meant keeping one's word.[8] Thomas Aquinas explained that promises should be kept as a matter of fidelity.[9] Liberality, for Aristotle, meant not merely giving resources away, but giving them away sensibly, 'to the right people, [in] the right amounts, and at the right time'.[10] Commutative justice in voluntary transactions meant exchanging resources of equivalent value, so that neither party was enriched at the expense of the other.[11] Thomas Aquinas explained that a person might part with resources either as an act of liberality or as an act of commutative justice.[12] The late scholastics concluded that liberality

[7] See generally I. Birocchi, *Saggi sulla formazione storica della categoria generale del contratto* (1988), 25; P. Cappellini, 'Schemi contrattuale e cultura theologico-giuridica nella seconda scolastica: verso una teoria generale' (thesis, Univ. of Florence, 1978/79); M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (1959), 6; H. Thieme, 'Qu'est-ce que nous, les juristes, devons à la seconde scolastique espagnole?' in Paolo Grossi (ed.), *La seconda scolastica nella formazione del diritto privato moderno* (1973), 20; H. Thieme, 'Natürliches Privatrecht und Spätscholastik', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung* 70 (1953), 230; J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), 69–133.

[8] *Nicomachean Ethics*, IV.vii.1127a–1127b.

[9] *Summa theologiae*, II–II, Q. 88, a. 3; a. 3 ad 1; Q. 110, a. 3 ad 5.

[10] *Nicomachean Ethics*, IV.i.1119b–1120a. Thomas discussed liberality in a similar way. *Summa theologiae*, II–II, Q. 117, aa. 2–4.

[11] Aristotle, *Nicomachean Ethics*, V.ii.1130b–1131a; Thomas Aquinas, *Summa theologiae*, II–II, Q. 61, a. 2.

[12] *Summa theologiae*, II–II, Q. 61, a. 3.

and commutative justice were the two basic types of arrangements one could enter into by promising.[13]

It was easier for them to read this distinction into Roman law because, in the fourteenth century, Baldus had already described liberality and exchange as the two *causae* or reasons that a contract must have, even in Canon law, to be enforceable.[14] This distinction was not to be found in the Roman texts which referred to the *causa* of a contract.[15] There is strong evidence, which I have presented elsewhere, that he took the distinction from Aristotle and Thomas Aquinas.[16] He often drew upon their philosophy to explain Roman texts even though, unlike the late scholastics, he did not try to rebuild Roman law on a philosophical groundplan.

In any event, this distinction cut across the Roman classification of contracts. *Mandatum*, *commodatum*, *mutuum*, and *depositum* were all gratuitous contracts but the first was a contract *consensu* and the last three were contracts *re*. Sale, lease, and barter were all contracts of exchange but the first two were nominate contracts *consensu* and the last was an innominate contract. The late scholastics reclassified these contracts according to whether they were based on liberality or commutative justice, and the northern natural lawyers and those they influenced continued the enterprise. Grotius and Pufendorf presented elaborate schemes of classification in which they showed how the contracts familiar in Roman law could be fitted into these two grand categories.[17] Domat and Pothier explained that these are the two *causes* or reasons for making a binding promise.[18]

The distinction also inspired fresh thought about when a promise became binding. The late scholastics concluded that all contracts of exchange should be binding upon consent. The Roman rules, they said, were mere matters of positive law, established, no doubt, for some sound pragmatic reason, but not founded in principle.

[13] L. Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (Paris, 1628), lib. 2, cap. 17, dubs. 1, 3; cap. 18, dub. 2; cap. 21, dubs. 2, 4; L. Molina, *De iustitia et iure tractatus* (Venice, 1614), disps. 252, 259, 348; D. Soto, *De iustitia et iure libri decem* (Salamanca, 1553), lib. 3, Q. 5, a. 3; lib. 4, Q. 1, a. 1; lib. 6, Q. 2, aa. 1, 3.

[14] Baldus de Ubaldis, *In decretalium volumen commentaria* (Venice, 1595), to X. 1.4.11 no. 30; Baldus de Ubaldis, *Commentaria Corpus iuris civilis*, to C. 3.36.15 no. 3.

[15] See Dig. 2.14.7.1; 12.7.1; 44.4.2.3.

[16] J. Gordley, 'Good Faith in Contract Law in the Medieval *Ius Commune*', in R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Contract Law* (2000), 93.

[17] H. Grotius, *De iure belli ac pacis libri tres*, ed. B. J. A. de Kanter-van Tromp (Leiden, 1939), II.xii.1–7; S. Pufendorf, *De iure naturae et gentium libri octo* (Amsterdam, 1688), V.ii.8–10.

[18] J. Domat, *Les loix civiles dans leur ordre naturel*, 2nd edn (Paris, 1713), liv. 1, tit. 1, § 1, nos. 5–6; § 5, no. 13; R. Pothier, *Traité des obligations*, in M. Bugnet (ed.), *Oeuvres de Pothier*, 2nd edn, vol. II (Paris, 1861), § 42.

Whether gratuitous promises should be binding on consent was initially less clear. The sixteenth-century theologian and philosopher Cajetan, in his commentary on Thomas Aquinas, claimed that the promisor who broke such a promise was unfaithful to his word. But the disappointed promisee was no poorer. Consequently, the promisee had no claim against the promisor as a matter of commutative justice except if he had suffered harm by changing his position in reliance that the promise would be kept.[19] The French jurist Connanus took a similar position.[20] Soto, Molina, and Lessius disagreed, followed by Grotius and the northern natural lawyers.[21] They pointed out that executory promises to exchange were binding even though no one had become poorer. Gifts were acts of liberality but could not be revoked after delivery. They concluded that, in principle, promises of gifts should be binding as long as the promisor intended to transfer a right to the object to the promisee. Roman law required a formality only as evidence of this intention and to ensure deliberation.[22]

If, in principle, a promise should be enforced whenever the promisor wished to confer a right on the promisee, then gratuitous agreements to make a loan for consumption or for use, or a deposit, or a pledge should be enforceable even before delivery. The Roman rules were, again, mere features of positive law.

According to the late scholastics, these contracts were also acts of liberality. They differed from contracts to make gifts in that the promisor might be able to benefit the promisee without incurring any cost himself. Indeed, according to Lessius and Molina, the promisor normally made a gratuitous loan for use on the assumption that he would not have a use for the property he loaned. If this assumption proved unfounded, he would have the right to withdraw from the transaction even after delivery. He should not have such a right if he promised a gift of money or property because then he was not acting on the assumption that the gift would be costless.[23] Lessius and Molina reached this conclusion even though it seemed to contradict a Roman text:

[19] Cajetan (Tommaso de Vio), *Commentaria* to Thomas Aquinas, *Summa theologiae* (Padua, 1698), to II–II, Q. 88, a. 3; Q. 110, a. 1.

[20] F. Connanus, *Commentariorum iuris civilis libri X* (Naples, 1724), I.6.v.1.

[21] Soto, *De iustitia et iure*, lib. 8, q. 2, a. 1; Molina, *De iustitia et iure*, disp. 262; Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 2; Grotius, *De iure belli ac pacis*, II.xi.1.5; Pufendorf, *De iure naturae et gentium*, II.v.9.

[22] Molina, *De iustitia et iure*, disp. 278, no. 5; Lessius, *De iustitia et iure*, lib. 2, cap. 18, dubs. 2, 8.

[23] Molina, *De iustitia et iure*, disp. 294, nos. 8–10; Lessius, *De iustitia et iure*, lib. 2, cap. 27, dub. 5.

As lending rests on free will and decency, not on compulsion, so it is the right of the person who does the kindness to fix the terms and duration of the loan. However, once he does it, that is to say, after he has made the loan for use, then not only decency but also obligation undertaken between lender and borrower prevent his fixing time limits, claiming the thing back or walking off with it in disregard of agreed times . . . Favours should help, not lead to trouble.[24]

Molina agreed that, as a general principle, one should not be able to change one's mind in a way that injures another. But, he argued, the borrower should have understood that the loan was made on the tacit condition that the lender had no need for the object. If the need arose, it was an accident for which the promisor should not be held responsible.[25]

The late scholastics were discussing when promises were binding in principle, or, as they put it, as a matter of natural law. They acknowledged that Roman law was different. Nevertheless, their work undermined the Roman rules by providing a coherent, philosophically grounded account of which promises should be enforced.

In time, the rules which the late scholastics ascribed to the natural law became accepted as positive law. In some places such as Castile, innominate contracts were made enforceable by statute.[26] Elsewhere, beginning in the sixteenth century, jurists simply declared that the custom of the courts was to enforce them.[27] As Nanz has shown, the first jurist to mention this custom was Wesenbeck.[28] He cited earlier jurists in support who, in fact, had never taken this position.[29] By the eighteenth century, this view had become almost universal.[30] The Roman rules about innominate contracts were gone. Contracts of exchange were enforceable upon consent. According to many jurists, promises to make gratuitous loans for use or consumption, to accept a deposit, or to give a pledge were binding before delivery, although they often added (following a tradition that went back to Bartolus) that the contracts of *mutuum*, *commodatum*, *depositum*, and *pignus* themselves were formed by delivery since that is what their names implied. This change could not have been caused by a mis-citation.

[24] Dig. 13.6.17.3. [25] Molina, *De iustitia et iure*, disp. 279, no. 10.
[26] Molina, *De iustitia et iure*, disp. 257–8.
[27] J. Voet, *Commentarius ad pandectas* (The Hague, 1698), to Dig. 2.14 § 9; W. A. Lauterbach, *Collegii theoretico-pratici* (Tübingen, 1744), to Dig. 2.14 § 68; J. Wissenbach, *Exercitationum ad I. pandectarum libros* (Frankfurt, 1661), lib. 2, disp. 9, no. 35; see B. Struvius, *Syntagma iurisprudentiae secundum ordinem pandectarium concinnatum*, to Dig. 2.14 no. 32 (Jena, 1692) (arguing that some agreements would still not be enforced when the parties did not so intend).
[28] K. Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (1985), 85.
[29] M. Wesenbeck, *In pandectas iuris civilis et codicis iustinianei libros viii commentaria* (Lyons, 1597). [30] Zimmermann, *Law of Obligations*, 539–40.

Jurists must have thought that they were moving to a sounder position. They thought the position was sounder because it was the one which the leading jurists of their time believed to be theoretically correct.

When older rules did survive, often they were congenial with the principles of the late scholastics and natural lawyers. Contracts to give money or property still required the formality of registration. Certain traditional exceptions to this requirement were also preserved. One was for promises to charitable causes (*ad pias causas*).[31] Another was for promises to those about to marry (*propter nuptias*).[32] Another concerned the so-called *donatio remuneratoria*: the law would enforce an informal promise to reward someone who had conferred a benefit on the promisor in the past.[33] As mentioned earlier, the late scholastics and natural lawyers explained the formality itself as a way of ensuring deliberation. Liberality, to them, meant not merely giving away money but giving it away sensibly. Although they were not explicit, presumably they thought that in these exceptional cases the gift was more likely to be sensible or, in the case of a *donatio remuneratoria*, that it was not truly an act of liberality but compensation for a benefit received.

This change in early modern times gave the civil law of contracts the shape which it still has today. In most continental countries, informal promises of exchange are binding in principle. Promises to give away money or property still require a formality. The most common formality today is to execute a document before a 'notary' who is not the Anglo-American notary public but a member of the legal profession. Nevertheless, as we will see, the traditional exceptions to this requirement have largely disappeared.

In Scotland, matters took a somewhat different course in early modern times, and, as a result, the shape of Scots law today differs from that of other civil law jurisdictions. As on the continent, the older Roman rules were largely discarded.[34] Jurists such as Stair agreed with the late scholastics and natural lawyers that promises were binding in principle.[35] Nevertheless, Scots law did not adopt the continental solution that promises to give money and property required the formality of registration or, later, notarization. Their rule was that such a promise was enforceable only if the promisor acknowledged the promise in a written document or under oath.[36] By way of exception, it was enforceable if the promisor had

[31] Lessius, *De iustitia et iure*, lib. 2, cap. 18, dub. 6, no. 9; Molina, *De iustitia et iure*, disp. 279, no. 2. [32] Molina, *De iustitia et iure*, disp. 279, no. 7. [33] *Ibid.*, disp. 279, no. 6.
[34] James, Viscount of Stair, *Institutions of the Law of Scotland*, vol I. ed. D. M. Walker (1981), I.x.4, 12. [35] *Ibid.*, I.x.10.
[36] D. M. Walker, *The Law of Contracts and Related Obligations in Scotland*, 2nd edn (1985), § 10.2.

acted in a way that acknowledged the existence of the promise (homologation) or allowed the promisee to change his position in reliance upon it (*rei interventus*).[37] These traditional rules have now been replaced by the Requirements of Writing (Scotland) Act 1995, which nevertheless reflects their influence. Under the Act, a gratuitous promise[38] must be made in writing unless undertaken in the ordinary course of business.[39] Absent a writing, the doctrine of *rei interventus* applies in an altered form:[40] the promisee may still have an action if he changes his position in reliance on the promise with the promisor's knowledge and acquiescence.[41]

The civil law retained this shape even after the Aristotelian ideas that had inspired the late scholastics fell from favour. By the nineteenth century, these ideas seemed strange and unacceptable. The contract theories of the late scholastics and the natural lawyers were replaced by the so-called 'will theories'. In these theories, contract was defined in terms of the will of the parties. The innovation was not the concept of will. Jurists had always known that parties enter into contracts by expressing the will to be bound. The innovation was to define contract simply in terms of the will without reference to the types of arrangements that the parties might legitimately will to enter into or the reasons why the law should enforce them.[42]

Consequently, the principle that contracts are binding on consent was now understood differently. It now meant that, in principle, whatever the parties willed should be enforced. The consequence was not so much a change in the rules of contract law. It was that the point of some of these rules now became hard to understand. If whatever the parties willed should be enforced, it was hard to see why the law should only enforce certain promises. The doctrine that there were two kinds of *causa* seemed puzzling. French jurists pointed out that it seemed merely to mean that the promisor must have some reason for promising which might or might not be to receive something in return.[43] Jurists still said that promises of gifts required a formality to ensure deliberation, but the reason why

[37] Walker, *Law of Contracts*, §§ 13.35–13.36.
[38] More technically, gratuitous unilateral obligations.
[39] Requirements of Writing (Scotland) Act 1995, s. 2(a)(ii).
[40] W. M. Gloag and R. C. Henderson, *The Law of Scotland*, 10th edn, ed. W. A. Wilson and A. Forte (1995), § 8.3.
[41] Requirements of Writing (Scotland) Act 1995, s. 1(3) and 1(4).
[42] See Gordley, *Philosophical Origins*, 161–213.
[43] C. B. M. Toullier, *Le droit français suivant l'ordre du Code*, 4th edn, vol. VI (Paris, 1869–78) § 166; A. M. Demante and E. Colmet de Santerre, *Cours analytique du Code Civil*, 2nd edn, vol. V (Paris, 1883), § 47; C. Aubry and C. Rau, *Cours de droit civil français d'après la méthode de Zachariae*, 4th edn, vol. IV (Paris, 1869–71), § 345 n. 7; F. Laurent, *Principes de droit civil français*, 3rd edn, vol. XVI (Paris, 1869–78), §§ 110–11.

deliberation was particularly necessary was left obscure. The rules that governed gratuitous loans, deposits, and pledges were often different from those governing either gift or exchange, but the reason why was no longer clear.

On the eve of the twentieth century, then, the civil law was the product of three quite distinct historical influences: the Roman system of particular contracts; the late scholastic and natural law theories of fidelity, liberality, and commutative justice; and the nineteenth-century will theories.

### *B. Common law*

The common law was not taught in universities until the eighteenth century. The common lawyers were either practitioners or judges, and, until the nineteenth century, there was little literature on what we call contract law aside from the reports of decided cases.[44] Blackstone devoted only a few pages to contract. The first treatise on the common law of contract was written by Powell in 1790.[45] Until the nineteenth century, the law was organized, not according to doctrines or principles, but by writs. A writ was needed to bring a case before the royal courts, and eventually the number of writs was limited. To succeed, a plaintiff had to bring his case within one of these writs.

What we call the common law of contract grew out of two writs. One was covenant which could be used to enforce a promise given under seal, a formality originally performed by making an impression in wax on a document containing the promise. The other was assumpsit. To recover in assumpsit, the promise had to have 'consideration'.

There is a famous and inconclusive debate over whether the common law courts borrowed the idea that a promise needs consideration from the civil idea of *causa*. However that may have been, the doctrines had quite different functions. The doctrine of *causa*, as we have seen, identified the reasons why, in principle or in theory, a party might make a promise or the law might enforce one. The doctrine of consideration was a pragmatic tool for limiting actions on a promise to those cases in which courts thought an action was appropriate. These cases were so heterogeneous that the term 'consideration' had no single meaning.

In some of these cases, the promise was made to obtain something in return. But in some it was not. The promise of a father to give money or

[44] A. W. B. Simpson, 'Innovation in Nineteenth Century Contract Law', LQ Rev. 91 (1975), 247 at 250–1. [45] J. Powell, *Essay upon the Law of Contracts and Agreements* (London, 1790).