STUDII

EQUALITY AND THE LAW OF CONTRACT: THE POSSIBLE IMPACT OF ARISTOTLE'S THEORY OF COMMUTATIVE JUSTICE

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Abstract. *The evolution of contract law is motivated by a governing regime's reception of new social politicies and political ideals. Today constitutions world wide have emphasised the need for democracy based on human rights. In order to achieve such a change within the law of contract it is opportune to re-emphasise the element of equality within the contracting paradigm. Classical contract law departs from the premise of formal equality which supports procedural fairness. It is suggested that the time has come to re-conceive equality in order to be able to manifest substantive fairness. It is suggested to redefine equality within this frame by underpinning contract law with the neo-Aristotelian theory of commutative justice which demands that no one be enriched at another's expense. Commutative justice supports an equality in exchange and so establishes substantive fairness by demanding a fair price.*

Key words*: equality; formal equality; substantive equality; neo Aristotelian theory; commutative justice;*

Cuvinte cheie: egalitate; egalitate formală; egalitate de fond; teorie neoaristotelică; justiție comutativă

1. Introduction

Contract law constantly changes either by expanding or contracting its range, by distinguishing its rules and modifying its basic principles. This evolution is driven by the reception of new social policies and political ideals. South African contract law which plays a pivotal role in the distribution of wealth in society presents a potent example of such evolution. The inception of the South African Constitution[1] required South African jurists to reconsider the previously unquestioned maxims of their disciplines. South African constitutional democracy is based on a progressive vision and interpretation of Human Rights. This change in its post apartheid social practices promoted statutory intervention to protect the weak against exploitation. Protection of the consumer has not been left to interpretation of basic principles and general clauses but has been codified in consumer legislation.[2] Consequently, it raises the question whether the pre-apartheid tenets of the common law of contract remain valid in the twenty-first century.

In this paper it is argued that the philosophical basis of modern contract doctrine is in need of change and that the element of equality requires re-emphasis. Such emphasis is required to establish a balance between contracting parties in order to reflect the transformative imperative of the South African Constitution and to realise freedom, equality and human dignity as demanded by the Bill of Rights.[3] Today modern contract law demands market regulation in order to offer worthwhile opportunities, to satisfy needs and to allow citizens to achieve a good life.[4] In order to situate equality within mainstream contract law doctrine this paper analyses the potential contribution of James Gordley[5] and his view of equality as based on the Aristotelian theory of commutative justice.

2. The principle of equality

In modern egalitarian society the notion that the ideal of equality is a recent phenomenon is startling and difficult to absorb. Until the eighteenth century inequality was generally accepted on the basis of the belief in a natural human hierarchy.[6] This hypothesis collapsed during the seventeenth century with the development of natural law and the concomitant idea of natural rights, of which the natural equality of all rational beings forms a cornerstone.[7] Gosepath[8] describes how Hobbes,[9] Locke[10] and Rousseau[11] paved the way for Kant[12] formulating the equality postulate of universal human worth and recognition of the same freedom for all rational beings as the sole principle of human rights.[13] The Enlightenment led towards social movements and revolutions,[14] resulting in modern Bills of Rights and Declarations and Conventions of Human Rights, beginning in Virginia with the Bill of Rights of 1776 and continuing in the *Déclaration des droits de l´homme et du citoyen* of 1789, Western constitutions and United Nations conventions until the South African constitution of 1996.

Dworkin[15] has drawn a distinction between moral equality, understood as prescribing treatment of persons as equals, and the principle of treating persons equally. The idea of equal respect for all persons and equal worth or equal dignity of all human beings, is accepted in modern Western political and moral culture.[16] However, the recognition that human beings have a moral claim to be treated the same, does not mean that they are identical. The principle of equality is abstract, diverse and contested.[17] Nevertheless the presumption of equality has been conceived which has germinated in law with opposite results. First, in the domain of politics that everyone, regardless of differences, should be awarded an equal share in the distribution unless as a result of universally acceptable reasons, unequal distribution can be justified.[18] This presumption provides an easy theory of distributive justice. Since egalitarianism has come to be associated with socialistic ideas, it is important to stress that neither communism nor socialism, despite their protest against poverty and exploitation and their demand for social security for all citizens, calls for absolute economic equality.[19] At the other extreme a presumption of equality has been one of the cornerstones of the so-called classical theory of contract during the last two centuries.[20]

3. The presumption of equality in the current contract theory

The present philosophical underpinning of modern South African contract law derives from the development of human rights and natural law.[21] According to Mill,[22] the rights of freedom and equality gave birth to the doctrine of freedom of contract, which includes the premise that both contracting parties are equal. The fact that exact equality seldom exists was ignored as formal equality before the law was accepted as adequate.[23] Freedom of contract has remained the foundation of contract theory, regardless of the fact that social and political values and conditions have changed.[24] The current model was intended for businessmen negotiating at arm's length and negotiating a future deal. However, this model was applied to all contracts,[25] as its purpose was to create a facility for individuals to pursue their voluntary choices by facilitating the creation of legal obligations on any terms freely chosen by those individuals.[26] This theory of contract is held to maximize the liberty of the individual and expresses a Western political and social ideology. In adopting this system of contract the theory sowed the seeds of its own destruction, since what is appropriate for businessmen of theoretically equal bargaining power is not necessarily suitable for all. In this model freedom of contract not only implies equality, but is held to establish equality.[27] However, the divide between the formal and substantive aspects of both freedom and equality becomes evident in the contrast between the law of contract as it is taught in textbooks and as reported in the law reports, let alone as it functions in society.[28] This state of affairs can be ascribed to socio-economic developments, for example the concentration of power in business and industry, the increasing awareness of fundamental human rights and the expansion of the functions of the state. Classical contract theory did not take into account the discrepancies of resources, such as ownership, wealth and knowledge which sustain inequality between the parties to a contract. Ignoring those disparities equalled tacit condonation of exploitation of the weaker party,[29] while the argument that no one can be forced to contract shows how the theory ignores the reality of economic necessity. Thus, throughout history many members of society fail to achieve an economic situation enabling them to enjoy freedom of contract, let alone the resources to litigate.[30]

4. Critique

In terms of conventional contract theory a contracting party is an abstract, middling person, without basic needs,[31] who is treated equally with other contracting parties such as giant corporations by the invisible hand of the market. However, it is today generally recognized that parties to a contract are rarely of equal knowledge, ability, or resources; in other words they are rarely of equal bargaining power.[32] Better-situated parties may be able to bargain through an attorney in an attempt to level the playing field, but a party with superior bargaining power will subordinate the weaker party. This raises the question that if parties to an exchange are rarely equal in bargaining power, in what sense are they equal?

The shortcomings resulting from the ficticious equality of contracting parties have been alleviated in a piecemeal manner by means of legal paternalism,[33] interpretation of the defects of agreement, implied terms, and recently public policy has been brought to prominence.[34] However, the introduction of a mélange of legislation, which has caused differentiation and materialisation[35] of contract doctrine, is a clear indication of the malaise afflicting the law of contract.

The South African Constitution included "equality" as both a fundamental right[36] and a foundational value,[37] which not only allows but proscribes the necessity to consider how this value/principle/right can achieve a reduction of inequality in bargaining power and the concomitant exploitation of a weaker contracting party. In the most recent Constitutional Court decision dealing with contract law *Botha v Rich*[38] it was stated clearly that it is a purpose of our Constitution that "contracting parties are treated with equal worth and concern."[39]

In consequence, it is timely to investigate an alternative theoretical foundation for the equality conundrum in the law of contract. An original contribution is found in the work of James Gordley whose focus on equality of exchange establishes reciprocity in its historical setting as a guiding principle. Thus another view of equality will be advanced which it is submitted may be better suited to the socio-economic realities of today than the classical law of the jungle model.

5. James Gordley's approach to equality and the Aristotelian theory of commutative justice

5.1. Introduction

James Gordley's seminal work *The Philosophical origins of modern contract doctrine*[40] and subsequent work[41] resurrects the Aristotelian theory of commutative justice, which departs from the premise that none should be enriched at the expense of another, and is entrenched by an equality in exchange. As the title indicates the book is more a philosophical investigation than a legal textbook and positivists will ridicule the practical necessity of a coherent philosophy of contract, because any questioning of their doctrine is to their mind adequately answered with the trump cards of autonomy and legal certainty. However, since legal scholarship in contract theory, which relates to private autonomy and freedom and sanctity of contract, struggles to adapt to the 21st century, a look at its roots may be appropriate to ascertain the purpose of contract and the boundaries of enforceability.

5.2. Historical background to commutative justice

Gordley explains that the first coherent theory of contract law was developed during the sixteenth- and seventeenth-century by the School of Salamanca.[42] These scholars applied the ethical principles of Aristotle as recepted, understood and transferred by Thomas Aquinas to contemporary Roman law.[43] It is submitted that this doctrine as interpreted and explained by Gordley is relevant today.

First, Aristotle's distinction between distributive and commutative justice[44] and secondly, the Aristotelian purpose of contract law namely to allow persons to obtain the goods and services needed to live a good life,[45] have an eternal ring.[46]

Gordley explains that in Aristotelian tradition, in an ideal world, a democracy would distribute resources equally. However, the purpose of allowing people to lead good lives may best be advanced by the recognition of private property and a degree of inequality in property ownership. If the distribution of wealth is unjust, this should be changed by a centrally made decision, rather than by individuals redistributing wealth on their own. Individuals who feel that they own more than necessary are always free to redistribute wealth by way of a promise to make a gift thus exhibiting the Aristotelian virtue of liberality.[47] Another Aristotelian distinction is between two types of contracts ie to make gifts and to effect an exchange.[48] Gordley describes the latter, our modern synallagmatic contract as an act of voluntary commutative justice,[49] which is respected if the performances are equal in value, which is as a rule determined by the prevailing market price.[50] In this manner commutative justice serves distributive justice by preserving the distribution of income.[51] Exchanges which would seriously detract from the sort of life a human being ought to live[52] should not be enforced.[53]

Since the basic tenets of Aristotelian legal philosophy, namely the dichotomy of commutative and distributive justice, as well as the purpose of contract, that each party is enabled to obtain the goods and services she requires to live a good life, while still preserving a distribution of wealth which is considered just since it allows others to obtain what they need to live a good life,[54] have stood the test of time, it is fitting to take note of Gordley's theory of commutative justice.

5.2.1. Gordley's thesis: fusion of Roman law of contract and Aristotelian-Thomist philosophy of the late scholastics

Gordley[55] draws attention to and analyses the influence exerted by Roman legal doctrine and the moral theology of Thomas of Aquinas in shaping the modern doctrines of private law as well as the natural jurisprudential concepts of contract and obligation. He traces the fusion which took place between the detailed precepts of Roman law and the Aristotelian/ Thomist virtue of justice in the writings of Vitoria, Soto, Molina and Lessius.[56] He shows how the doctrines of *causa*, fraud, mistake and duress were based upon Aristotelian-Thomist philosophy.[57] Gordley[58] argues that the first theory of contract, based on promise-keeping, liberality and commutative justice was developed by the school of Salamanca[59] on the postulates derived from the philosophies of Aristotle and Aquinas. The latter's *Summa Theologiae* is recognized as the authoritative work influencing the early modern scholastic tradition, while in the *Secunda secundae* part of this work Aquinas deals with moral theological and legal problems.[60] The scholastics of the 16th and 17th centuries reached a synthesis of the most important intellectual traditions that previously prevailed in Europe,[61] in which the Aristotelian-Thomistic natural law philosophy occupied an important place alongside the late Medieval *ius commune* and Renaissance humanism.[62] In regard to the topic of commutative justice and equality of

exchange, Gordley examines the pre-nineteenth-century jurists and philosophers who developed the doctrine of equality in exchange by drawing on Aristotle's theory of exchange as propounded in his *Nichomachean Ethics*[63] and the Justinian texts C 4 44 2 and 8[64] dealing with *laesio enormis*. The crux of the matter is the fact that the leading protagonists of modern natural law such as Grotius,[65] Pufendorf[66] and Barbeyrac[67] absorbed this theory of contract into their works,[68] in spite of their attacks on the intellectual foundation thereof. This hybrid Salamancan theory of contract was thereupon transplanted into the work of Domat[69] and Pothier,[70] and ultimately codified in Prussia's *Allgemeines Landrecht*[71] and the French *Code Civil*.[72]

Grotius and Pufendorf replaced the Aristotelian-Thomist philosophy with that of voluntarist ethics.[73] The new paradigm of contract law viewed the making of a contract simply as an act of will and the parties were bound simply to what they willed, not to obligations that followed from the essence or nature of their contract.[74] Simpson refers to this notion as a *Grundnorm* from which many contract law rules were inferred.[75]

This change of focus from the nature of contracting to the examination of the motives and intentions of those making the contract is an eloquent restatement of the central difficulty facing all early modern contract theories, namely the framing of a coherent and compelling account of obligation. During the nineteenth-century the will of the parties was generally accepted as the basis for contractual doctrine.[76]

The impact of the Spanish school of neo-scholastic writings on seventeenth- and eighteenth-century natural legal discourse is much more important than the apparently limited focus on private law doctrine would suggest. Today it is common cause that their achievements were utilised by the prominent natural law jurists such as Hugo Grotius (1583–1645) and Samuel von Pufendorf (1632–1694).[77] Gordley[78] gives an account of how much of Grotius's writing remained steeped in the detail of scholastic learning. He ascribes the failures of contractual theories to the fact that from the natural lawyers onwards the postulates of the existing contract theory were negated.[79] As Grotius and later philosophers abandoned the transcendent unifying principles of Aristotle,[80] these were replaced with personal will and lately economic efficiency as the essence of a theory of contract.[81] The influence of Kant[82] and Posner[83] has led to the elevation of personal autonomy as the personification of human dignity or economic efficiency as the philosophical underpinning of modern contract. However, these theories have proven to have their own shortcoming and internal contradictions, which arise, according to Gordley,[84] at precisely the points where the original Aristotelian explanations have been abandoned.

6. Aristotelian and Thomist theory of commutative justice

It falls outside the scope of this paper to do justice to the full range of Gordley's theory of contract. The essence which is relevant will be briefly summarised. The focus of Gordley's research can be divided into five major phases: the original work of Aristotle,[85] the interpretation by Thomas Aquinas thereof in his *Summa theologiae*,[86] the first theory of

contract as developed by the scholastic school of Salamanca, the reworking by the natural lawyers and present day contract law theory.[87]

Aristotle views happiness as the purpose of life and to achieve such a person must act in accordance with complete virtue by developing her capabilities. The justification of contracts is found in that they support the desirable quality that facilitates individuals to realise a good life.[88] Thus transfers of donations are justified because they support the virtue of liberality and exchanges because they support commutative justice.[89] The premise of the Aristotelian tradition is the belief that "human beings have an end, a manner of life in which their human potentialities are realised."[90] Accordingly, human happiness is perpetuated by living a manifestly human life, a life which realises as far as possible, one's potential as a human being.[91] Living a human life is the end to which all contracts are a means either in its application or as an essential ingredient of life.[92] Consequently, Gordley reasons that since man is a social animal, part of living such a life is helping others to do so as well.[93] It is this latter construct that distinguishes distributive from commutative justice.[94] Distributive justice[95] ensures that each person has the wealth he requires to fulfil his needs, while commutative justice enables individuals to retain the wealth required to live a good life without another being enriched at their expense.[96] The purpose of commutative justice is to preserve each individual's share of wealth, which defines the purpose of contract law, namely to protect this share, because we wish each person to have the means to live as people should live, ie a good life. Thus no one was to be enriched at the expense of another; no one should gain from another's loss.[97] Aristotle did not refer to unjust enrichment as it is known today but as a rule within contract law. In this regard it may be noted that Robert Feenstra has shown that the late Scholastics were the first to identify unjust enrichment as a separate division of private law such as property and contract.[98] Hence the notion of unjust enrichment was borrowed by the Northern natural lawyers from whom modern lawyers captured the idea, although the original philosophical theory of commutative justice which underpinned it became forgotten.[99] Gordley has argued that modern legal systems recognise when a contracting party is unjustly enriched at another's expense and that the reason that the legal system provides a remedy is because of the law's objective to preserve each person's share of capital.[100] This is a reference to commutative justice whether it is directly referred to as such or not.

Aristotle distinguished between two forms of commutative justice: voluntary commutative justice which entailed contracts while involuntary referred to delict or tort.[101] Commutative justice of contract law included specific contracts such as purchase and sale, loan for consumption, pledge, loan for use, deposit, and letting and hiring.[102] Both types of commutative justice were subject to the principle that no one should become enriched at the expense of another. In contract law this form of commutative justice further required that each party had to perform something of equal value[103] while preserving a distribution of wealth that is just.[104] Thomas Aquinas interpreted this requirement as demanding that an exchange ought to place the same obligation or weight on both of the contracting parties.[105] It is this pivotal requirement of commutative justice namely equality in exchange, which justifies a fresh approach to equality in the law of contract, namely to review the outcome of the agreement rather than the so-called equality of the parties at inception of the contract.

6.1. Equality in exchange: the doctrine of a just price

The question which now requires consideration is what Aristotle understood an equal exchange to mean, which encompasses the question regarding a just price. For an interpretation of the latter it is necessary to look at the debate held by the late scholastics and the early natural law school on Aristotle's work dealing with equality of exchange.

The School of Salamanca, the late scholastics prospered from the late 15th century to the early 17th centuries.[106] While mainly known for their pioneering work on international law, these theologians/ jurists made major contributions to private law, of which the doctrine of a just price is relevant to the topic under discussion.[107]

The notion of a just price is often misunderstood. To countermand the misconception Gordley emphasises what the concept did not mean to the supporters of Aristotelian commutative justice.[108] These scholars did not intend the contracting parties to place the same value on the goods performed.[109] According to them a seller should not price a thing for more than its just price even if the purchaser would benefit by much more from acquiring the goods.[110] The personal value that each party places on the resources he receives will necessarily be greater than the value he places on the resources he gives.[111] They did not intend an equality in their personal gain.[112] If they would have done, there would have been no reason for the exchange.[113] Neither did these jurists believe that the just price of goods constituted an intrinsic constant characteristic such as the goods' shape or colour.[114] Gordley mentions the scholastics Covarruvius,[115] De Castro,[116] Molina,[117] Soto,[118] and the natural lawyers Grotius[119] and Pufendorf[120] as regarding the market price as a reflection of a purchaser's needs, the scarcity of goods and the costs of production of the goods.[121] A just price was not viewed as a stable price but, one that fluctuated from day to day and from area to area, according to the differences in need, scarcity and cost.[122] Thus Noonan in his book, *The scholastic analysis of usury* [123] and De Roover in his work on a just price[124] state explicitly that the late scholastics and natural lawyers identified a just price with the price on a competitive market which fluctuates daily and from place to place depending on need, scarcity, and cost. Gordley accepts that according to the late scholastics and the early natural lawyers the just price was the price for which goods were normally traded.[125] Such a price was determined by the cost of production, the need of the goods and their scarcity.[126]

The question which requires further consideration is why these scholars believed that a fluctuating price would maintain equality. The answer to this question appears problematic. Gordley[127] has pointed out that in order to maintain equality the just price must always equal the cost of production. In such a case both seller and purchaser neither gain nor lose. The seller would receive the exact amount of her expenses and labour while the purchaser could resell for an amount equalling her expenditure. According to Langholm this economic model is today referred to as a long-run equilibrium price.[128] In a long-run equilibrium a market price set according to scarcity and need exactly covers the cost of production.[129] However, the Aristotelian scholars were unaware of the economic model relating to a long-run equilibrium and Gordley suggests that they were untroubled by the fact that a fluctuating price might not

be just in every transaction.[130] A competitive market price was consequently considered just because it preserved equality to the greatest extent if need and scarcity were considered and that prices must fluctuate in order to take account of scarcity and need.[131]

Be it as it may, this essay does not aim to provide a definitive answer to the question regarding a just price. The aim was to draw attention to the philosophical theory of commutative justice and the principle of equality in exchange as a means to explain that contract law can benefit from a doctrine of equality which departs from an equality of exchange rather than a doctrine of formal equality or equality of bargaining power.

7. Analysis

The point of interest for this paper is found in the fact that neither Aristotle nor Aquinas was an adherent of the principle of equality in whatever form.[132] Recognising existing inequalities, their approach to ban exploitation from contract came from another direction, namely the outcome of the transaction. Aristotle's commutative justice is held by Gordley to be the key element. In synallagmatic contracts a certain symmetry of performances was required and the precept against unjust enrichment should be viewed within this context. The school of Salamanca developed a coherent theoretical framework in which the doctrine of *justum pretium* or *laesio enormis* played a significant role.[133]

Modern contract is based on the will of the parties; this foundation is held to guarantee justice and party autonomy and is considered recognition of human dignity. The seed for this construct can be found already in Book III of *Nichomachean Ethics* of Aristotle where it is argued that man is responsible for his acts only to the extent that he acts freely and in the absence of ignorance or compulsion.[134] This is the postulate of equal freedom: every person should have the same freedom to structure his or her life, and in a peaceful and appropriate social order.

However, legal equality is the principle of formal equality ie that all members of a society must have equal general rights and duties. These rights and duties have to be grounded in general laws applicable to everyone. However, both legal and political equality[135] are abstract notions and do not take socio-economic reality into consideration. Equal opportunity requires that social institutions are designed in such a way that persons who are disadvantaged have an equal chance in the political or economic process. The main controversy here is to what extent the state should endeavour to establish equality of social conditions for all by way of taxes, the educational system, social insurance, and positive discrimination. The equality required in the economic sphere is the most complex as it tackles the question regarding what constitutes justified exceptions to the equal distribution of goods. Factors such as need or disadvantages compete with existing rights, such as differences in performance, efficiency, compensation and affirmative action.

Since parties to an exchange are seldom if ever equal in all relevant aspects of bargaining power, it is argued that such equal power is unnecessary for a fair exchange, as long as the dominant party refrains from exploiting her superior bargaining power. It is also argued that equal bargaining power does not automatically warrant a just exchange, since parties of equal power might both attempt to manipulate and coerce each other. However, it is widely

accepted that equality of bargaining power is important, since in the presence of vast disparities in bargaining power, it is almost impossible for the stronger party not to manipulate or coerce the weaker party. Therefore, experience has taught that a broad balance of power is practically necessary for a justice in exchange. Furthermore, a requirement governing all exchanges is that each party must respect the human dignity of the other, which respect usually requires an exchange of equivalents.

To identify an equality of bargaining power requires contextualization of the parties' relative situation at the time of the conclusion of the agreement. Inevitably this will require analysis of the exact source of procedural irregularities and deficiencies in the formation process of the contract. This route involving determination of an equality of bargaining power manifests a theory of procedural fairness. Courts are severely limited when it comes to discovering the will of the parties, which is often a matter of motivation and intention.

On the other hand a theory involving an equality of exchange manifests a hypothesis of substantive fairness. In consequence, to discover whether parties to a contract have treated each other as equals, it is convenient to see if what they exchanged was of equal value. If the exchange was unequal, it is proper to suspect a constraint on the party's autonomy such as misrepresentation, fraud or duress. In such instance it is justifiable to suspect that one party did not respect the equality of the other. Since courts can take notice of the equality of what was exchanged more readily than the equality of the parties, this approach is understandably focused on substantive fairness. Thus, the legal principles and rules governing contracts are consistent with the general principle that justice in exchange requires equality of market values rather than equality of the parties.

8. Conclusion

In a period in which metaphysical, religious and traditional views have lost their general plausibility[136] the remaining beacon in Western culture has become Human Rights. However, taking these rights seriously places a serious duty on all lawyers and changes most legal questions into moral-juridical debates. As we are facing the beginning of the 21st century we bear witness to a kind of re-moralization of contract law because an observance of decency is increasingly demanded from providers of goods and services, which undermines the presumption of equality. On the other hand, moral theologians and scholastics of the 16th and 17th centuries appear to have developed a coherent theory of contract relying on equality of exchange in response to the thin morality associated with the civilian tradition.

Hallebeek and Decock[137] have pointed out that early modern scholastic moral thought was in touch with real life and did not have some vague moral theory about a better world. The 16th and 17th century moral theologians were active in practice as consultants to businessmen and politicians, and were both theologian and jurist. Thus, in their fusion of Aristotelian-Thomistic philosophy and legal concepts from Roman, Canon, and statutory law, observance of the equality-principle of Aristotle's commutative justice stood central. Gordley emphasises the extent to which contract doctrine requires an ethical foundation. It is this notion that law and ethics are connected which has been resurrected by the South African Bill of Rights.

What is distinctive and important about the Scholastic analysis is that the basic focus is directed upon the object or objects transferred rather than on the parties to the transaction. This does not mean that the Scholastics did not consider the relationship between the parties to the exchange and, in particular whether that relationship was characterized by any elements which constrained their individual autonomy. But the affiliation between the parties was subordinate to the relation between the objects. In modern contract law it is the relationship between contracting parties which is emphasized and their relative situation which is taken into account when evaluating the fairness or not of a contract or term. Perhaps it is time to begin evaluating the relative outcomes of contracts, which evaluation appears to be more in the realm of the possibility than evaluation of the parties' relative position at the time of contracting. Gordley's commutative justice clearly supports the argument that exploitation in contracting should be outlawed and that the principle of reciprocity is required as one of the elements for enforceability. Experience has shown that formal equality does not guarantee substantive fairness while an equality in exchange appears to do so.

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[1] Constitution of the Republic of South Africa 108 of 1996.

[2] Consumer Protection Act 68 of 2008; National Credit Act 34 of 2005.

[3] Section 7 (1) states: "This bill of rights is a corner stone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.". Section 7(2) states: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[4] J Gordley "Contract law in the Aristotelian tradition" in P Benson (ed) *The theory of contract law* (2001) 286; S Liebenberg "Towards an equality promoting interpretation of socio-economic rights in South Africa: Insights from egalitarian liberal tradition" 2015 *South African Law Journal* 411*ff*; L Hawthorne "Constitution and contract: Human dignity, the theory of capabilities and *Existenzgrundlage* in South Africa" 2011 *Studia Universitatis Babes-Bolyai. Series: Iurisprudentia* at studia.law.ubbcluj.ro 2011 – Numeral 2 (published 30 August 2011).

[5] J Gordley *The philosophical origins of modern contract doctrine* (1991); *id* "Contract law" (note 4 above) 265-335.

[6] C W Maris "Inleiding: recht tussen macht en emancipatie" in Maris (ed) *Gelijkheid en recht* (referred to as *Gelijkheid* (1988) 18.

[7] Maris *Gelijkheid* (note 6 above) 52-54; JC Smith and DN Weisstub *The Western idea of law* (1983) 618.

[8] S Gosepath "Equality" *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition) EN Zalta (ed) at http://plato.stanford.edu/archives/spr2014/entries/equality (on 12-5-2014).

[9] SA Lloyd and S Sreedhar "Hobbes's Moral and Political Philosophy" *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition) EN Zalta (ed) at http://plato.stanford.edu/archives/spr2014/entries/equality (on 12-5-2014); Thomas Hobbes (1588-1679); his most important work is *Leviathan, or The Matter, Forms and Powers of a Common Wealth Ecclesiatical and Civil,* written during the English Civil wars (1642-1651) at www.biography.com/people/thomas-hobbes-9340461 (on 2-2-2015).

[10] John Locke (1632-1704); his *Two treatises of government* (1590) were a landmark in the development of natural rights and social contract at www.biography.com/people/john-locke-9384544 (on 23-2-2015).

[11] Jean-Jacques Rousseau (1712-1778). *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (1755). *A discourse upon the origin and the foundation of the inequality among mankind* at www.gutenberg.org/cache/epub/11136/pg11136-images.html (on 5-5-2015; transcribed from CW Eliot (ed) *Harvard Classics* vol 34 (1910) translator not named); *Le contrat social* (1762) elaborated his doctrine of inequality.

[12] Gosepath "Equality" (note 8 above); M Rohlf "Immanuel Kant" *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition) EN Zalta (ed) at http://plato.stanford.edu/archives/sum2014/entries/kant (on 12-5-2014). Kant (1724-1804). Gosepath refers to *Metaphysik der Sitten* (1797) in *Kants Gesammelte Schriften Königlichen Preusischen Akademie der Wissenschaften* 1900- .

[13] Kant *Metaphysik* 230.

[14] Maris *Gelijkheid* (note 6 above) 18.

[15] R Dworkin *Taking rights seriously* (1977) 370; *cf* also R Dworkin *Sovereign virtue: The theory and practice of equality* (2000) 65-119.

[16] G Vlastos "Justice and equality" in J Waldron (ed) *Theories of rights* (1984) 41-76.

[17] Gosepath "Equality" (note 8 above) distinguishes between formal, proportional, moral and distributive equality.

[18] With different terms and arguments, this principle is conceived as a presumption by S I Benn & R S Peters *Social principles and the democratic state* (1959) 111 and by H A Bedau "Egalitarianism and the idea of equality" in J R Pennock, J Chapman (eds) *Equality* (1967) 3-27 at 19; and as a relevant reasons approach by B Williams "The idea of equality" in B Williams *Problems of self* (1973) 230-249; as a conception of symmetry by E Tugendhat *Inequality* (1993) 374; for criticism of the presumption of equality see P Westen *Speaking equality* (1990) chap 10.

[19] The orthodox Marxist view of economic equality was expounded in the *Critique of the Gotha Program* (1875), in which Marx rejects the idea of strict equality. *Cf* Gosepath "Equality"(note 8 above).

[20] Traditional contract law refers to the so-called classical contract law. Built upon freedom of contract, classical contract law departs from the premise that both contracting parties are equal and the legal system impartially enforces the sanctions of the law of contract, irrespective of the circumstances of the parties. The equality adhered to is equality before the law and in this paradigm the law is not concerned with social and economic equality and/or any resulting inequality. For further reference see JN Adams and R Brownsword *Understanding Contract Law* (2004) 41f; PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) 226ff and 341ff; H Collins *The Law of Contract* (2003) 22f; L Hawthorne "The principle of equality in the law of contract" 1995 *Tydskrif vir Hedendaagse Romeins- Hollandse Reg* 157 164ff; D Bhana and M Pieterse "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited 2005 *South African Law Journal* 865 and 883ff; L Hawthorne "Distribution of wealth, the dependency theory and the law of contract" 2006 *Tydskrif vir Hedendaagse Romeins Hollandse-Reg* 48 at 53ff; P Aronstam *Consumer protection, freedom of contract and the law* (1979) 14; J Wightman *Contract: A critical commentary* (1996) 85ff; J N Adams and R Brownsword *Key issues in contract* (1995) 59; W Friedmann *Law in a changing society* (1959) 131; GF Lubbe and CM Murray *Farlam and Hathaway: Contract- Cases, Materials and Commentary* (1988) 18–26.

[21] This has been explicitly stated by the South African Supreme Court in *Brisley v Drotsky* 2002 (4) SA 1 SCA by Cameron JA at para [88] where he held: "All law now enforced in South Africa and applied by the courts derives its force from the constitution. All law is therefore subject to constitutional control, and all law inconsistent with the Constitution is invalid. That includes the common law of contract, which is subject to the supreme law of the Constitution."

[22] John Stuart Mill *On liberty* Ch I 15-28 Ch IV 140-177 Ch V 183-186 197 at www.gutenberg.org/files/34901-h/34901-h.htm (on 10-5-2015); Hawthorne 1995 *THRHR* (note 20 above) 157 at 162.

[23] Collins (note 20 above) 6f.

[24] Lubbe and Murray (note 20 above) 26.

[25] AWB Simpson *History of the Common Law of Contract* (1974) 325.

[26] P Gabel and J Feinman "Contract law as ideology" in D Kairys (ed) *The politics of law: a progressive critique* (1982) 176; J Feinman "Critical Approaches to contract law" 1983 *UCLA LR* 831 at 834ff.

[27] Collins (note 20 above) 6; P Gabel "Reification in Legal Reasoning" *Research in Law and Sociology* Vol 3 (1980) 45.

[28] Gabel and Feinman (note 26 above) 183; Friedmann (note 20 above) 119; E Mensch "The history of mainstream legal thought in D Kairys (ed) *The politics of law: a progressive critique* (1982) 754; Feinman 1983 *UCLA LR* (note 26 above) 831 at 836. However, see the contribution made by S Van der Merwe, LF Van Huysteen, MFB Reinecke and GF Lubbe *Contract General Principles* (2012) and their contribution on the topics of good faith 274ff and public interest 166ff.

[29] Collins (note 20 above) 6; Gabel and Feinman (note 26 above) 176; R L Hale "Bargaining, Duress, and economic Liberty" 1943 *Columbia LR* 621f.

[30] Collins (note 20 above) 6.

[31] Collins (note 20 above) 6.

[32] See the provisions protecting the indigent consumer in the consumer legislation of the past years eg the South African Consumer Protection Act 68 of 2008 in general, but especially sec 52; Proposal for a Regulation of the European Parliament and the Council of the European Union on a Common European Sales Law 11 October 2011, COM (2011) 635 final at http://bit.ly/1eZPRJB (on 1-4-2015).

[33] Hawthorne 1995 *THRHR* (note 20 above) 157ff.

[34] L Hawthorne "Concretising the open norm of public policy: inequality of bargaining power and exploitation 2014 *THRHR* 407.

[35] L Hawthorne "Materialisation and differentiation of contract law: can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention" 2008 *THRHR* 438.

[36] Constitution Section 9.

1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).National legislation must be enacted to prevent or prohibit unfair discrimination.

5) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).National legislation must be enacted to prevent or prohibit unfair discrimination.

6) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[37] Constitution Sec 1 The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) human dignity, the achievement of equality and the advancement of human rights and freedoms.

Sec 7(1) The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

[38] 2014 ZACC 11.

[39] 2014 ZACC 11 para 40.

[40] Note 5 above.

[41] This essay relies mainly on the chapter "Contract law" (note 4 above) and the articles "The moral foundations of private law" 2002 *The American Journal of Jurisprudence* 1-23; "Equality in exchange" 1981 *California LR* 1587-1656. For a full list of professor Gordley's work consult www.law.tulane.edu/uploadedFiles/Faculty_and_Admin/CVs/jgordley_cv.pdf (at 20-7-2015).

[42] Bio-bibliographical information on these authors from the scholastic school (period ca 1500 to 1800 is available on Jacob Schmutz's (Université Paris-IV Sorbonne) website: www.scholasticon.fr; Gordley *Philosophical origins* (note 5 above) 69*ff*; W Decock and J Hallebeek "Precontractual duties to inform in early modern scholasticism" 2010 *Tijdschrift voor Rechtsgeschiedenis* 91.

[43] Gordley *Philosophical origins* (note 5 above) 30ff*.*

[44] Gordley *Philosophical origins* (note 5 above) 12; and 73*ff.*

[45] Gordley " Equality in exchange" (note 4 above) 286.

[46] Liebenberg 2015 *SALJ* 427 refers to Nancy Fraser's theory of 'parity of participation'. Liebenberg at 427 states that the standard of participatory parity is more demanding than formal equality because it requires the creation of conditions for people to participate in society as equals. Also Hawthorne 2011 2 (note 4 above), who supports Martha Nussbaum's "capabilities theory" to prevent enforcement of contracts which deny a contract party a minimum standard of existence and so compromises the individual's human dignity.

[47] Gordley "Contract law" (note 4 above) 298-309.

[48] Decock and Hallebeek (note 42 above) 93; Gordley "Contract law" (note 4 above) 307.

[49] Gordley "Contract law" (note 4 above) 310ff; Decock and Hallebeek (note 42 above) at 92 point out that the idea of justice in voluntary transactions as being commutative justice comes from Aquinas in his *Summa Theologiae*.

[50] Gordley "Contract law" (note 4 above) 311; Gordley "Equality in exchange" (note 41 above) 89.

[51] Gordley "Equality in exchange" (note 41 above) 1589.

[52] Gordley "Contract law" (note 4 above) 309.

[53] Hawthorne 2011 2 (note 4 above).

[54] Gordley "Contract law" (note 4 above) 309; Liebenberg 2015 *SALJ* 411*ff*; Hawthorne 2011 2 (note 4 above).

[55] Gordley *Philosophical origins* (*note 5 above*) 69-111; Gordley "Equality in exchange" (note 41 above) 1587ff.

[56] Gordley *Philosophical origins* (note 5 above) 69ff; Gordley "Contract law" (note 4 above) 265ff.

[57] Gordley *Philosophical origins* (note 5 above) 50; 82ff; Decock and Hallebeek (note 42 above) 92ff.

[58] Gordley *Philosophical origins* (note 5 above) 10.

[59] The theology faculty of the University of Salamanca was the centre of academic excellence on the Iberian peninsula. *Cf* J Gordley *Philosophical origins* (note 5 above) 3f.

[60] Gordley *Philosophical origins* (note 5 above) 6.

[61] Gordley *Philosophical origins* (note 5 above) 6ff.

[62] Gordley *Philosophical origins* (note 5 above) 40.

[63] Aristotle *Nichomachean Ethics* V in R McKeon *The basic works of Aristotle* (1941) 927.

[64] C 4 44 2 Emperors Diocletian and Maximian to Aurelius Lupus. If you or your father sold property for less than its value, it is just that you should receive it back, through the authority of the judge upon restoring the price, or that the purchaser, at his election, should pay you what is lacking of the just price (and keep the property). A price is considered too little if one half of the true value is not paid. (Promulgated October 28 285). C 4 44 8 The same Emperors and the Caesars to Aurelia Euodia. If your son sold your land with your consent, fraud of the purchase through cunning and trickery should be shown, or fear of death or imminent bodily harm, in order to avoid the sale. The fact that you state that the land was sold for a little less than its value, is not alone sufficient to invalidate the sale. For if you consider the nature of purchase and sale, that when the parties are intending to enter into such contract, the purchase wants to purchase for less, the seller wants to sell for more, and that it is with difficulty and after many contentions, the seller gradually receding from what he asked, the purchase adding to what he offered, that they finally (the possibilities for political participation should be equally distributed; all citizens have the same claim to participation in forming public opinion, and in the distribution, control, and exercise of political power), consent to a definite price, you surely must see that neither good faith, which protects the contract of purchase and sale, nor any other reason, permits that the contract, completed by consent, either immediately or after discussion of the price, should be rescinded on that account, unless less than half of the value of the property at the time of the sale was given, and in such case the purchaser has the right of election already extended to him (to pay the remainder of the just price). Given December 1 293).

[65] Grotius (1583-1645) one of the fathers of modern natural law and international law on account of his *De Jure Belli ac Pacis* published in 1625 at www.britannica.com/biography/Hugo-Grotius (on 1-7-2015).

[66] Samuel Pufendorf (1632-1694) another founder of modern natural law at plato.stanford.edu/entries/pufendorf-moral (on 15-6-2015); Gordley *Philosophical origins* (note 5 above) 75 and 75 n 23.

[67] Jean Barbeyrac (1674-1744) translated Grotius and Pufendorf but made own contribution as well at www.biographybase.com/biography/Barbeyrac_Jean.html (on 1-7-2015).

[68] Gordley *Philosophical origins* (note 5 above) 71-75.

[69] Jean Domat (1625-1695) 17th century systematiser of Roman law and a such a distant source of the Code Civil. at www.universalis.fr/encyclopedie/jean-domat (on 1-7-2015); AA Roberts *A South African legal bibliography* (1942) 107; RC van Caenegem *An historial introduction to private law* (1992) 6.

[70] Robert Joseph Pothier (1699-1772) whose *Traité des obligations* (1761-1764) had a decisive influence on the Code Civil; Van Caenegem (note 69 above) 7; Roberts (note 69 above) 242.

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[71] The Prussian Civil Code promulgated in 1794, a product of the Enlightenment at www.brittanica.com/topic/Prussian-Civil-Code (on 11-6-2015); Gordley "Equality in exchange" (note 41 above) 1592.

[72] Code Civil Livre III Titre III Des contrats ou des obligations conventionelles en general (gallica.bnf.fr/ark:/12148/bpt6k1061517 at 17-7-2015) (Book III Title III artt 1101-1369-11 Of contracts and conventional obligations in general at www.legifrance.gouv.fr/content/download/1950/13681/..../Code_22pdf (on 17-7-2015); Gordley "Equality in exchange" (note 41 above) 1593f.

[73] Gordley *Philosophical origins* (note 5 above) 7; JB Schneewind *The invention of autonomy: A History of modern moral philosophy* (1998) 73ff 96 102 122 139 141 157f 247 257.

[74] Gradually it came to be recognized that making a contract at law and in politics was not "an exercise of the virtue of liberality by which one enriched another, or of the virtue of commutative justice by which one exchanged things of equal value." Gordley *Philosophical origins* (note 5 above) 7.

[75] AWB Simpson "Innovation in nineteenth century contract law" (1975) *Law Quarterly Review* 266; Gordley *Philosophical origins* (note 5 above) 7f.

[76] Gordley *Philosophical origins* (note 5 above) 8.

[77] Gordley *Philosophical origins* (note 5 above) 4ff; R Feenstra "Quelques remarques sur les sources utilisées par Grotius dans ses travaux de droit naturel" in R Feenstra (ed) *The world of Hugo Grotius* (1984) 65-81 and 78-80; B Tierney *The idea of natural rights* (1997) 317-329.

[78] Gordley *Philosophical origins* (note 5 above) 6ff.

[79] Gordley *Philosophical origins* (note 5 above) 7ff.

[80] Gordley *Philosophical origins* (note 5 above) 8ff. By the nineteenth century, contract scholars were shedding the conventional explanations of the doctrinal structure: those explanations, presupposing as they did an Aristotelian framework of thought, seemed unintelligible. Increasing reliance was placed on the will of the parties as the basis of all contractual principles.

[81] C Fried *Contract as promise* (1981), *passim*; M J Radin *Boilerplate The fine print, vanishing rights, and the rule of law* (2013) ch 4; MJ Trebilcock *The limits of freedom of contract* (1993) ch 1; R A Posner *Economic analysis of law* (2011) *passim*; HB Schäfer and C Ott *The economic analysis of the civil law* (2004) *passim.*

[82] Gordley *Philosophical origins* (note 5 above) 224.

[83] RA Posner *Economic analysis of law* (1973) 126; For a introduction into this paradigm L Kornhauser "The economic analysis of law" *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition) EN Zalta (ed) at http://plato.stanford.edu/archives/sum2015/entries/legal-econanalysis (on 28-7-2015).

[84] Gordley *Philosophical origins* (note 5 above) 7f; *id* "Moral foundations" (note 41 above) 1ff.

[85] Gordley *Philosophical origins* (note 5 above) 10ff refers to Aristotle *Nicomachean Ethics* V 2.

[86] Gordley *Philosophical origins* (note 5 above) 10ff refers to Thomas Aquinas *Summa theologiae* II-II, qv. 88, art 3; qv 110, art 3 ad 3; Also Gordley "Good faith in the medieval Ius Commune" in R Zimmermann and S Whittaker (eds) *Good Faith in European contract law* (2000) 93-117 at 107.

[87] Gordley *Philosophical origins* (note 5 above) 10 ; *id* "Contract law" (note 4 above) 265ff; *id* "Moral foundations" (note 41 above) 1-23; *id* "Equality in exchange" (note 41 above) 1587-1656.

[88] Radin (note 81 above) 67.

[89] Gordley *Philosophical origins* 72f; Gordley "Equality in exchange" (note 41 above) 1623; JB Murphy "Equality in exchange" 2002 *American Journal of Jurisprudence* 85.

[90] Gordley "Contract law" (note 4 above) 286.

[91] Gordley "Moral foundations" (note 41 above) 1.

[92] Gordley "Contract law" (note 4 above) 309; Radin (note 81 above) 67.

[93] Gordley "Contract law" (note 4 above) 333; Radin (note 81 above) 68.

[94] Gordley "Contract law" (note 4 above) 333; According to Gordley the distinction between distributive and commutative justice was initially presented by Aristotle in the fifth book of the Nichomachean Ethics. McKeon (note 63 above) 927.

[95] Gordley "Contract law" (note 4 above) 286; Gordley "Equality in exchange" (note 41 above) 1589.

[96] Gordley "Contract law"(note 4 above) 265, and 313.

[97] Gordley "Equality in exchange" (note 41 above) 1589f; Murphy (note 89 above) 86.

[98] Gordley "Equality in exchange" (note 41 above) 1590. R Feenstra in "Grotius' doctrine of unjust enrichment as a source of obligation: Its origin and its influence on Roman-Dutch law" in E Schrage ed *Unjust enrichment* (1995) 197.

[99] Feenstra (note 98 above) 197; Gordley "Equality in exchange" (note 41 above) 4.

[100] Gordley "Moral foundations" (note 41 above) 5.

[101] Involuntary commutative justice involved acts of theft, adultery, assault, imprisonment, murder robbery, mutilation, abuse and insult. Gordley "Equality in exchange" (note 41 above) 1590 refers to Aristotle *Nichomachean Ethics* in McKeon (note 63 above) 1131a. In this essay the accent falls on Aristotle's understanding of contractual commutative justice and that of delict will not be dealt with.

[102] Gordley in "Equality in exchange" (note 41 above) 1590 refers to Aristotle *Nichomachean Ethics* in McKeon (note 63 above) 1131a.

[103] Gordley in "Equality in exchange" (note 41 above) 1590 refers to Aristotle *Nichomachean Ethics* in McKeon (note 63 above) 1132a-32.

[104] Gordley "Contract law" (note 4 above) 309.

[105] Gordley "Equality and exchange" (note 41 above) 1590 refers to Aquinas *Summa Theologica* II-II, q 77, a. 1 (Biblioteca de Autores Cristianos 1961).

[106] Gordley *Philosophical origins* (note 5 above) 69.

[107] Gordley *Philosophical origins* (note 5 above) 94ff.

[108] Gordley " Equality in exchange" (note 41 above) 17.

[109] Murphy (note 89 above) 87.

[110] Gordley *Philosophical origins* 94. For this opinion Gordley relies on Lessius *De iustitia et iure* (1628) lib 2 cap 17 dub 1; Molina *De iustitia et iure tractatus* (1614) disp 252.

[111] Gordley "Contract law" (note 4 above) 312; Murphy (note 89 above) 87.

[112] Gordley *Philosophical origins* (note 5 above) 94.

[113] Gordley "Contract law" (note 4 above) 312; Murphy (note 89 above) 87.

[114] Gordley "Moral foundations " (note 41 above) 17.

[115] Gordley "Equality in exchange" (note 41 above) 1605 relies on Covarruvius *Variarum ex iure pontificio, regio et caesareo resolutionum libri quatuor* (1568) II, iii no 5.

[116] Gordley "Equality in exchange" (note 41 above) 1605 relies on De Castro *In Primam Codicem partem Commentaria* (1495) 4 44 2 no 4.

[117] Gordley "Equality in exchange" (note 41 above) 1605 relies on Molina *De iustitia et iure* (1614) II disp 348 no 3.

[118] Gordley "Equality in exchange" (note 41 above) 1605 relies on De Soto *Libri decem de iustitia et iure* (1553) VI q 2, a 3.

[119] Gordley "Equality in exchange" (note 41 above) 1605 relies on Grotius *De iure belli ac pacis libri tres* (1680) II xii, 14.

[120] Gordley "Equality in exchange" (note 41 above) 1605 relies on Pufendorf *De jure naturae et gentium libri octo* (1672) V I 6.

[121] O Langholm *Price and value in the Aristotelian tradition* (1979) 61-143; Gordley "Equality in exchange" (note 41 above) 1605; Murphy (note 89 above) 87.

[122] Langholm (note 121 above) 28-31 and 61-143; Gordley "Equality in exchange" (note 41 above) 1605; Gordley *Philosophical origins* (note 5 above) 94-102; Gordley "Moral foundations" (note 41 above) 3; Gordley "Equality in exchange" (note 41 above) 1605 relies on De Soto (note 118 above), Molina (note 117 above). Thomas Aquinas took the same factors into consideration in *In decem libros Ethicorum Aristotelis ad Nicomachum expositio* lib 5 lec 9 and *Summa theologica* II 2 Q 77 a 3 ad 4.

[123] J Noonan *The scholastic analysis of usury* (1957) 82-88.

[124] R De Roover "The concept of the just price and economic policy" 1958 *Journal of economic history* 410.

[125] Gordley *Philosophical origins* (note 5 above) 96.

[126] Gordley *Philosophical origins* (note 5 above) 97 refers to: De Soto (note 118 above), Molina (note 117 above). Also Thomas Aquinas (note 122 above). Langholm (note 121 above) 61-143 mentions that this argumentation by the late scholastics was not original since the medieval commentaries to Aristotle's *Ethics* had repeatedly reiterated this point. Langholm also views St Thomas Aquinas *In decem libros ethicorum Aristotelis ad Nicomachum expositio* lib 5 lec 9 as a foundational text.

[127] Gordley *Philosophical origins* (note 5 above) 98.

[128] Langholm (note 121 above) 34.

[129] Langholm (note 121 above) 34.

[130] Gordley *Philosophical origins* (note 5 above) 99.

[131] *Ibid*.

[132] See note 6 above.

[133] Gordley *Philosophical origins* (note 5 above) 69-112.

[134] De Kock and Hallebeek (note 42 above) 91.

[135] The possibilities for political participation should be equally distributed; all citizens have the same claim to participation in forming public opinion, and in the distribution, control, and exercise of political power.

[136] J Habermas "Discourse ethics: notes on a program of philosophical justification" in J Habermas *Moral consciousness and communicative action* (translated by C Lenhardt, S Weber Nicholsen) (1990) 43-115.

[137] Decock and Hallebeek (note 42 above) 104.