

# FORMS OF IMPOSED PROTECTION IN LEGAL HISTORY, ESPECIALLY IN ROMAN LAW

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## Abstract

Imposed protection can be traced in Roman law in several forms: the application of the criterion of good faith (*bona fides*) by the judge, especially in contractual relations. Outside this sphere a special legal remedy for the defendant was introduced through the *exceptio doli*, introduced in 69 BC. Imposed protection is also visible in early family law since the Law of the XII Tables (450 BC), pertaining to children and women. Further legal measures were taken in the form of protective statutes (*leges*, e.g. *Lex Cincia* against impulsive donations) and in the form of decisions of the Senate (*Senatus Consulta*), e.g. the *SC Velleianum* protecting women and the *SC Macedonianum* protecting sons. In their turn the rules concerning mistake of law do have protective elements for groups of persons, women, minors, farmers and soldiers. All these legal principles stemming from Roman law spread over Europe in the long process of the reception of Roman law and became a part of living law until this very day.

## 1 Introduction

Legal measures to protect economically and socially weaker parties are supposedly a rather recent phenomenon in legal history. Indeed, at first glance they are not clearly present in Roman law and cannot be found earlier than the nineteenth century. During the latter period, they were a necessary consequence of the blatant forms of inequality that resulted from the Industrial Revolution. On a legislative level, measures to protect weaker parties may also be understood as a reaction to the ultra-liberal ideas behind the codifications of the early nineteenth century.<sup>1</sup> However, imposed legal protection sometimes takes another form that already existed in classical Roman law or that developed during the reception of Roman law in civil law countries.

## 2 Protection Through the Expanding Application of the Concept of Bona Fides (Good Faith)

In Roman law, economic or social inequality as such was not regarded as a reason to institute special legal remedies for the protection of weaker parties. However, within the framework of the ever-expanding number of contractual *iudicia bonae fidei*, the judge could take forms of undue influence or duress into account and so protect a weaker party. In classical Roman law, those *iudicia bonae fidei* already covered the most important commercial transactions, like the four types of consensual contract: sale (*emptio/venditio*), letting and hiring (*locatio/conductio*), partnership (*societas*) and mandate (*mandatum*). Other *iudicia bonae fidei*, for example those following most forms of *contractus re*, like pledge (*pignus*),<sup>2</sup> contract of loan for use (*commodatum*)

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<sup>1</sup> For an interesting account of the behaviour of a liberal jurist in the nineteenth century, see G. Baert, 'François Laurent. Zijn leven, zijn tijd en zijn strijd (1810-1887)' in J. Erauw and M. Storme (eds.), *Liber Memorialis François Laurent* (Brussels 1989) especially at 40 ff.

<sup>2</sup> This contract of pledge provides the debtor, who gave the pledge, with the *actio pignoratitia in personam*, to be distinguished from the *actio pignoratitia in rem* (= *actio Serviana*), an *actio in rem* for the benefit of the creditor to reclaim the pledge from third parties as well.

and contract of deposit (*depositum*), were instituted by the praetor during the period of classical Roman law, during the first 250 years of the Christian era. In this way, standards of good faith gradually came to be more widely applied.

A special remedy against abuse was created by the so-called rules of *laesio enormis* (prejudice of more than half the market price), introduced by the Emperor Diocletian in two constitutions concerning the sale of a plot of land, in which he seemed to protect the vendor.<sup>3</sup> In the Middle Ages, these constitutions were given a wider application, beyond the scope of contracts of sale, under the influence of the Aristotelian concept of justice, which became popular during the mid-thirteenth century. In some later national codifications, the rules concerning *laesio enormis* in the law of sale survive until this day.<sup>4</sup>

All of this does not imply that the *iudicia stricti iuris*, in which the judge does not automatically apply standards of good faith, afforded absolutely no protection to weaker parties. As early as 69 BC, we find such protection in the form of an *exceptio doli*, a legal remedy awarded by the praetor to the defendant in cases in which the defendant was treated dishonestly, such as when a debtor was absolved informally but was nevertheless summoned to court by the plaintiff on the grounds that the obligation still existed in the strict sense of the law. In such cases, the *exceptio doli* was granted to the defendant and the claim was dismissed. Somewhat later, an active legal remedy for the plaintiff was granted in the form of a praetorian *actio de dolo*.<sup>5</sup>

Other examples include cases of duress and intimidation (*metus*).<sup>6</sup> Here the praetor provided legal remedies in the form of a *restitutio in integrum propter metum*. Other passive and active legal remedies in these cases were the *exceptio metus* and a delictual remedy called *actio quod metus causa gessum sit*. This action could lead to a fine.<sup>7</sup> The difference with the application of *bona fides* was that none of these legal remedies were ever granted automatically: the party concerned had to specifically request such a remedy during the first stage (*in iure*) of the proceedings.

### 3 Protection Through Early Institutions of Family Law

The following examples of imposed protection may be found in early Roman law, but the notion of protection may be a later historical retro-projection. The original purpose of the measures may well have been to secure the authoritarian family order under the *patria potestas*, but they were subsequently understood in a different way, namely as protection for socially weaker persons.

One example of this is the *tutela impuberum* (tutelage for children).<sup>8</sup> In the absence of paternal authority, children under the age of twelve (girls) or fourteen (boys) were placed under the tutelage of a tutor. This form of protection was focused mainly on the estates of children, but it was also a consequence of the structure of the Roman family in the early Roman republic, where the *pater familias* had quasi-patrimonial rights as far as his wife and children were concerned. At this time, there was even a *ius vitae necisque* – the father decided on the life or death of family members under his authority. Excesses were not punished directly at the legal level, but only at the religious level by a magistrate called the *ensor*, when he gave a *nota censoria*. This *nota censoria* had consequences for the religious and social position of the person concerned, as well

<sup>3</sup> C. 4.44.2 and C. 4.44.8.

<sup>4</sup> R. Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition* (Cape Town 1990) 259 at n. 156, with many further references. See recently, Th. Finkenauer, 'Zur Renaissance der *laesio enormis* beim Kaufvertrag' in *Festschrift für H.P. Westermann* (Cologne 2008) 183-207; R. Hardy, 'De *iustum pretium*-leer. (Nieuwe) inzichten uit de rechtseconomie, het mededingingsrecht en empirie' (2010) *Nederlands Juristenblad* 1160-1164.

<sup>5</sup> A. Wacke, 'Zum *dolus*-Begriff der *actio de dolo*' in *Revue Internationale des Droits de l'Antiquité*, 3ème série, XXVII (1980) 349-386.

<sup>6</sup> A.S. Hartkamp, *Der Zwang im römischen Privatrecht* (Amsterdam 1971) *passim*.

<sup>7</sup> On *actiones populares*, see L. Winkel, 'Quelques remarques sur l'accusation publique en droit grec et romain', *Revue Internationale des Droits de l'Antiquité*, 3ème série, XXIX (1982) 281-294.

<sup>8</sup> For a brief survey, see M. Kaser and R. Knütel, *Römisches Privatrecht* 19 (Munich 2008) 334 ff.

as indirect consequences for his legal position.<sup>9</sup> For example, it led to *infamia*, which meant that the person in question could no longer play a role in political life and could never in the future become a *tutor* or *curator*.

When the father (*pater familias*) died, he could appoint a *tutor* in his will, or one could be nominated by a magistrate. The first appearance of this *tutela impuberum* was in the Law of the Twelve Tables, around 450 BC (Leg. XII Tab. 5.6). According to the relevant provisions, children under the age of twelve/fourteen could conclude contracts that were to their benefit (a rule surviving until Justinian's time, as appears from Inst. Just. 1.25). In all other cases, the permission of the father or *tutor* was required. Youngsters over the age of twelve/fourteen, free of *patria potestas*, were under the guidance of a *curator* and were entitled to restitution (*restitutio in integrum*) when a contract was to their disadvantage. Moreover, an *exceptio legis Laetoria*<sup>10</sup> could be raised when a minor was sued for a loan and when a popular action was available, that is to say, an action that could be raised by anyone, a so-called *actio popularis* against the person who had abused an inexperienced minor.<sup>11</sup> Later, in the course of the reception of Roman law, the *tutela impuberum* and the *cura minorum* were no longer distinguished from each other, but they survived until the arrival of modern law for the protection of minors.<sup>12</sup>

The tutelage of women (*tutela mulieris*) was connected to the disappearance of the old form of marriage by *manus*, through which a woman came under the authority of her husband at the same level as his children. Gaius (1.144-145 = Leg. XII Tab. 5.1) wrote:

Veteres enim voluerunt feminas etamsi perfectae aetatis sint, propter levitatem in tutelam esse. (For it was the wish of the old lawyers that women even those of full age, should be in guardianship as being scatterbrained.)

However, this form of tutelage had already almost been abolished in classical Roman law, as apparent from Gaius 1.190:

Feminas vero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse videtur: nam quae vulgo creditur, quia levitate animi plerumque decipiuntur et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera; mulieres enim quae perfectae aetatis sunt, ipsae sibi negotia tractant et in quibusdam causis dicis gratia tutor interponit auctoritatem suam; saepe etiam invitus auctor fieri a praetore cogitur. (There seems, on the other hand, to have been no very worthwhile reason why women who have reached the age of maturity should be in guardianship; for the argument which is commonly believed, that because they are scatterbrained they are frequently subject to deception and that it was proper for them to be under a guardian's authority, seems to be specious rather than true. For women of full age deal with their own affairs for themselves, and while in certain instances the guardian interposes his authorisation for the form's sake, he is often compelled by the praetor to give authorisation, even against his wishes.)<sup>13</sup>

This text, written in about 160 AD, clearly shows that guardianship for adult women was already in decline, but it is nevertheless remarkable that a century later women were not only no longer under tutelage but apparently also very active participants in commercial transactions! That is why, in the time of Diocletian, many imperial rescripts were addressed to women. The enigmatic aspects of these rescripts and their addressees have been examined by the well-known Italian Romanist Eduardo Volterra.<sup>14</sup>

Persons with mental illness had a guardian on the basis of the Law of the Twelve Tables (Leg. XII Tab. 5.7a):

Si furiosus escit, adgnatum gentiliumque in eo pecuniaque eius potestas esto. (When a person will be mentally ill, the agnate and relative must be in control of his person and of his patrimony.)

<sup>9</sup> See further F. Grelle, 'La "Correctio morum" nella legislazione Flavia' in H. Temporini et al. (eds.), *Aufstieg und Niedergang der Römischen Welt*, II,13 (Berlin, New York 1980) 340-365.

<sup>10</sup> Sometimes referred to as *Plaetoria* in the past, even in Roman legal sources. The *Lex (P)Laetoria* dates from 192 or 191 BC.

<sup>11</sup> J.A. Ankum, 'Gab es im klassischen römischen Recht eine *exceptio* und eine *replicatio legis Laetoriae*?' in G. Klingenberg, J.-M. Rainer and H. Stiegler (eds.), *Vestigia iuris Romani – Festschrift Gunter Wesener* (Graz 1992) 21-33 (also in J.A. Ankum, *Extravagantes, Scritti sparsi di diritto romano* (Naples 2007) 243 ff.).

<sup>12</sup> H. Coing, *Europäisches Privatrecht*, Vol. I (Munich 1985) 197 ff.

<sup>13</sup> Translation by W.M. Gordon et al. (Ithaca, NY 1988).

<sup>14</sup> E. Volterra, 'Les femmes dans les "inscriptions" des rescripts impériaux' in E. von Caemmerer et al. (eds.), *Xenion, Festschrift P.J. Zepos*, Vol. I (Athens, Freiburg/Br., Cologne 1973) 717-724. (also in E. Volterra, *Scritti Giuridici*, Vol. V (Naples 1993) 339-346).

This is called *cura furiosi*: the guardian was responsible for the administration of the assets of the person concerned. Prodigals had also been under guardianship since the time of the Law of the Twelve Tables, originally only for what they had acquired *ab intestato*. This was commonly understood as *cura prodigi* (found in Leg. XII Tab. 5.7c, transmitted in D. 27.10.1 pr.). Tutors and guardians were appointed according to fixed rules of family law and were under the supervision of a magistrate. If necessary, a magistrate nominated tutors and guardians. When the guardianship came to an end, the tutor or curator could be forced to render an account of his administration with the *actio tutelae*. Fraud on his part during the period he acted as a tutor or curator was sanctioned by a criminal *accusatio suspecti tutoris*, which had far-reaching consequences for the status of those found guilty of such fraud.<sup>15</sup>

#### 4 Legal Protection Through Legislation and Magistrates

Apart from above-mentioned contractual protection by Roman magistrates within the framework of *bona fides* (see section 2), namely the *exceptio doli* and the *actio de dolo*, the Romans adopted legislative measures to protect socially weaker groups. Thus, one could consider the relationship between *patroni* and *liberti*, the so-called *clientela* relationship, as another form of imposed legal protection.<sup>16</sup> Poor Roman citizens, and also freed slaves, entered into special relationships with wealthy Roman citizens for whom they had to perform services<sup>17</sup> in return for social and legal protection. In addition, the *Lex Cincia* – a *plebiscitum*<sup>18</sup> of 204 BC – provided protection against donations made under social pressure.<sup>19</sup> The regime of the *Lex Cincia* was aimed at protecting a donor of lower status who might be forced by a person of higher status to make a donation. Gifts in excess of a certain amount were prohibited and could only be given to certain close relatives (*personae exceptae*). Nevertheless, the sanction was again founded in the law of procedure, in the form of an *exceptio legis Cinciae*, which could be raised against a claim for a gift, for example when someone promised to give an amount of money in the form of a formal oral *stipulatio*. The resulting *condictio* or *actio ex stipulatu* could be countered by the *exceptio legis Cinciae*. Although the *donatio* was not a contract in classical Roman law, it could be the reason (*causa*) for a stipulation or a transfer of ownership.

During the Roman Principate, other forms of imposed legal protection were established by means of decisions of the Senate (*Senatus Consulta*). I will mention two decisions that played an important role in legal history after the reception of Roman law.

The *SC Velleianum* (46 AD) prohibited women from standing surety for other people's debts. Here it is important to observe that in Roman law personal security was far more prevalent than real security, such as pledge and mortgage. In cases where a woman had stood surety in spite of the *senatus consultum*, she was entitled to the *exceptio SC Velleiani*.<sup>20</sup> The reason for this remedy was protection against possible constraint under which sensible women agreed to disadvantageous legal transactions. According to Wolfgang Ernst,<sup>21</sup> the protective regime of the *SC Velleianum* is still visible in modern consumer law. He explains this by referring to German private law,

<sup>15</sup> Loss of status in public and private law: no possibility to be elected as a magistrate; no possibility to have a function on behalf of others in private law (*capitis deminutio*).

<sup>16</sup> E. Badian, *Foreign Clientelae* (Oxford 1958).

<sup>17</sup> B. Albanese, *Le persone nel diritto privato romano* (Palermo 1979) 63 ff.; W. Waldstein, *Operae libertorum. Untersuchungen zur Dienstpflcht freigelassener Sklaven* (Stuttgart 1986).

<sup>18</sup> A decision of the lower popular assembly called *concilium plebis* whose decisions were binding on all Roman citizens since the *Lex Hortensia* (287 BC).

<sup>19</sup> F. Casavola, *Lex Cincia, contributo alla storia delle origine della donazione romana* (Naples 1960).

<sup>20</sup> On the indirect effect of an *exceptio*, see the dissertation of J.M.J. Chorus, *Handelen in strijd met de wet* (Leiden 1976) 37 ff., and the further discussion in Max Kaser, *Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht* (Vienna 1977) *passim*. On the history of the *SC Velleianum*, see also D. Medicus, *Zur Geschichte des Senatus Consultum Velleianum* (Cologne, Graz 1957) especially at 29 ff.

<sup>21</sup> W. Ernst, 'Interzession: Vom Verbot der Fraueninterzession über die Sittenwidrigkeit von Angehörigenbürgschaften zum Schutz des Verbrauchers als Interzedenten' in R. Zimmermann et al. (eds.), *Rechtsgeschichte und Privatrechtsdogmatik* (Heidelberg 1999) 395-430. See also J.E. Spruit, 'Het

especially BGB § 138.<sup>22</sup> This provision indeed differs significantly from the equivalent provision in the Dutch Civil Code (Arts. 3:40 and 3:44<sup>23</sup>), where the element of giving an advantage to a third person (in Roman terminology *intercessio*) is absent.

The *SC Macedonianum*, issued during the reign of Vespasian at the end of the first century AD, contained a prohibition on lending money to a son who was still under the authority of his father. Paternal authority in classical Roman law terminated only on the death of the father.<sup>24</sup> The loan was not immediately void *ipso iure*, but a legal remedy was available to protect the son against a claim by the money lender, the so-called *exceptio SC Macedoniani*.

Apart from the rules of this *senatus consultum*, there was the *peculium*, a patrimony at the disposal (but not ownership) of someone who was not legally independent – a son or even a slave – that enabled him to take part in economic activities.<sup>25</sup> However, the rules concerning the *peculium* do not aim at the protection of the user of the *peculium* but rather his *pater familias*.

## 5 The Rules of Mistake of Law as Imposed Protection

The rules concerning mistake of law may be regarded as a form of imposed legal protection, not only in private law, including the law concerning *delicta privata* ('delicts' in Scottish and South African legal terminology), but also in criminal law, the latter being beyond the scope of this paper.<sup>26</sup> Under these rules, four groups of privileged persons – women, minors, farmers and soldiers – could invoke a mistake of law that others were generally not allowed to invoke. The main authority here is a rather famous passage from the Digest:

D. 22.6.9 pr. Paulus liber singularis de iuris et facti ignorantia. Regula est iuris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere. Videamus igitur in quibus speciebus locum habere possit, ante praemisso quod minoribus viginti quinque annis ius ignorare permissum est. Quod et in feminis in quibusdam causis propter sexus infirmitatem dicitur. Et ideo sicubi non est delictum, sed iuris ignorantia, non laeduntur. (Paul in his monograph on mistake of law and of fact. It is a rule that mistake of law is harmful for everyone, but a mistake of fact is not. Let us see in which cases this rule applies, taking into account beforehand that it is permitted for persons younger than twenty-five years old not to know the law. And this holds also for women in certain cases because of the weakness of the female. And therefore they are not victims when there is mistake of law and no delict.)

In other texts, soldiers (*militēs*) and farmers (*rustici*) were added to the group requiring special protection. Soldiers are mentioned in:

Raets-besluit van Burgemeester Velleius' in J. Van der Westhuizen et al. (eds.), *Huldigingbundel Paul van Warmelo* (Pretoria 1984) 194-215.

<sup>22</sup> § 138 BGB: '(1) Ein Rechtsgeschäft das gegen die guten Sitten verstößt, ist nichtig. (2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich *oder einem Dritten* für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Mißverhältnis zu der Leistung stehen.' (emphasis added)

<sup>23</sup> BW Art. 3:40: '(1) Een rechtshandeling die door inhoud of strekking in strijd is met de goede zeden of de openbare orde, is nietig. (2) Strijd met een dwingende wetsbepaling leidt tot nietigheid van de rechtshandeling, doch, indien de bepaling uitsluitend strekt ter bescherming van één der partijen bij een meerzijdige rechtshandeling, slechts tot vernietigbaarheid etc.' BW Art. 3:44: '(1) Een rechtshandeling is vernietigbaar, wanneer zijn door bedreiging, door bedrog of door misbruik van omstandigheden is tot stand gekomen, etc.'

<sup>24</sup> Even a son becoming a Roman magistrate remains under the *patria potestas*! For a witty account of this *SC Macedonianum*, see David Daube, 'Did Macedo kill his father?' (1947) *Zeitschrift der Savigny Stiftung*, Rom. Abt. 65, 308 ff. (also in D. Daube, *Collected Studies*, Vol. II (Frankfurt am Main 1991) 193-234).

<sup>25</sup> There are many Roman legal texts on both these institutions in the Digest and Codex of Justinian. See J.J. Brinkhof, *Een studie over het peculium in het klassieke Romeinse recht* (dissertation, Nijmegen 1978). The talented Leiden Romanist Egbert Koops is currently preparing a new book on *peculium*.

<sup>26</sup> See nevertheless the interesting text Pap. D. 48.5.39(38).2: 'Quare mulier tunc demum eam poenam, quam mares, sustinebit, cum incestum iure gentium prohibitum admiserit: nam si sola iuris nostri observatio interveniet, mulier ab incesti crimine erit excusata.' (A woman is excused from the crime of incest when it concerns a form of this crime which is only considered as such in Roman law; she is not excused from a form of incest according to natural law!)

C. 1.18.1 Imp. Antonius A. Maximo militia. Quamvis cum causam tuam agreres, ignorantia iuris propter simplicitatem armatae militiae adlegationes competentes omiseris, tamen si nondum satisfacisti permitto tibi, si coeperis ex sententia conveniri, defensionibus tuis uti. [213] (Emperor Antonius Caracalla to the soldier Maximus. Although you have omitted to use available ways of defending yourself, when you were involved in a procedure by ignorance of the law through the simplicity of those belonging to the army, I allow you to use your ways of defence when you did not yet comply to the sentence and your opponent has started to compel you to do so. [213 AD])

Simplicity of mind (*rusticitas*) was the reason for protection in some but certainly not all other cases:

C. 2.2.2 Imp. Gordianus A. Nocturno. Venia edicti non petita patronum seu patronam eorumque parentes et liberos, heredes insuper, etsi extranei sunt, a libertis seu liberis eorum non debere in ius vocari ius certissimum est; nec in ea re rusticitati venia praebetur, cum naturali ratione honor eiusmodi personis debeatur. [239] (Emperor Gordianus to Nocturnus. When a special permission is not asked, it is very fixed law that patrons, their parents and children cannot be summoned to court by freed men or their children. And in this case there is no clemency towards simplicity of mind, for one has to pay respect towards those persons out of natural reason. [239 AD])

Particularly interesting is the appearance in this text of the *naturalis ratio*, which we find at the very beginning of the Institutes of Gaius (around 160 AD)<sup>27</sup> as a basic principle of *ius gentium* – in Gaius’s terminology ‘natural law’.<sup>28</sup> A freed man had summoned the son of his patron to appear in court in contravention of a decree of the Senate. In this case, stupidity or ignorance was no excuse – natural reason must teach you that you have to honour your patron and his family. This is a reference to the above-mentioned *patronus-clientela* relationship (see section 3).

In the Middle Ages, these persons were sometimes called *personae privilegiatae*,<sup>29</sup> an expression most probably coined by the glossator Bulgarus<sup>30</sup> at the beginning of the twelfth century, but using the old concept of *privilegium* defined by Modestinus in the third century AD:

D. 50.17.196 Modestinus libro octavo regularum. Privilegia quaedam causae sunt, quaedam personae. Et ideo quaedam ad heredem transmittuntur, quae causae sunt; quae personae sunt, ad heredem non transeunt. (Privileges are sometimes linked with a thing, sometimes with a person. And therefore those that are linked with a thing pass over to the heir, those that are linked with a person do not pass to the heir.)

It is not certain whether the expression *personae privilegiatae* appears in the authoritative Accursian gloss, *Glossa ordinaria*, in the mid-thirteenth century.<sup>31</sup>

<sup>27</sup> Gaius, Inst. 1.1, reconstructed with the help of D. 1.1.9.

<sup>28</sup> L.C. Winkel, ‘Ist die Bedeutung der gaianischen *naturalis ratio* von der Zeit abhängig?’ in M. Avenarius, R. Meyer-Pritzl and C. Möller (eds.), *Ars iuris, Festschrift für Okko Behrends zum 70. Geburtstag* (Göttingen 2009) 603-609. See also M.A. Loth and L.C. Winkel, ‘Reasonableness in a Divided Society’ (2009) *De Iure* 302-315.

<sup>29</sup> Th. Mayer-Maly, ‘*Error iuris*’ in H. Miehsler and E. Mock (eds.), *Ius Humanitatis, Festschrift A. Verdross* (Berlin 1980) 147-169; Th. Mayer-Maly, ‘*Rusticitas*’ in *Studi in onore di Cesare Sanfilippo*, Vol. I (Milan 1982) 309-347; L.C. Winkel, *Error iuris nocet, Rechtsirrtum als Problem der Rechtsordnung, Vol. I: Rechtsirrtum in der griechischen Philosophie und im römischen Recht bis Justinian* (Zutphen 1985) 89 ff.

<sup>30</sup> H.U. Kantorowicz, *Studies in the Glossators of the Roman Law* (Cambridge 1938, repr. Aalen 1969) 246, quotes a short treatise of the glossator Bulgarus from first half of the twelfth century, entitled *Summula de iuris et facti ignorantia*, where we read in lines 4-7: ‘Amplius inquiritur, an *persona* tua *privilegio* sit *munita*, ut *militis*, cui contra rem iudicatam subvenitur, si nondum solverit. Similiter et *minor* privilegio gaudet, ut *prediximus*, et *femina*, que iuris ignara solvit, sublevatur, in quibus [casibus] veterum legum statuta declarant.’ (Further, one asks whether your person is provided with a privilege, as the soldier who is helped after a sentence when he has not yet paid. In the same way a minor enjoys a privilege, as we have said before, and a woman who in ignorance of the law made a payment, is helped in the cases indicated by the provisions of the old laws.)

<sup>31</sup> The expression is medieval, but cannot be traced exactly, see e.g. the gloss *Regula est* ad D. 22.6.9 pr. where it is missing. Canon law sources are more likely here. S. Kuttner, *Kanonistische Schuldlehre* (Vatican City 1935, repr. 1973) 166-167, says that Gratian already distinguishes between groups of persons. In later legal history (nineteenth century), F.C. von Savigny, *Das System des heutigen römischen Rechts*, Vol. III (Berlin 1840) 429-440 mentions the four groups, but does not use the expression *personae privilegiatae*. Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, edited by Th. Kipp, 9th edn. (Frankfurt 1906, repr. Aalen 1984) Vol. I, § 29, 123 ff., deals with the concept of *privilegium* but does not use *personae privilegiatae* either.

## 6 Legal Protection in the Legislation of Justinian and its Reception

In later legal history, most of the above-mentioned forms of imposed legal protection were preserved in Justinian's legislation. They were then revived during the first stages of the reception that resurrected Roman law in its Justinianic form after the eleventh century, when Roman law was taught at universities, starting with Bologna in 1088. Territorial legislation sometimes altered the age of minority, and women were generally considered to be *sui iuris*. In some regions, however, a married woman lost full legal capacity, and this was often linked to the regime of matrimonial property. Grotius (*Inleidinge* I, 5, 21-23) tells us that the overwhelming power of the husband, also over his wife's property, stems from 'oude Duitsche zeden' (old Germanic customs). Most likely her incapacity goes back at least to the *Sachsenspiegel* (I, 31, 2),<sup>32</sup> as Grotius indicates in the margin of the Lund manuscript of the *Inleidinge*.<sup>33</sup> In a country like the Netherlands, where general community of property between husband and wife was common, the legal incapacity of married women endured until 1957. Both the *SC Velleaenum* and the *SC Macedonianum* were part of received Roman law everywhere, as were the rules for the protection of minors, prodigals and persons who were mentally ill.<sup>34</sup>

Taking into account the *histoire de longue durée*, one may say that the oldest forms of legal protection are to be found in family law but that the idea of protection spread to all areas of patrimonial law. Apart from examples of protection from the field of family law, the principle of good faith played a key role in other fields. In the *ius commune*, most probably since Donellus, all contracts gradually came under its spell, starting with contracts between merchants. However, at the end of the sixteenth century, even Grotius was still hesitant in this regard and occasionally referred to the distinction between *iudicia bonae fidei* and *iudicia stricti iuris*.<sup>35</sup> Nevertheless, one may generally assume that in the European *ius commune* all contracts gradually became *contractus bonae fidei*.<sup>36</sup>

The period of national codification resulted in a rather formal approach to imposed protection. Minors, mentally disabled persons, prodigals and – in some cases – women remained protected, but all other forms of protection were formalised under the influence of the notion of legal equality, which was one of the main consequences of the French revolution, and liberalism, which was a consequence of *liberté*. For a considerable amount of time, *l'égalité devant la loi* prevented the courts from taking forms of unequal social power into account.<sup>37</sup> It took nearly a century before more sociological approaches to law arose and these forms of inequality came to be studied and explained. This happened for the first time not in France or England but in the newest industrial

<sup>32</sup> For an account of old Germanic customary law of the first half of the thirteenth century, see J.B.M. van Hoek, *Eipe von Repgow's rechtsboek in beeld: observaties omtrent de verluchting van de Sachsenspiegel* (Zutphen 1982).

<sup>33</sup> F. Dovring, H.W.F.D. Fischer and E.M. Meijers (eds.), *Hugo de Groot, Inleidinge tot de Hollandsche rechts-geleerdheid* (Leiden 1965) 21 at n. 1.

<sup>34</sup> A survey of the reception of Roman law in France may be found in the works of Philibertus Bugnyon, *Traité des loix abrogées et inusitées en toutes les cours, terres, jurisdictions et seigneuries du Royaume de France* (Brussels 1677) (in the collection of the University Library in Leiden) and Bernardus Autumnus, *La conférence du droit François avec le droit roman, civil et canon* (Paris 1644) (in the collection of the University Library in Leiden). A survey of the reception of Roman law in the Netherlands appears in Simon van Groenewegen van der Made, *De legibus abrogatis*. Its third edition from 1669 (in the collection of the University Library in Amsterdam) was translated into English by B. Beinart and Margaret Hewett in three volumes (Johannesburg 1974-1987). According to Bugnyon, I, 166, women in France were not allowed to act in court, neither for themselves nor for others, the last without any doubt a consequence of the reception of the *SC Velleaenum*. See also Autumnus, II, 269; Groenewegen (1669) at 486. Cf. Grotius, *Inleidinge*, I.4.7 with interesting references to the *Lex Langobardorum* in the surviving manuscript of Lund. See the edition edited by Dovring, Fischer and Meijers, *supra* n. 33, at 15 n. 2.

<sup>35</sup> *De iure belli ac pacis* II.11.6. See L. Winkel, 'Die Irrtumslehre' in R. Feenstra and R. Zimmermann (eds.), *Das römisch-holländische Recht – Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (Berlin 1992) at 232.

<sup>36</sup> H. Coing, *supra* n.12, at 410.

<sup>37</sup> E. Griffin-Collart, 'L'évolution de la notion d'égalité de l'utilitarisme à l'état de providence' in L. Ingber (ed.), *L'Égalité*, Vol. IV (Brussels 1975) 352-371.

country of Europe, the German Empire. Rudolph von Jhering,<sup>38</sup> Eugen Ehrlich<sup>39</sup> and Anton Menger,<sup>40</sup> all German speaking jurists, may be mentioned here. However, legal equality was not the same as social and economic equality! Special attention must be paid to the development of imposed legal protection in nineteenth-century Europe in the field of labour contracts. At that time, freedom of contract in the field of labour was unveiled as fictitious, and collective labour contracts therefore arose in place of individual ones.

## 7 Conclusions

Many measures of modern consumer protection may be regarded as extensions and elaborations of the old criterion of good faith (*bona fides*) in Roman contract law. The system of *causa* in contract law<sup>41</sup> and in the regime for the transfer of ownership, and the further development of the *causa stipulationis* in Roman law<sup>42</sup> and the aforementioned transfer of ownership, can serve as possible remedies for the protection of the underprivileged. In these areas, modern Dutch private law is still strongly influenced by Roman law.<sup>43</sup>

The old institutions in Roman family law, which were aimed at protecting weaker persons, are not only part of Dutch private law but are generally present in the legal systems of civil law countries. However, it remains unclear whether similar common law institutions can also be traced back to Roman law.

<sup>38</sup> Rudolph von Jhering, *Der Zweck im Recht* (1877-1884, many reprints), see also F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd edn. (Göttingen 1967) 451 ff.

<sup>39</sup> E. Ehrlich, *Grundlegung der Soziologie des Rechts* (Munich, Leipzig 1929). Ehrlich was also the author of a book entitled *Beiträge zur Theorie der Rechtsquellen, Vol. I: Das ius civile, ius publicum, ius privatum* (Berlin 1902, repr. Aalen 1970); see also M. Rehbinder, *Die Begründung der Rechtssoziologie durch Eugen Ehrlich* (Berlin 1967) who hints at the interesting link between the study of Roman law at the end of its practical application in Germany and the birth of legal sociology.

<sup>40</sup> A. Menger, *Das bürgerliche Recht und die besitzlose Volksklasse*, 4th edn. (Tübingen 1908).

<sup>41</sup> In this respect, the doctrine of *causa* is comparable with the English concept of consideration. Still interesting is E.M. Meijers, 'Nieuwe bijdragen omtrent de leer der consideration en der causa' in Meijers, *Verzamelde Privaatrechtelijke Opstellen*, Vol. III (Leiden 1955) 301-310.

<sup>42</sup> J.G. Wolf, *Causa stipulationis* (Cologne, Vienna 1970) especially at 76 ff.

<sup>43</sup> J.A. Ankum, 'Roman law in the New Dutch Civil Code' (1994) *Casopis pro právní vedu a praxi* II, 203-225.