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# Hugo Grotius on Exchange and Price

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## Abstract

This paper explores the way Grotius's construction of a theory of acts which aimed at dealing with legal issues, in the chapter on contracts in a book from *De Jure Belli ac Pacis* (1625) where the causes of the birth of war are discussed (bk II), gave birth to an original understanding of exchange and price. The latter is part of a more extended economic analysis which, at the difference of economic policy aspects, has been paid till now little attention. Yet, Grotius' conception of exchange and price occupies an interesting position between the scholastic analysis where price was compared to a norm of just price and the later articulation, in classical economic thought, between typically natural prices and market prices. In a way, his conception of price might be viewed as a continuation of the Scholastic approach, illustrated two centuries and a half ago by Thomas Aquinas in the *Summa Theologica*, IIa-IIae, q. 77, where the issues debated aim to enlighten the priest about the morality of a transaction carried out by such of his parishioners. But here, with Grotius, the issue is no longer the morality or sinfulness of the transaction, but its lawfulness. This shift from a religious to a legal approach gives birth to an attempt to explain why individuals can deviate from a commonly accepted price in an exchange, and under what conditions, in the framework of either natural law or the law of nations, this effective price can be regarded as legal by a magistrate.

## 1. Introduction

On 30 March 1763, Adam Smith explained to his students that “[t]here are properly speaking two sorts of price on commodities, which tho they appear unconnected are nevertheless very closely connected” (*Lectures on Jurisprudence* (1762–1763), vi.58; see also vi.67, vi.76, and (1766), 224, 229). What was to follow is well known: Smith’s distinction between natural and market prices opened the path to a way of understanding

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price which would run throughout the whole classical period. Through its different variants, this amounted to understanding price not as an isolated, single category, but as a hierarchical structure of two or more fields of evaluation. Stated differently, what Smith initiated by addressing the two kinds of prices in this way was a hermeneutic: understanding the price did not mean understanding what directly determines, say, the current market price, but rather understanding what determines, first, the natural price and, then, what determines the possible gap between the natural and the market price – and, consequently, what determines the possible range of deviation of the second from the first. But what about the understanding of price that came before Smith’s hermeneutic, that is, before the idea that each kind of price, natural and market, has a direct economic meaning?

If Smith considers the distinction between “two sorts of prices” to be commonsense, it is because such a distinction had already existed for a long period, a period during which economic issues related to price were embedded into normative concerns. It could be argued that the Scholastic theory of price, such as in Thomas Aquinas’s *Summa Theologiae* (IIa–IIae, q. 77) at the end of the 13th century, was an example of such embedment into normative concerns – here, religious and moral (Lapidus 2021): the possible gap between an effective price and the just price in a transaction (“just” in that it complies with the moral requirements of commutative justice) was interpreted in terms of information and of the moral characteristics of the buyer and the seller (see Lapidus 1994; Chaplygina and Lapidus 2016, pp. 25–26; Januard 2022b). In a way, the conditions for the acceptability of a price in a transaction, advocated by the theologians who followed Thomas, can be seen as sophisticated devices whose purpose was to enlighten the priest about the private information constituted by the morality of the seller and the buyer.

But in this long journey from the scholastic authors to Adam Smith, something changed with Hugo Grotius’s *De Jure Belli ac Pacis* (1625),<sup>1</sup> and this despite his long-

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<sup>1</sup> After Schumpeter’s lack of interest (Schumpeter 1954, p. 112) and in contrast with political philosophers, jurists and theologians, Grotius’s work has received little attention from economists. In relation to his conception of price, H. Sewall (1901) obviously preceded Schumpeter and offered a picture which goes from the Greeks to Adam Smith; dealing more recently with similar issues, A. Lapidus (1986) explored the unbroken thread which runs from medieval just price theories to classical economics and Marx; J. Gordley (1991) pointed out the synthesis between the theory of contracts in Roman law and Thomistic principles which started with the Salamanca school and was completed with Grotius and

recognised affiliation with scholasticism (see Knight 1925, pp. 210–221; Saint Leger 1962, pp. 45–57). Though what has been called the “impious hypothesis” (Crowe 1976) – the idea that the laws of nature remain true even though one concedes “that there is no God, or that human affairs are of no concern to Him” (*De Jure*, Prol., 11)<sup>2</sup> – does not turn Grotius into a secular thinker, and originated in the Salamanca school, probably in Vásquez, it helps us to understand how the evolution of normative concerns towards a more legal content could lead to religious considerations being set aside (see Tuck 1979, pp. 76–77). This should not, of course, be seen as an expression of avowed atheism (he makes systematic reference to Scripture, to the authors of Christian antiquity, and to Scholasticism), nor as an indication that religious considerations do not play a role in Grotius’s work. His theological contributions and religious commitment are well known, and of course do play a role. But with regard to social issues, although religion stands at the origin of the laws which bind men together, it recedes into the background to allow legal argument to unfold without it, finding its substance instead in natural facts (H. Nellen 2007, p. 273; M. Koskenniemi 2021, pp. 296–299). Grotius developed a conception of what would later be identified as modern natural law (see Haakonssen 1996), whose two-stage architecture set out in nine rules and thirteen laws was given as early as 1604–1605 in chapter 2 of his *De Jure Praedae*, published in 1868, long after his death. But despite its divine origin, from the *De Jure Praedae* to the *De Jure Belli* (see R. Tuck 1979, pp. 59–60; 1999, pp. 100–102) it is maintained that “natural law is so immutable that it cannot be changed by God himself” (*De Jure*, I, 1.10.5), so that its source should be sought in the consistency of our actions with our sociability (the “fountain of law”, as Grotius (*De Jure*, Prol., 8) called it) and consequently with the respect of one another’s rights,<sup>3</sup> as rational human beings (see also Lapidus 2023). With

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Pufendorf but at the price of philosophical explanation; and N. Theocarakis (2006) focused on the transformation of the Aristotelian legacy up to Smith. On other aspects of Grotius’s economic ideas, see also I. Hont (1990) on his influence on the birth of Scottish political economy; J. Salter (1999) on poverty; P. Borschberg (2011) and C. Suprinyak (2023) on his doctrinal position on free trade; A. Lapidus (2021, 2023) on the relation with legal concerns and money loans.

<sup>2</sup> The edition of Hugo Grotius’s *De Jure Belli ac Pacis* used in this text is that by J.B. Scott in 1913, which reproduces the 1646 edition, published just after Grotius’s death. Where it seemed sufficiently faithful to the Latin original, the translations of Grotius’s quotations follow the 1925 English translation by F.W. Kelsey. References are given according to the numbering of chapters, sections and sub-sections in Scott’s and Kelsey’s editions.

<sup>3</sup> Grotius mentions them as follows: “the abstaining from that which is another’s, and the restitution of what we have of another’s, or of the profit we have made by it, the obligation of fulfilling promises, the

this change of perspective, the elements of economic reasoning, especially those related to price, now came to disregard issues related to the possible sinfulness of an operation, and could instead be established through a critique of the legal categories derived from Roman law, which ended up enlightening the civil judge in priority to the priest.

Grotius's starting point was a critical construction of a typology of acts, from which he derived a normative analysis of exchange. The latter uses a conception of justice obviously inherited from Aristotle, but which combined three types of equality, relating to information, to the absence of coercion and, finally, to the thing exchanged itself (section 2). The realisation of this equality in exchange first makes it possible to identify the legally acceptable price associated with it, this being a common price that can be understood in an equivalent way by reference to a socially recognised need that measures it, or to the labour and expenses of the merchants. This legal acceptability then extends to transaction prices that may deviate from the common price, either because of variations in the tastes of the parties and in the scarcity of the good, or because, in the absence of a common judge regarding equality issues, the agreement of the seller and buyer through a bargaining process has made it acceptable (section 3).

## **2. Acts, exchange and equality**

Grotius deals with economic issues mainly in Book II of *De Jure Belli ac Pacis*, after introducing the justifiable causes of war: “defence, recovery of things [*recuperationem rerum*], and punishment” (*De Jure*, II, 1.2.2). Recovery of things was seen as an effect of ownership, of acquisition and of transfer. And it is as a result of the legal examination of obligations deriving from ownership that he introduces Chapter 12 on contracts, which contains most of the material on exchange, price, money and lending.

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reparation of a damage done through our own default, and the merit of punishment among men” (*De Jure*, Prol., 8).

## 2.1. From a typology of acts to exchange

The perspective from which Grotius approaches economic matters is that of a typology of “acts” (see Lapidus 2021, pp. 104–106 and 2023),<sup>4</sup> either “simple” or “mixed” (*De Jure*, II, 12.1). Simple acts are so called because, unlike mixed acts, they produce a single advantage for each party to the contract, from a legal point of view. Mixed acts, therefore, are viewed as combinations of simple acts. The latter are divided between “permutatorial acts” (*permutatorii*) and “beneficial acts” (*benefici*) (*De Jure*, II, 12.2). Most of what we identify as situations of exchange or organisations fall under the header of permutatorial acts,<sup>5</sup> which, as Roman jurists had already explained, are themselves divided into acts that “separate the parties” (*dirimunt partes*) and acts that “produce a community” (*communione adferunt*) (*De Jure*, II, 12.3.1). Consider, for instance, two major cases of contracts called *consensu*:<sup>6</sup> the sale (*emptio-venditio*) and the partnership (*societas*). The sale belongs to the permutatorial acts which separate the parties (*De Jure*, II, 12.3), whereas a partnership is an example of acts that produce a community (*De Jure*, II, 12.4).

It remains that most exchange situations are treated through the case of permutatorial acts that separate the parties, for which Grotius proposed a combinatorics (*De Jure*, II, 12.3.3) derived from the *Digesta*. This combinatorics comes after a discussion of the reciprocal obligations of two free men, each of them having had a natural son with the other’s slave, and each of whom wants to have his child emancipated. Paul generalized the issue:

Either I give to you so that you give to me [*do tibi ut des*], or I give to you so that you do something for me [*do ut facias*], or I do something for you so that you give to me [*facio ut des*], or I do for you so that you do for me [*facio ut facias*]. (*Digesta*, 19.5.5 pr)

In the *Digesta*, these distinctions were used to identify the so-called “innominate” contracts (“*quorum appellationes nullae jure civili proditae sunt*” *Digesta*, 19.5.3) which,

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<sup>4</sup> I am indebted to a referee of this journal who drew my attention to the work of J. Gordley. The latter had already noted the distinctive character of the all-encompassing system of acts built by Grotius (Gordley 1991, pp. 104–105).

<sup>5</sup> Some types of economic transactions, however, like deposit, commission or *commodatum*, are said to belong to beneficial acts (*De Jure*, II, 12.2).

<sup>6</sup> The contracts *consensus* in Roman law are synallagmatic contracts of good faith, whose remarkable feature is that they are formed solely on the basis of the mutual agreement of the parties.

unlike a simple pact (*pactum*) which did not give rise to legal obligations (“*nuda pactio obligationem non parit*” *Digesta*, 7.14.7.4), could benefit from legal protection even though they did not fall within the recognised contract categories of Roman law (*re, verbis, litteris, consensu*; see *Institutiones*, 3.13.2). But Grotius provided them with a wider relevance, not restricted to innominate contracts. Each modality, *giving* or *doing*, for each party is given a content, so that he could systematically illustrate various situations of exchange, dealing indistinctly with nominate contracts (like the sale, *emptio venditio*) and innominate contracts (like barter, *permutatio*):

- giving / giving (*dari ut detur*; *De Jure*, II, 12.3.4):
  - giving a thing / giving a thing = barter (*permutatio*)
  - giving a thing / giving money = sale (*emptio ac venditio*, i.e. buying and selling)
  - giving money / giving money = change (*cambium*)
  - giving the use of a thing / giving a thing [no example given]
  - giving the use of a thing / giving money = lease (*locatio*)
  - giving the use of a thing / giving the use of a thing [no example given]
- doing / doing (*facti cum facto permutatio*)
  - “innumerable kinds” (*De Jure*, II, 12.3.5)
  - military service / protection (within the feudal contract; *De Jure*, II, 12.5)
- doing / giving (*facio ut des*; *De Jure*, II, 12.3.5):
  - doing / giving money:
    - labour / money = wage labour (again, *locatio* in Grotius’s words<sup>7</sup>)
    - protection / money = insurance (*assecuratio*)
  - doing / giving a thing [no example given]
  - doing / giving the use of a thing [no example given]<sup>8</sup>

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<sup>7</sup> The use of the same word, *locatio*, to designate both a “lease” and “wage labour” makes sense as long as we bear in mind that, in Roman law, the contract *consensu* known as *locatio conductio* was declined as *locatio rei*, that is, lease of a thing, or as *locatio operarum* (lease of works), which is what a wage labour contract is. Interestingly, a third possibility was given by the *locatio operis faciendi* (the location of a work to be done), which refers rather to a contract of employment for a craftsman.

<sup>8</sup> Grotius did not illustrate these two last possibilities, but they could be viewed as examples of an innominate contract of the type *facio ut des*, called “*transactio*” (“transaction”; see the title 4, *De transactionibus*, in the *Codex*, book 2), in which a person gives up a disputed right in return for something that the other party commits to providing.

The outstanding characteristic of this combinatorics is less in the variety of examples which it provides explicitly than in the absence of any illustration for several items, which – like the empty cells of the Mendeleev table in its original form – shows that it covers potentially the whole range of exchange situations involved in simple permutatorial acts that separate the parties. Moving to mixed acts allows the introduction of exchange situations in which the contract offers one party more than a single advantage. This is the case, for instance, with the *foenus nauticum*, the sea loan. The *foenus nauticum* has long been considered a possible substitute for a usurious money loan (Lapidus 1991, pp. 32–34). Grotius simplified this discussion by considering it as an elementary combination, within a mixed act, between two simple acts: a free, therefore non-usurious, loan contract, the *mutuum*, in which money is given for the subsequent return of the same amount of money, and an insurance in which money is given by the borrower in return for the compensation of a peril if it occurs:

So, the sea loan is a mixture between a contract of *mutuum* and an insurance [*foenus quoque nauticum mixtum quid est ex contractu mutui, et periculi aversi*]. (*De Jure*, II, 12.5)

It is only after having constructed a typology of acts, simple and mixed, and in relation to them, that Grotius introduces the contracts which are the subject of chapter 12. He defines them (*De Jure*, II, 12.7) as a subset of the set of acts, from which are withdrawn those beneficial acts which he called “mere beneficial” (*mere beneficos*), in which we can recognize what will be later identified as a gift without a counter-gift.<sup>9</sup> In the tradition of the moral philosophy inherited from Thomas Aquinas, this would amount to saying that contracts are those acts which *are not* exclusively governed by the virtue of charity.

In this way, contracts might be identified from an economic viewpoint with exchange, understood in a broad sense, since they also include (i) *mixed acts* in which a *mere beneficial act* is combined with a *permutatorial act*; (ii) *beneficial acts with mutual obligations*, like gifts and counter-gifts, whose belonging to exchange is not consensual; and (iii) *permutatorial acts which produce a community*, which include various types of partnership. By contrast, exchange in a narrow sense, from which an explicit price emerges, is a subset of contracts which corresponds to *permutatorial acts which separate*

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<sup>9</sup> “Mere beneficial acts” are the first subclass of the beneficial acts. The existence of a gift and a counter-gift corresponds, for Grotius, to the second subclass of beneficial acts which he called “beneficial acts with mutual obligations” (*benefici actus cum obligatione mutua*) (*De Jure*, II, 12.2).



*the parties* for simple acts, or to a combination of such simple acts for *mixed acts*. An immediate consequence is that what Grotius explains in the sequel to this chapter also applies to exchange, broadly or narrowly understood.

## 2.2. Equality of what?

At first sight, when Grotius writes that “[i]n contracts, nature commands equality” (*De Jure*, II, 12.8), this seems to echo a general concern in the Scholastic tradition about commutative justice – a tradition which runs at least from Thomas Aquinas, for whom in commutative justice “it is necessary to establish an equality from thing to thing [*opportet adaequare rem rei*]” (*Summa Theologiae*, IIa-IIae, q. 61, a. 2, resp.), to Leonardus Lessius, whose influence on Grotius is well known (W. Decock 2013, p. 598–601), and who alternatively called the just price the “equal price” (*pretium justum seu aequale*) in his *De Jure et Justitia* (2.21.2). Yet Grotius’s target for equality is wider than the one borrowed by Thomas from the Aristotelian concept of reciprocal justice (see Decock 2013, pp. 600–601): where Thomas first refers to an equality of thing to thing in a just exchange, and then specifies the conditions under which it can be achieved – depending on the morality of the parties, and on their information, even in the case of an accidental exchange (Lapidus 1994) – Grotius presents equality as governing not only the things exchanged, but also the circumstances of this exchange:

This equality is required both in the acts and in that which is in question with these acts; and in respect to the acts, it covers the preceding as well as the principal acts. (*De Jure*, II, 12.8)

What immediately follows Grotius’s point about the extent of equality is a systematic account of the way it is involved in acts and their effects. From an economic point of view, this amounts to an account of how equality is involved in prescriptive statements relative to information and coercive power.

Equality as regards information can be interpreted as equal access to relevant information about the thing exchanged. This is presented as a natural requirement of the contract:

[T]he person who is making a contract with any one ought to point out to him the defects of the thing in question which are known to himself: this is not only prevailingly established by the civil laws, but is also consistent with the nature of the act. For between the contracting parties, there is a

closer association than what is common to mankind. [...] [T]he nature of a contract which was devised for the sake of mutual advantage requires something closer. (*De Jure*, II, 12.9.1)

It is emphasised that the information to be disclosed is only that which is relevant to the expectations of the buyer and seller. Grotius gives several examples, borrowed from Roman law, where irrelevant information does not need to be mentioned (*De Jure*, II, 12.9.1); and this is extended to the case of already known information, which does not need to be repeated (*De Jure*, II, 12.9.3). However, he is careful to give a specific treatment of the classic case discussed by Thomas Aquinas (*Summa Theologiae*, IIa–IIae, q. 77, a. 3, obj. 4 and ad 4), where “many ships are en route, bringing grain.”<sup>10</sup> His conclusion, by the way, is coherent with that of his predecessor:

The giving of such information is, in fact, a part of one’s duty, and praiseworthy, so that often it cannot be omitted without violating the rule of charity [*caritatis regula*]. Yet such omission is not unjust, that is, it is not repugnant to the right of the one with whom the trade is made. (*De Jure*, II, 12.9.2)

The reference to charity shows that revealing the information, which would be praiseworthy, transforms the act from permutatorial into merely beneficial, so that it falls outside the scope of exchange. On the other hand, concealing it would surely be less praiseworthy, but since the contract deals with the present sale of grain, the information about what will arrive tomorrow is supposed to be irrelevant to the present transaction. Consequently, if a seller is allowed to conceal such information, it is not because he has some license to cheat, but because for him, as for the buyer, intertemporal separability applies – again, like it did for Thomas Aquinas. Note, however, that Grotius’s position in the case of a spot transaction seems to be governed by legal, contract-related concerns, different from those which prevail in the case of forward operations. A similar position is expressed about some kinds of private monopolies (*De Jure*, II, 12.16). In other places he had made clear that he was aware of the differences between the present value of a present good and that of an identical but future good – an example of intertemporal non-

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<sup>10</sup> Thomas was discussing the necessity, for a seller, to reveal the faults of the thing he was offering for sale. In this context, he imagined a situation where a seller of grain had private information concerning the upcoming arrival of many other sellers of grain – which would result in the lowering of the price. However, he concluded that “the seller, since he sells his goods at the price actually offered him, does not seem to act contrary to justice through not stating what is going to happen. If however he were to do so, or if he lowered his price, it would be exceedingly virtuous on his part: although he does not seem to be bound to do this as a debt of justice” (*Summa Theologiae*, IIa–IIae, q. 77, a. 3, ad 4).

separability. His argument for allowing interest loans is worth recalling: “the right of repaying money or wine borrowed only after a certain time is something capable of being evaluated: for he pays less who pays late” (*De Jure*, II, 12.20.2).

The second domain of equality is the reciprocal absence of coercion. This does not mean that all fear has to be withdrawn from the contract. What Grotius called “extrinsic” fear – that is, extrinsic to the contract – might be at the origin of the willingness to contract, and it does not have to be removed. On the contrary, though, when the fear is “unjustly inspired for the sake of making the contract”, it should be removed (*De Jure*, II, 12.10). It is obvious that this requirement, in the framework of a bilateral exchange, results in the solution not depending on the respective bargaining power of the buyer and seller. Thus, the equality relating to information and the equality relating to the absence of coercion converge in their effects to set the bounds of a negotiation space within which the last equality – that relating to the thing being exchanged – will be achieved.

This third and last equality, related to the thing exchanged, Grotius introduces indirectly in two steps. First, by opposing exchange to beneficial acts:

Whatever, in fact, the parties promise or give, they should be believed to promise or give as on an equality with that which is about to be received, and due by reason of that equality. (*De Jure*, II, 12.11.1)

Then, after recalling the two previous equalities, and imagining the case where such equality, related to the thing itself which is the matter of the transaction, is not respected:

There remains equality in the matter in question [*aequalitas in eo de quo agitur*; equality related to the thing], consisting in this, that although nothing has been concealed which ought to have been said [equality related to information], and no more has been exacted than what was considered due [equality related to non-coercion], nevertheless if an inequality has been detected in the thing [*si in re tamen deprehendatur inaequalitas*], although without the fault of either party [...], this inequality should be repaired, and something should be taken from the one who has more and given to the one who has less; for in the contract it was proposed, or ought to have been proposed, on both sides, that each should have the same amount. (*De Jure*, II, 12.12.1)

This makes clear the effectiveness of Grotius’s construction. It aimed to distinguish three possible ways of violating the laws of nature in the course of an exchange. These are three ways of introducing inequality: (i) inequality related to information; (ii) inequality related to non-coercion; (iii) inequality related to the things exchanged. Each

of these requires its own legal treatment, but they should be examined in this order, since an inequality related to the things might be meaningless if it is preceded, for instance, by an inequality related to information.<sup>11</sup>

### 3. Common price and transaction price

The exchange system devised by Grotius makes it possible to eliminate, in successive stages, the various sources of inequality until an equal exchange ratio is achieved. Yet we only know that such an equal exchange ratio, which seems to play the same role as the just price in scholastic economic thought, should exist. We do not know yet how it is determined.

#### 3.1. Common price: from need to labour and expenses

The answer is to be found in a discussion about the way a price is measured. In a few paragraphs, drawing on Aristotle and the commentaries of the Roman jurists, Grotius brings together the three ways the issue was dealt with throughout the Middle Ages<sup>12</sup> – need (*indigentia*), labour and expenses of the merchants (*laborum et expansarum, quas mercatores faciunt*), and common estimation (*quanti omnibus valeret*) – and proposes an ingenious way of relating them (*De Jure*, II, 12.14. 1 and 2).

The starting point, explicitly relying on Aristotle, is a natural value given by need:

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<sup>11</sup> Such effectiveness seems to have been difficult to recognise. For instance, despite an accurate account of the way Grotius's concept of equality "subsumed" the anterior concept of exchange, Decock concludes by favouring the link with previous Scholastic debates, to the detriment of the novelty of the construction (Decock 2013, pp. 600–601). Yet the Scholastic tradition was anchored in a Latin Aristotelian conception of what was called particular justice, distinguishing commutative and distributive justice and, through them, two kinds of equality, linked respectively to arithmetical and geometrical means. With Grotius, commutative justice is also linked to equality, but the latter is divided into three ordered components, identified not formally (like an arithmetic or geometric mean) but by their object. While its roots in the Scholastic debates are undeniable, Grotius's slight alteration, as Decock sees it, leads to a renewed understanding of the norm of equality and of the part it plays in the understanding of price especially (see *infra* § 3.3) when the *jus gentium* prevails.

<sup>12</sup> Both needs and labour and expenses were mentioned, for instance, by Thomas Aquinas in his commentaries on Aristotle's *Ethics* (*Ethicorum*, lib. V, lec. 9). See Januard 2022a, p. 754. On the respective parts played by needs and labour and expenses in Scholastic economic thought, see also Lapidus 1986, pp. 18–32, Theocarakis 2006, pp. 19–22 and Chaplygina and Lapidus 2016, pp. 21–27.

The most natural measure of what any thing is worth is need, as Aristotle rightly shows. (*De Jure*, II, 12.14.1)

The rest of the subsection makes it clear that, as with Grotius's distant scholastic predecessors, the need (*indigentia*) in question was not about the fancy of a transient desire, but rather the permanence of socially recognized wants (see Lapidus 1986, pp. 20–21; Langholm 1987, pp. 122–125 for a lexical discussion; Chaplygina and Lapidus 2016, pp. 23–24).<sup>13</sup> But Grotius held that in thinking we were measuring need, we could be mistaken. For, he writes, “Nor is this the only measure”. And he gives several indications of what might be measured instead of *indigentia*: the “will of men” (*hominum voluntas*), which can make us long for something beyond what is necessary; or the “desire” (*cupiditas*), the measure of which, he says, quoting Cicero, “is the estimation of things”. It is remarkable that these examples (*De Jure*, II, 12.14.1) revolve around the same idea: a subjective appraisal of things can lead to a measurement of their price, on the occasion of a real or imagined transaction, different from that determined by a socially recognized need, independent of any subjective content. This measure which would depart from the need is further reinforced by the symmetrical consideration of the available quantities of the traded good: “the most necessary things [according to *indigentia*] are worth less because of their abundance [*propter copiam*]” (*De Jure*, II, 12.14.1).

The result is that what he called the “most natural measure” of a price, its socially recognized need, might differ from transaction prices, which are driven by subjective desires and the scarcity of the thing exchanged. But the difficulty of identifying this most natural measure led Grotius to approach it in another way. This was performed in the continuation of his previous observations. Facing the disparities in individual assessments, Grotius dismissed them, since such assessments, treated like reservation prices, did not mean that a thing could be sold or bought for this price, but only for a

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<sup>13</sup> Earlier developments showed that the vocabulary used had already moved away from *indigentia* to designate something closer to subjective utility. Bernardino of Siena, for example, whose works are widely recognised as a milestone in the first half of the 15th century in a Franciscan trend that runs from Peter of John Olivi to Gerald Odonis and Antoninus of Florence, speaks of *complacibilitas*, which refers to the desirability that, together with the ability of a good to satisfy human need (*virtuositas*) and its scarcity (*raritas*), determines its price (see Lapidus 1986, pp. 41–42).

commonly observed price, common therefore to most transactions. Quoting Seneca (*De Beneficiis*, VI, 15), he concludes with him:

The price of each thing depends on its time. Though you have praised [those things] highly, they are not worth more than they can be sold for [*cum bene ista lauderis, tanti sunt quanto pluris venire non possunt*]. (*De Jure*, II, 12.14.1)

And further:

Hence it happens that a thing is estimated as much as is commonly [*communiter*] offered or given for it. (*Ibid.*)

At this point, there is no special reason to believe that the common price is not like other transaction prices (such was, for instance, Sewall's interpretation (1901, p. 38) of the common price as a current price), and thus possibly different from the assessment given by need. But Grotius goes on, now quoting the jurisconsult Paul, to suggest that this price is also "common" in another sense – that of a shared valuation:

The prices of things do not arise from the feeling or utility of individuals [*ex affectu nec utilitate singulorum*], but by common estimation; that is, as he [Paul] explains elsewhere, how much it would be worth to all. (*De Jure*, II, 12.14.1)

Grotius here reverses the path he had taken at the beginning of the subsection. He moves from individual subjective assessments to a shared assessment. Now, he had already observed that need was common "in the exchange of things among Barbarians". It is therefore easy to draw from this that the common price, in the sense of a shared assessment, is equivalent to the "most natural measure" of price, the need.

The following step was to move away from a representation in terms of a common price understood as a need, facing transaction prices depending on subjective evaluations, in favour of an alternative representation in terms of cost content which, here again, recalls the scholastic approach to the just price:

And in that common price, account is usually taken of the labour and expenses [*laborum et expansarum*] which the merchants incur; and it is also usually changed suddenly by the abundance and scarcity [*copia et inopia*] of buyers, of money, and of commodities. (*De Jure*, II, 12.14.2)

Grotius thus achieves a construction modelled on the one in which need (*indigentia*) is the pivotal value, by substituting a production cost (*labores et expansae*) which, again, is intended to represent the common price. But where transaction prices could differ from the common price, understood as a need, because of subjective desires and the scarcity

of the good, it is this same common price which, when understood as a cost of production, can be modified due to the scarcity of the commodity, of partners in the exchange, and of money. Interestingly, this is a way of claiming that the need for a good, as represented by its common price, may change because, for example, it becomes scarcer. The need for water thus increases because it is less abundant and, in Grotius's representation, this is not because of our whims but because everyone can recognise the lack of it.

### 3.2. Deviations from the common price

However, while the common price could vary, Grotius points out the reasons why a transaction price might nevertheless deviate from it. And he is careful to note that these deviations, which allowed a thing to be bought and sold for more or less than the common price, could be legal. Such legal prices of transaction, different from the common price, arise in response to “accidents involving estimable things” [*rei accidentia aestimabilia*].<sup>14</sup> He gives several examples in succession, which have in common the compensation for a loss or a decline in profits (including because of an anticipated or delayed payment), or he imagines the case in which a buyer has special feelings for a thing, or, put in a less familiar way, the case when things “are bought or sold to oblige a person, being otherwise not to be bought or sold” (*De Jure*, II, 12.14.2).

Some of these examples may seem odd to the contemporary reader, and one could discuss at length on what basis some of them would be considered legal, irrespective of its deviation from the common price. But if we bear in mind that the approach adopted is that of a jurist who intends to provide the judge with the means to assess the lawfulness of a transaction within a contract which is not of strict law but only of good faith (which gives the magistrate the greatest scope for interpretation), the method followed becomes more transparent. After providing the magistrate with the means to determine a common price in accordance with natural law from a common estimate or from the labour and expenses of the merchants and giving the reasons for its variations, he specifies the conditions under which the transaction price may deviate from the common price, without

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<sup>14</sup> Here again, this echoes what Thomas Aquinas said about exchange by accident (*Summa Theologiae*, IIa-IIae, q. 77, a. 1, resp. and ad 3), which might lead to a price different from the just price, but acceptable on moral grounds (Lapidus 1994, pp. 446–454).

this leading to its illegality. This legality of a transaction price distinct from the common price can, however, be understood in two ways: either, as in the cases just discussed, because it can be approved on account of the particular circumstances facing the buyer and seller; or because the law of nations (the *jus gentium*) itself cannot or does not oppose it.

Grotius addresses the latter case in the last section of his chapter on contracts, where he mitigates the previous natural law considerations (“And indeed what we have said up to now is in accordance with the law of nature itself”; *De Jure*, II, 12.25) by approaching the same issues from the perspective of the law of nations<sup>15</sup> – typically, when foreigners, not submitted to civil law, are involved, so that the legal principles are based on the application of reason to custom. It is from this point of view that he considered certain inequalities in exchange to be acceptable although rejected by natural law:

Nor does it appear that anything is changed by the instituted law of nations; with one exception, that if an inequality of things be agreed upon, this, where neither lying intervened, nor reticence of what ought to have been said, is regarded as equality in external actions.<sup>16</sup> And thus, as by the Civil Law before Diocletian there was no action before a court of law for such inequality, so now among those who are connected only by the law of nations, there is no demand or compulsion allowed on that account. (*De Jure*, II, 12.26.1).

This means that, for example, if the seller has greater bargaining power, which contradicts equality with regard to the absence of coercion, so that the exchange would be unjust according to natural law, the existence of an agreement would make the resulting transaction price legal according to the law of nations. It is from this perspective that Grotius approached the position asserted by Pomponius in the *Digesta* (4.4.16.4), here again quoted extensively since the Middle Ages, that “in the price of selling and buying,

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<sup>15</sup> Recall that the law of nations (*jus gentium*) was originally the law which, comprising basic human protections, applied to all the inhabitants of Rome, including those who, not being Roman citizens, were not subject to civil law. It was an intermediate law, between natural and civil law, derived from customs and human reason. A typical example of this was slavery, then regarded as accepted by the law of nations, but not by natural law (though Grotius, for instance, accepted slavery as a consequence of a just war; for a discussion of Grotius’s position on slavery, see Tuck 1979, pp. 70–71). We are indebted to the authors of Salamanca, like Vitoria or Suárez, and finally to Grotius for extending the idea of *jus gentium* to the principles and rules governing the behaviour of states and individuals in an international context. The evolution of the notion of *jus gentium*, from the 13<sup>th</sup> century onwards, is one of the main threads running through Koskenniemi’s book (2021).

<sup>16</sup> That is, equality in human interactions, as opposed to actions that would depend solely on one’s own consciousness.



it is naturally allowed to circumvent one another [*naturaliter licere se mutuo circumvenire*]” (*De Jure*, II, 12.26.1). He discusses the word “naturally”, arguing that it had to be understood in a looser sense, as “put for a received custom” (*De Jure*, II, 12.26.2), which fits with the law of nations, not with that of nature. As for “allowed”, he understood the word in a most restricted sense:

Where allowed is, not that it is right, but that it is so far permitted since there is no remedy against him who in such a case chooses to defend himself on the basis of the agreement. (*De Jure*, II, 12.26.1)

### **3.3. Bargaining under the law of nations**

The possibility “to circumvent one another” reveals the kind of behaviour which is made acceptable according to the law of nations. This was done with the help of a passage from the *Codex of Justinian* (*Codex*, 4.44.8) which Grotius reproduces almost literally:

This is the substance of buying and selling (say the Emperors, meaning by the word “substance” a perpetual custom) that since the buyer desires to buy cheaper and the seller to sell more dearly, they reach this agreement; and with difficulty, after many disputes, little by little, while the seller lowers the sum which he had asked, and the buyer adds to his offer, they finally agree on a definite price. (*De Jure*, II, 12.26.3)

These lines, written in the first half of the 6th century, are striking for an economist today. They precisely describe a bilateral exchange situation, which is typically known to have an indeterminate equilibrium – the indeterminacy being removed by the bargaining process. In the *Codex*, like in the *De Jure*, this process is described quite accurately. Yet its interpretation in both cases is different.

In the *Codex*, the bargaining process followed on from a very concrete question concerning the possibility of rescission of the sale of a farm by the son of its owner because the latter considered that the price obtained was too low. The *Codex* claimed that “[t]he fact that you state that the land was sold for a little less than its value, is not alone sufficient to invalidate the sale” (*Codex*, 4.44.8) – all the more so since the contract of sale (*emptio et venditio*) was typical of the category of contracts named *consensu*, where the validity only depended on the agreement between buyer and seller. But, interestingly, in some cases the *Codex* made an exception. The reason provided was that the significance of the efforts accomplished made it unacceptable to question the agreement

unless “less than half of the just price of the property at the time of the sale was given” (*ibid.*). This example was discussed during the Middle Ages, in relation with the just price, as a case of what was to be called *laesio enormis* and progressively extended to the protection of any buyer or seller of any good. As a result, the local stability of the transaction was guaranteed by the extent of the efforts of both parties to reach an agreement through the bargaining process. Since the middle of the 20<sup>th</sup> century, commentaries (for example, J. Baldwin (1959, p. 17), A. Lapidus (1986, pp. 35–36), O. Langholm (2003, pp. 72–73)), have generally focused the discussion on the evolution of the perception of its possible limits. From an economic point of view, this means that *ex ante* the buyer and the seller accept such efforts because they know that neither of them (except in case of some limits like the *laesio enormis*) will appeal to a court’s judgment, so that these efforts will not have been carried out in vain.

Grotius’s approach was different. It was no longer a question of the sale of a farm, but of bilateral transactions within the legal framework of the law of nations where the parties do not have a common judge concerning equality issues – which, again, corresponds to the standard conception of a contract *consensu*, based on *jus gentium*, where the agreement between the parties is a sufficient requirement. “And thus”, Grotius says, “among those who base their association on the law of nations alone, no recourse or coercion [to a judge] on that account [inequality in the transaction] is allowed” (*De Jure*, II, 12.26.1). It is in such context that he holds that his “rules” (the legality of a bargaining process eventually leading to inequality) are appropriate:

However, the advantage of introducing the rules which I have mentioned is manifest for the prevention of infinite disputes [*ad praecidendas controversias infinitas*] owing to the uncertain price of things between those who do not have a common judge [– disputes] which would have been unavoidable if men were allowed to withdraw from agreements on account of inequality. (*De Jure*, II, 12.26.3)

In the *De Jure*, by contrast with the interpretation from the *Codex*, the acceptance of a transaction price, even if unequal, on which the seller and the buyer have found an agreement at the end of a bargaining process while ignoring the common price, is reinforced, because the difficulties encountered during this bargaining process are less than those that would be experienced if any agreement might be challenged.

The point is not trivial. However, it must be qualified. The superiority of a bargaining process that allows for inequality and results in a transaction price binding for both parties, only has worth under the law of nations when compared to a process whose outcome would otherwise be indefinitely challenged. But what if we compare this situation to that which would prevail according to the law of nature? Obviously, a common price which respects equality in exchange, or a transaction price in the case of a bilateral transaction for which the parties have good reason to deviate from the common price, is better than the price obtained as the outcome of a bargaining process under the law of nations. This is simply because what is just from the point of view of natural law is preferable to what is unjust – even if it is legal from the point of view of the law of nations. Grotius’s conclusion was straightforward and testifies to the fruitfulness of his particular conception of equality:

The writer of the life of Isidore, whom I mentioned a little before,<sup>17</sup> says that buying at less or selling at more than what is just is an injustice, which is permitted indeed by law, but which in fact perverts what is just. (*De Jure*, II, 12.26.4)

#### **4. Concluding remarks**

The long succession of contributions by theologians and canonists – stretching, say, from Albert the Great to Lessius – concerning the “just” or “equal” price, was not only intended to enlighten a confessor faced with his parishioner: it could also be used by judges in an ecclesiastical or civil court. This intellectual configuration was the result of an interpenetration between what was a matter of religion and what was a matter of law. For Grotius, as for his successors, even when discussing the writings of a theologian it was definitely a matter of law. So Grotius’s economic analysis of exchange and price appears to us not as the result of a questioning of the possible sinful nature of a transaction, but as a by-product of a legal investigation in which the various types of contracts and their properties are explained on the basis of a typology of acts. Within an attempt to account for the causes of wars, its purpose was to provide a hypothetical judge with the necessary

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<sup>17</sup> Grotius explicitly mentioned Photios I, Ecumenical Patriarch of Constantinople in the second half of the 9th century. However, Photios did not write directly on the life of Isidore of Gaza: in his *Bibliotheca*, he included a review of the *Life of Isidore* by his contemporary Damascius, in the late 5th century.

elements to assess the validity of a transaction, according to either natural law or the law of nations. Obviously, this first requires us to answer the question of how to identify a legally acceptable price. The operation was realized in three steps: (i) a *common price*, determined through three equivalent channels – a socially recognised need, the work and expenses of merchants or a common estimation – which guarantees equality in exchange; (ii) *transaction prices*, which may deviate in an acceptable way from the common price, through changes in tastes or variations in scarcity; (iii) *transaction prices* under *jus gentium* in bilateral exchanges, which are the result of a bargaining process, where equality is no longer required and which for this reason cannot be the subject of litigation before a civil court.

Leaving aside the particular aspects of Grotius's construction, both from a legal and an economic point of view, which nevertheless still testify to its interest today, the fact remains that his approach illustrates the general issue faced by a normative perspective: the norm must first be explained, and then the deviations from the norm. It is in this gap that economic reasoning is introduced. And this is what, despite his differences with his Scholastic predecessors on other issues (see Tuck 1999, p. 108), Grotius bequeaths to posterity (see Lapidus 1986). First of all to Samuel Pufendorf, whose work spread to Northern Europe and France thanks to his translator Jean Barbeyrac, whom he shared with Grotius. Then to Gershom Carmichael, who disseminated his thought in Scotland, in what was to become the Glasgow School. And then to his successor Frances Hutcheson, who was Adam Smith's professor and predecessor at the same university. And finally to Smith himself, who could explain in the *Lectures*, and even more so in the *Wealth of Nations*, that when we speak of prices, we mean two different and yet interconnected things. Without, this time, the need to enlighten either a priest or a magistrate.<sup>18</sup>

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<sup>18</sup> A referee for an early version of this paper rightly observed that Smith did remain concerned with enlightening the legislator. However, through knowledge of political economy, seen, now, as a science, the aim was to contribute to the implementation of his economic policy (see the introduction to Book IV of the *Wealth of Nations*), and not to judge the moral or legal acceptability of this or that singular transaction between a seller and a buyer.

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