



Institute for International  
Law and Justice

**IILJ International Legal Theory Colloquium Spring 2012**  
Convened by Professors Benedict Kingsbury and Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown, unless otherwise noted

NYU Law School  
Vanderbilt Hall 208, 40 Washington Square South  
(unless otherwise noted)

**SCHEDULE OF SESSIONS:**

- January 25** Harlan Grant Cohen, *University of Georgia*  
“Finding International Law, Part II: Our Fragmenting Legal Community”
- February 1** Anthea Roberts, *London School of Economics / Visiting Professor at Harvard University*  
“Clash of Paradigms: Actors and Analogies  
Shaping the Investment Treaty System”
- February 8** Odette Lienau, *Cornell University*  
“Rethinking Sovereign Debt: The Politics of Reputation in the Twentieth Century”
- February 29** Nico Krisch, *Hertie School of Governance (Berlin) / Visiting Professor at Harvard University*  
“From Consent to Consultation: International Law in an Age of Global Public Goods”
- March 21** Doreen Lustig, *New York University*  
“The Business of International Law: International Legal Attitudes  
Toward the Business Enterprise, 1870-1954”
- April 4** Martti Koskenniemi, *University of Helsinki / New York University / Visiting Professor at Columbia University*  
“International Law and the Emergence of Mercantile Capitalism: Grotius to Smith”
- April 17** Horatia Muir Watt, *Sciences Po*  
“Global Governance and Private International Law”  
[to be held, exceptionally, on a Tuesday at 4pm; location TBA]
- April 18** Armin von Bogdandy & Matthias Goldmann, *Max Planck Institut, University of Heidelberg / New York University*  
“Sovereign Debt”

## INTERNATIONAL LAW AND THE EMERGENCE OF MERCANTILE CAPITALISM

### Grotius to Smith

Martti Koskenniemi

Among the many texts by Peter Haggenmacher that throw light on some often neglected aspect of Grotius is the 1997 article on *Droits subjectifs et système juridique chez Grotius*.<sup>1</sup> Not that the importance of subjective rights in Grotius would have been wholly ignored. In fact, the turn to subjective rights in early modern natural law has been commented upon by many historians of political thought.<sup>2</sup> What is particularly useful in Haggenmacher's long essay, however, is the stress made there on the linkage between subjective rights and what Grotius in *De jure belli ac pacis* chose to call "expletive justice", justice in inter-individual relations. The distinction made by Grotius between *expletive* and *allocative* justice resembles the more familiar Aristotelian juxtaposition of justice in commutative (horizontal) relations between individuals and justice in distributive (vertical) relations between individuals and the community. Throughout his oeuvre, Grotius privileges the former to the latter, in *De jure belli ac pacis* (1625) throwing doubt on the legal character of distributive justice *tout court*. It is, he suggests, best seen as a set of non-legal maxims of charity, or obligations of conscience. Only relations of expletive justice are "hard law" that ground universally valid rights. Any violation of them, wherever it occurs, is liable for punishment by the political community, or if the violation takes place outside the boundaries of political community, by the right-holders themselves. By this means, Grotius sketched a system of global exercise of power by public and private actors in the name of enforcing natural rights.

In this essay I will situate this achievement within the world-wide emergence of new types of economic relationship that have sometimes been abbreviated as the

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<sup>1</sup> Peter Haggenmacher, 'Droits subjectifs et système juridique chez Grotius,' in Luc Foisneau, *Politique, droit et théologie chez Bodin, Grotius et Hobbes* (Paris, Kimé 1997), 73-130.

<sup>2</sup> Michel Villey, *La formation de la pensée juridique moderne* (Paris, PUF 2003), 545-558; Richard Tuck, *Natural Rights Theories. Their Origin and Development* (Cambridge University Press 1979), 58-82; Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, Eerdmans 1997), 324-342.

“empire of civil society”.<sup>3</sup> The natural rights theory put forward by Grotius was an important step in the development of legal and political thought that peaked in the publication of Adam Smith’s *The Wealth of Nations* in 1776.

## I

Grotius’ definition of “*ius*” is situated in the first Chapter to *De jure belli ac pacis*. Like the Spanish theologian Francisco Suárez (1548-1617), Grotius takes up three meanings of the term.<sup>4</sup> First is *ius* as the object of justice – *quod iustum est*, - “that which is just”.<sup>5</sup> This is often regarded as the form of *ius* that we find prevalent in the *Summa theologiae* of Thomas Aquinas but may be traceable even further to Roman law and Stoic sources and is usually translated as “objective” justice.<sup>6</sup> Like Suárez, Grotius also makes reference to a notion of *ius* that is synonymous to that of “law” – *idem valet quod Lex*. This sense of *jus* describes any legal norm that is valid in the community concerned.<sup>7</sup>

But more interesting is the third (second in the order of presentation) notion of *jus* – the subjective concept that exists as a “[q]ualitas moralis personae competens quad aliquid iuste habendum vel agendum”, a moral quality that human beings may “have” and carry with themselves wherever they go. This may exist in two modes that Grotius calls *facultas* and *aptitudo*:

“This moral Quality when perfect, is called by us a *Faculty*; when imperfect, an *Aptitude*: The former answers to the *Act*, and the latter to the *Power*, when we speak of natural Things.<sup>8</sup>

<sup>3</sup> See Justin Rosenberg, *The Empire of Civil Society* (London, Verso 1994).

<sup>4</sup> Hugo Grotius, *The Rights of War and Peace*, Book I (ed. And with an Intr. By R Tuck, Indianapolis, Liberty Fund 2005), Bk I Ch III-IX (136-150). See also Francisco Suárez, ‘De legibus ac deo legislatore’, in *Selections from Three Works* (Vol II, Translation, G.L. Williams et al, Oxford, Clarendon 1944), Bk I, Ch II, § 4 (29-30).

<sup>5</sup> Grotius, *The Rights of War and Peace*, Bk I Ch I § III.I (136) Interestingly, the “just” is defined in a negative way – “that which may be done without injustice to an enemy”, injustice being defined as what is “repugnant to a Society of reasonable Creatures”, *id.*

<sup>6</sup> On the sources of Grotius’ notion of natural law, see Benjamin Strauman, *Hugo Grotius und die Antike. Römisches recht und römische Ethik im frühneuzeitlichen Naturrecht* (Baden-Baden, Nomos 2007), 146-150.

<sup>7</sup> Haggemacher, ‘Droits subjectifs’, 75.

<sup>8</sup> Grotius, *The Rights of War and Peace*, Bk I Ch I § IV (138).

*Facultas* is what Grotius relates to “*Right properly, and strictly taken*”.<sup>9</sup> It is strict, enforceable law. Grotius explains that in making the connection between *facultas* and subjective right he follows Roman law. This includes the power that one has on oneself (that is to say, one’s personal liberty) and those under one’s tutelage (wife, children or slaves) as well as over one’s property. Every human being has such *facultas* by virtue of merely being human. And the network of relations between *facultates* is that which is covered by expletive (commutative) justice, the horizontal system of inter-individual relations characterized by the exercise of such subjective rights on the one hand, and everyone’s duty to respect their use.<sup>10</sup>

Such *facultas* contrast with mere “*aptitudo*” that Grotius received from the Aristotelian notion of distributive justice (re-labelled by Grotius as allocative justice) that governs the vertical relations between public power and the subject of public power. Or in Grotius’ own words:

“*Attributive Justice*, stiled by Aristotle [...] *Distributive*, respects Aptitude or *imperfect Right*, the attendant of those Virtues that are beneficial to others, as Liberality, Mercy, and prudent Administration of Government.”<sup>11</sup>

This relationship, Haggemacher explains “ne constitue du droit qu’en un sens large et impropre”.<sup>12</sup> In other words, natural subjective rights belong to the realm of inter-individual justice and are both universal and binding as strict law, while entitlements based on attribution by the community, resulting from considerations of merit or charity, operative through administration and government of the community, are not legally binding. They may have moral or ethical force but do not ground any strong claim towards the State. Nor can they be enforced against *facultates*, especially against rights of *dominium*.

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<sup>9</sup> Grotius, *The Rights of War and Peace*, Bk I Ch I. § V (138).

<sup>10</sup> Grotius, *The Rights of War and Peace*, Bk I. Ch I. § V (138-9) and Preliminary Discourse, VIII (86).

<sup>11</sup> Grotius, *The Rights of War and Peace*, Bk I Ch I § VIII (143)

<sup>12</sup> Haggemacher, ‘Droits subjectifs’, 74.

To illustrate this distinction Grotius added in the 1631 edition of *De jure belli ac pacis* the story of Cyrus who had to adjudicate between two boys fighting over two coats. Cyrus decided to give the bigger coat to the bigger boy and the smaller coat to the smaller boy. In this he was corrected by his tutor. The task was not to attribute the coats in accordance with what Cyrus might have thought each had an entitlement according to allocative – that is to say, distributive – justice. The task was to give each boy the coat that belonged to him, over which he had the subjective right of *dominium*. The task of the State was not to distribute property according to some allocative principle but to give effect to the relations of *dominium* as they existed in the network of relations of commutative justice that governed the relationships of subjective right holders to each other. The King, in other words, was not entitled to intervene by an act of re-distribution. Allocative justice could not be exercised over expletive justice. To do this was to violate the strict right the smaller boy had to the bigger coat. A relationship of rights is prior to any relationship of attribution. The King may tax his subjects for the good of the community but not in order to distribute wealth among his subjects.<sup>13</sup>

## II

The primacy of subjective rights in Grotius' of natural law is tempered by his view that all of natural law, including natural rights, are an effect of an innate desire for society among humans. This "sociability", as he famously puts it in his attempt to refute the sceptic Carneades, "is the Foundation of Rights, properly so-called" – adding, however, immediately that what it means is "the Abstaining from that which is another's".<sup>14</sup> There is no doubt that the natural love of human companionship and life in organised society of which Grotius speaks in *De jure belli ac pacis* was intended to counterbalance the potentially egoistic implications of his strong view on subjective rights. Beyond the argument against Carneades, however, it plays no independent role in the development of his natural law beyond the reciprocal duty that all humans have to respect each

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<sup>13</sup> Grotius, *The Rights of War and Peace*, Bk I Ch I § VIII.2 (146-147).

<sup>14</sup> Grotius, *The Rights of War and Peace*, Preliminary Discourse, VIII (86).

others' rights, to fulfil promises, to provide restitution in case of violation, to repair damage and to suffer punishment.<sup>15</sup>

The stress on subjective rights dates back to Grotius' early advocacy work for the *Vereinigste Oostindische Compagnie* (VOC) in 1604-1606, published posthumously as it was found in an auction of Grotius' papers only in 1864.<sup>16</sup> In *De jure praedae*, Grotius sought to answer the question about the right of the company to send vessels to the Indies in search for commercial profit, and in the process to attack and seize the Portuguese vessel *Santa Catarina* and to capture its cargo.<sup>17</sup> The capture had taken place in what was from a Dutch perspective part of the High Seas where neither the Portuguese nor any other nation could extend its civil laws. For this reason, the applicable law was the law of nature. Throughout his career, Grotius had been concerned to find principles of law and religion that would be applicable universally and across confessional divides. To achieve this he followed what in the early work he called a "mathematical method" of demonstration that would lay the basis for a kind of minimal natural law whose force would lie in its reflecting what was a self-evident aspect of social life everywhere. And what would be such an obvious and universally recognized fact? In the Prolegomena to the *De jure praedae* observed God had given certain natural properties to all humans on the basis of which their existence may be preserved. Among these, he found that "self-interest, is the first principle of the whole natural order". "For all things in nature", he wrote, quoting Cicero, "are tenderly regardful of self, and seek their own happiness and security". On these facts, evident since the beginning of time and human society all authorities, he went on to claim, "admit that in human affairs the first principle of a man's duty relates to himself".<sup>18</sup>

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<sup>15</sup> The way Grotius' system of private rights and the corresponding duties reflects the Roman system of claims (*actiones*) is usefully discussed in Straumann, *Hugo Grotius und die Antike*, 162-165.

<sup>16</sup> Hugo Grotius, *De jure praedae (Commentary on the Law of Prize and Booty)* (Ed. and with an Introduction by M.J. van Ittersum, Indianapolis, Liberty Fund 2006).

<sup>17</sup> The capture of the Portuguese vessel had taken place in the strait of Singapore in the autumn of 1603. In the following February, its legality had been brought to judgment by the Amsterdam Admiralty Court. The most thorough description of the context of Grotius' advocacy work on the VOC today is Martina Ittersum, *Profit and Principle. Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595-1615)* (Leiden, Brill 2006).

<sup>18</sup> Grotius, *Commentary on the Law of Prize and Booty*, Prolegomena (21-22).

On this basis, Grotius created a whole system of natural law that he divided into nine “Rules” and thirteen “Laws”. The Laws were laid out in a hierarchical order and began with the right of self-preservation that extended to the right of preserving one’s property:

“LAW I. It shall be permissible to defend [one’s own] life and to shun that which threatens to prove injurious”

LAW II. It shall be permissible to acquire for oneself, and to retain, those things which are useful for life”<sup>19</sup>

These laws account for Grotius’ reputation as the representative of an “essentially modern theory of subjective natural rights”.<sup>20</sup> Their universal validity was based on the universal character of the desire of self-preservation. They had a corollary, of course, which drew the social consequences of this (individualist) morality as follows:

“LAW III. Let no one inflict injury upon his fellow.

LAW IV. Let no one seize possession of that which has been taken into the possession of another.

LAW V. Evil deeds must be corrected”.<sup>21</sup>

Human beings were not only desirous of self-preservation, but also – unlike animals – possessed reason. And reason taught them to forego immediate satisfaction of their needs and to join society in which their long-term interests would be best served. Private rights and sociability were thus not in conflict but, rightly understood, complementary. Out of everyone’s regard for their selves and their properties would emerge a society that would be prosperous and happy. Grotius went out of his way to explain towards the end of *De jure praedae* that regard to oneself was not at all sinful or in conflict with the general good. The just man “benefits himself before all else.”<sup>22</sup> And through the work of providence, what is just, is also always beneficial: “nothing base is truly advantageous,

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<sup>19</sup> Grotius, *Commentary on the Law of Prize and Booty*, Prolegomena (23) and Appendix A (500).

<sup>20</sup> Benjamin Strauman, “Ancient Caesarian Lawyers” in a State of Nature. Roman Tradition and Natural Rights in Hugo Grotius’s *De iure praedae*, 34 *Political Theory* (2006), 330.

<sup>21</sup> Grotius, *Commentary on the Law of Prize and Booty*, Ch II Prolegomena (27-29) and Appendix A (500)

<sup>22</sup> Grotius, *Commentary on the Law of Prize and Booty*, Ch XV, Thesis I (463).

whereas nothing honourable can fail to be expedient by virtue of the very fact that it is honourable".<sup>23</sup> The spoils received by the Company:

“are beneficial primarily because the individuals honourably enriched thereby are to be able to benefit many other persons, and because it is in the interests of the state that there should be a large number of wealthy citizens”.<sup>24</sup>

Out of the enrichment of the few, the whole society will benefit: the rising tide lifts all boats. The normative space constructed in *De jure praedae* is filled by natural, subjective rights that all humans have on the basis simply of being human. These rights cover the faculty to do whatever is necessary or useful for self-preservation and for acquiring whatever might seem needed for that purpose. In the context of *De jure praedae* this meant that like everyone the VOC had the right to pursue wealth by sending ships to the East Indies and engaging in trading relations with their inhabitants. In limiting access to the spice islands, the Portuguese were violating this God-given right and in so doing were no better than pirates. “For the name of “pirate” is appropriately bestowed upon men who blockade the seas and impede the progress of international commerce”.<sup>25</sup> It was thus perfectly just and proper for Captain van Heemskerck to punish them by attacking and seizing the *Santa Catarina* and its cargo.

It was true, of course that the authority of punishment in civil society belonged to the magistrates, to public power. But in the international realm, including in the High Seas, there was no such public power. It therefore fell on the right-holders themselves to enforce their right: “a private war is undertaken justly in so far as judicial recourse is lacking”.<sup>26</sup> The VOC was entitled to wage war against the Portuguese and to keep the booty it had acquired. Moreover, in seeking to break the monopoly in the pursuit of their subjective right, the Dutch were supporting the interests of commerce and exchange – interests with respect to

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<sup>23</sup> Grotius, *Commentary on the Law of Prize and Booty*, Ch XV, Thesis I (463).

<sup>24</sup> Grotius, *Commentary on the Law of Prize and Booty*, Ch XV, Thesis II (464).

<sup>25</sup> Grotius, *Commentary on the Law of Prize and Booty*, Ch XIV (449).

<sup>26</sup> Grotius, *Commentary on the Law of Prize and Booty*, Ch VIII, Conclusion VII, A 1 (142).



which humanity was united.<sup>27</sup> Their war was thus waged on behalf of humanity itself.

### III

The subjective rights of trade and navigation defended by Grotius in *De jure praedae*, and to which he gave a more elaborate formulation in *De jure belli ac pacis* twenty years later gave legal authority to the Dutch commercial expansion in the Indies and elsewhere. It did this by liberating Dutch merchants to seek wealth wherever they could find it either through taking possession of items not owned by anybody or engaging in contractual relations with the inhabitants of far off regions. Behind the concept of subjective rights and their enforcement, there lay an elaborate but familiar theory of legitimate authority based on the concept of *dominium*. To have valid rights was to possess *dominium* in either of its two senses as jurisdiction (*dominium jurisdictionis*) or property (*dominium proprietatis*). These were the only bases on which justified power over human beings could be exercised. How *dominium* could be attained had been the subject of many centuries of elaborate discussion among Catholic theologians. Following them, Grotius concluded that *dominium* could be attained either by original acquisition or derivatively from the original right-holder by contract or succession.<sup>28</sup> These were the rights that the VOC was seeking to enforce as its vessels sailed into the Indies and whose enjoyment the Portuguese were trying to prevent by their claim of monopoly. But the seas could not be either the exclusive jurisdiction or the property of anybody. Like the Spanish jurist Vazquez de Menchaca (“the pride of Spain”), whom Grotius closely followed, he argued that there could be no *dominium* on the seas because they could not be taken into possession. Nor could right over them have been granted by any earthly authority, such as the Pope, because no such authority existed with respect to the seas.<sup>29</sup>

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<sup>27</sup> Grotius, *Commentary on the Law of Prize and Booty*, Ch XII, Thesis I (303).

<sup>28</sup> Grotius, *The Rights of War and Peace*, Bk I Ch III § 1 (454).

<sup>29</sup> Grotius, *Commentary on the Law of Prize and Booty*, Ch XII (346-353).

Grotius followed the scholastic tradition in assuming that originally and under natural law, there had been neither lordship nor property; nobody had jurisdiction over other human beings and all ownership was shared. As recounted in the Genesis, only God possessed *dominium* over the world, and He had given it to human beings in common.<sup>30</sup> To this original state of affairs, however, positive law and practice had introduced a transformation. Property and jurisdiction had been created through the gradual division of things (*divisio rerum*) that had taken place in reaction to changing conditions. As communities became more cultivated and individuals more ambitious, they began to see benefits in the division of land and other properties: “as soon as living in common was no longer approved of, all men were supposed, and ought have been supposed to have consented, that each should appropriate to himself, by Right of first Possession, what could not have been divided”.<sup>31</sup> Here, for Grotius, lay the origin of both sovereignty and property.

#### IV

In most of this, Grotius followed the 16<sup>th</sup> century Spanish scholastics who had already made a firm link between private rights, commutative justice, property and sovereignty. The latter, for their part, had taken it over from an even earlier debate between the representatives of the *via antiqua* and *via moderna* in scholastic political theory, representatives of Thomistic orthodoxy and the followers of William of Ockham. In those 14<sup>th</sup> and 15<sup>th</sup> century debates, something like a subjective right had emerged in juxtaposition to the older, “objective” concept of right as simply that which is “just”. Human beings were described as having been created by God as free, or in the scholastic vocabulary, as owners of their own actions (*dominium actionum suarum*), and as such, entitled to agree on the division of formerly shared property.<sup>32</sup> This view had

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<sup>30</sup> Grotius, *The Rights of war and Peace*, Bk I Ch II § I (420-423).

<sup>31</sup> Grotius *The Rights of war and Peace*, Bk II, Ch II. § II.5 (427).

<sup>32</sup> See e.g. Richard Tuck, *Natural Rights Theories. Their Origin and Development* (Cambridge University Press 1979); Kurt Seelmann, *Die Lehre des Fernando Vazquez de Menchaca vom Dominium* (Cologne, Heymanns 1979); Annabel Brett, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought* (Cambridge University Press 1997); Brian Tierney, *The Idea of Natural Rights* (Grand Rapids, Eerdmans, 1997).

been present among the Parisian masters of the late-15<sup>th</sup> century and from them the representatives of Spanish late-scholasticism, the so-called “Salamanca school”, had received it and transmitted it to their students.<sup>33</sup>

This process had taken place as the Spanish theologians were seeking to respond to the political and economic transformations they saw around themselves: the discovery of the new world, reformation, and the massive expansion of commercial relations inside Europe and towards the outside world. At the head of this new movement in theology were the Dominican scholars, Francisco de Vitoria (1483/92-1546) and Domingo de Soto (1494-1560), simultaneously teaching at the University of Salamanca. From the third decade of the 16<sup>th</sup> century onwards, they were confronted by soldiers, merchants, noblemen and peasants whose souls were tormented not only by participation in the violence against the Indians but also and increasingly in the novel practices of trade and commerce that seemed to go against the traditional virtues of charity and liberality and appeared to constitute striking violations of the traditional prohibition of usury.<sup>34</sup> It was in the context of hearing confessions and managing the sacrament of penance that the theologians and jurists began to think about the new practices by reference to Thomistic doctrines of law and justice in a way that would provide a powerful justification for the expansion over the whole world of that system of productive and mercantile relations that we are used to calling “capitalism”.<sup>35</sup>

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<sup>33</sup> The most thorough study of the Salamanca school is Juan Belda Plans, *La escuela de Salamanca y la renovación de la teología en el siglo XIV* (Madrid, Biblioteca de autores Cristianos 2000).

<sup>34</sup> The Spanish *cambistas* operating in Antwerp were actually so worried that they sent a written request to the University of Paris in 1530 for an assessment of whether usury was involved in what they were doing. Vitoria, too, was consulted in this connection but confessed only to his “bewilderment” by the complexity of the problem. But there is no doubt that when he began discussing the justification of property trade in his regular lectures on the *summa* later in the 1530s, his concern much have been inspired by the consultation and the transformation of international world to which it related. See Marjorie Grice-Hutchinson, *The School of Salamanca. Readings in Spanish Monetary Theory 1544-1605* (Oxford, Clarendon Press 1952), 38-39 and for the consultation, Appendix I, 120-126.

<sup>35</sup> This section follows largely my ‘Empire and International Law: The Real Spanish Contribution’, 61 *University of Toronto Law Journal* (2011), 1-36 and ‘The Political Theology of Trade Law: the Scholastic Contribution’, in Ulrich Fastenrath et al (ed), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford University press 2011), 90-112.

Opening trade routes to the Americas had led to the introduction of huge quantities of gold and silver into the European and Asian markets; it also spawned a new commercial culture that sat uneasily with the traditional image of the virtuous life. What should one think of the professional practice of buying cheap and selling dear? Charging interest for exchanges of money may have been necessary to keep the trade going but it was hardly compatible with Christian ideals. Vitoria and Soto were in the business of teaching future clerics. They examined the new practices from the perspective of commutative justice that was “intimately bound with the sacrament of confession”.<sup>36</sup> As Soto observed, extracting profit or charging interest violated the principle of equivalence of transactions. Penance involved accepting a punishment the point of which was to seek the justice of equivalence. Those who have suffered from usurious practices must be reconciled by restitution.<sup>37</sup> “Restitution”, again, was dealt with in the Thomistic tradition under question 62 of the “Second part of the second part” (“*Secunda secundae*”) of the *Summa* – that is to say, within the part dealing with justice in commutative, inter-individual relations.<sup>38</sup>

The Spanish Dominicans followed Aquinas, dealing with the relations of property and contract that underlay the emerging economic system under the title of *ius gentium*. But whereas Aquinas had dealt with *ius gentium* in two places of his *Summa*, in the “Treatise on Law” in *Prima Secundae* and as part of the “Treatise on Virtues” of *Secunda Secundae*, canvassing both external and internal causes of eternal happiness, Vitoria did not even mention *ius gentium* in his commentary to the Treatise on Law. *All* of it was confined in the context of the virtue of justice more specifically of commutative justice, covering the horizontal relations of

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<sup>36</sup> Thomas Duve, ‘La teoría de la restitución en Domingo de Soto: Su significación para la historia del derecho privado moderno’, in Juan Cruz Cruz, *La ley natural como fundamento moral y jurídico en Domingo de Soto* (Pamplona, Eunsa, 2007), 190, 187-190.

<sup>37</sup> Soto, In quartum Sententiarum, Tomus Primus, De sacramentum poenitentiae. Salamantiae 1570, quoted in Dionisio Borobio García, *El sacramento de la penitencia en la Escuela de Salamanca (Publicaciones Universidad Pontificia de Salamanca 2006)*, 109 See also 127-128. 188-192, 235.

<sup>38</sup> See especially the hugely relevant Francisco de Vitoria, *Comentarios a la Secunda secundae de Santo Tomás [ComST II-II]*, (Edition preparada por Vicente Beltrán de Heredia (Salamanca, 1934/1952), Topmo III: De justitia (qq. 57-66), Q. 62 (especially p. 60-110, “Utrum restitutio sit actus justitiae commutativae”)

humans with each other.<sup>39</sup> There it operated as an instrument for applying the abstract principles of natural law in concrete – though universal – human circumstances. <sup>40</sup> *Ius gentium* lay out the universal principles of commutative justice and did this largely through the concept of *dominium*.

Under natural law, provided at creation, humans were free and enjoyed *dominium* in common. But now they lived as subjects of states in civil societies based on private ownership. It thus had to be the case that “dominion and supremacy (*praelatio*) were introduced by human law, not natural law”.<sup>41</sup> But how could human law deviate from a natural law that had its origin in God? Because freedom and common ownership were not based on a binding prescription (*praescriptio*), Vitoria and Soto responded, only a recommendation, (*concessio*). Natural law did not positively prohibit the *divisio rerum*.<sup>42</sup> It was precisely because humans enjoyed *dominium* also over their actions – because they had been created free – that they could set up institutions such as private property not originally provided by natural law. Because this had taken place everywhere it could not have been based on the civil law of this or that state. It had to have been undertaken by *ius gentium*.<sup>43</sup>

Vitoria’s discussion of the law and ethics of commerce was very respectful of the practices of the time.<sup>44</sup> Like Aquinas, he approved of commercial activities only if they were valuable for the community.<sup>45</sup> Profit-making for private gain was a

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<sup>39</sup> “...objectum iustitiae dicit ordinem ad alios”, Vitoria, ComST II-II, Q 57 A 1 § 4 (2).

<sup>40</sup> Vitoria’s views on the nature of *jus gentium* were obscure and varied from place to place. At one point he is even recorded as saying that whether we should regard it as natural or human law is only a terminological question. Vitoria, ComST II-II Q 57 2 (13).

<sup>41</sup> Vitoria, ‘On the American Indians’, in *Political Writings* (A Pagden & J Lawrance eds. Cambridge University Press 1991), Q 2 A 1 (254).

<sup>42</sup> Vitoria, ComST II-II, Q 62 A 1 n 20 (77). This technique had already been used by the canonists and through Vitoria and Suárez, it continued to be put forward by such enlightenment thinkers as Wolff and Achenwall. See Brian Tierney, ‘Permissive Natural Law and Property: Gratian to Kant’, *62 Journal of the History of Ideas* (2001), 381-399.

<sup>43</sup> Vitoria, ComST II-II, Q 62 A 1 n 23 (79).

<sup>44</sup> Here he followed the Parisian nominalists and the greatest Dominican of the preceding period, Tommaso de Vio, Cardinal Cajetan. See José Barrientos Garcia, *Un siglo de moral económica en Salamanca (1526-1629). Francisco de Vitoria y Domingo de Soto* (Salamanca, Ediciones de Universidad de Salamanca 1985), 31-36.

<sup>45</sup> Daniel Deckers, *Gerechtigkeit und recht. Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria* (Freiburg, Universitätsverlag, 1991), 258-263. Vitoria, ComST II-II, Q 77 A 1 § 2 (117-118).

mortal sin because it distorted the relations of equality that commutative justice aimed to maintain. When you buy something you do not need only to sell it at a profit, you injure both the original owner and the person to whom you sold it: one received less and the other paid more than if they had dealt with each other directly.<sup>46</sup> But it was possible to buy cheap and sell dear if one introduced a *change* in the object, for example by selling it at another time or another place from where one had bought it.<sup>47</sup> After all, trade was a providential means to make products available in places or at times when they would not otherwise exist. For such a service, the merchant was entitled to a fee.<sup>48</sup> Moreover, Vitoria accepted that sometimes it was possible in mercantile activities to engage in actions that would be wrongful for private individuals. Imagine a seaborne merchant who has arrived in a port and begins to sell the wheat he has brought. He knows that more ships are under way and that the price of wheat will soon fall. Does he have the duty to disclose what he knows? For the merchant, unlike for an ordinary individual, keeping silent in such a situation would not be a sin. Vitoria was of course adamant that merchants should never engage in fraud or coercion, or remain silent of defects they know are in the product. But he accepted that special rules could apply to their behaviour in commercial relations that would not be acceptable in ordinary exchanges between individuals.<sup>49</sup>

The systemic view reappears also in the Spaniards' view of the just price. They accepted that the goods on the market had no essential or natural value and that the just price was relative to how a thing is valued in the market ("*ex communi hominum aestimatione vel condicto*").<sup>50</sup> That "common estimation" was a function of many things, including the product's relative abundance or scarcity, in other words, supply and demand, at least in situations where there were lots of buyers

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<sup>46</sup> "Dicunt ergo omnes doctores supra allegati quod tales peccant mortaliter". Vitoria, ComST II-II Q 77 A 4 § 4 (149).

<sup>47</sup> See Vitoria, ComST II-II Q 77 A 4 (145-146) and Barrientos Garcia, *Un siglo de moral economica*, 66-71.

<sup>48</sup> See further, Horacio Rodriguez Penelos, 'Contribución de Domingo de Soto a la gestación del pensamiento económico hispanoamericano', in Juan Cruz Cruz, *La ley natural como fundamento moral y jurídico en Domingo de Soto* (Pamplona, Eunsa, 2007), 230-231..

<sup>49</sup> Barrientos Garcia, *Un siglo de moral economica*, *supra*, 65-66.

<sup>50</sup> Vitoria, ComST II-II, Q 77 A 1 § 2 (117-118). Deckers, *Gerechtigkeit*, 247-8.

or sellers. If there were so few of them so that a common price could not be identified, then Vitoria had recourse to the figure of the “wise man”. What would he pay for the thing? But as for products that later analysts would call “luxury”, their price could be freely agreed for “*volenti non fit injuria*”.<sup>51</sup> A regular exchange contract was lawful if it involved no fraud or deception, it was carried out voluntarily (and not through coercion), involved no monopolistic price-juggling and if there was a “legal price”, it had been followed.<sup>52</sup>

The universal liberty of trade in private property was not based on God’s grace – that is to say, it was not a privilege of Christians – but on utility. It was therefore applicable all over the world. It would, for example, provide the basis on which Catholic merchants from Spain could engage in mutually profitable transactions with Islamic or Jewish traders, travel to Protestant markets in Germany and the Netherlands and to exchange goods with the inhabitants of the New World. Since the beginning of times, “everyone was allowed to visit and travel through any land he wished [and t]his right was clearly not taken away by the division of property (*divisio rerum*)”.<sup>53</sup> It also followed that all nations were to show hospitality to strangers and everybody had the right to “all things that were not prohibited or others to the harm or detriment of others”.<sup>54</sup>

A special point of concern related to the novel forms of banking and credit. In order for the merchants to be able to make international payments rapidly and flexibly, the number of *cambistas* and bankers at trade fairs had increased so that the fairs “gradually became clearing-houses for the whole of Western Europe”.<sup>55</sup> A key instrument was the letter of exchange issued at one fair to be cashed at another a few months later. These letters could also be used as instruments for making payments to third parties that would ultimately be guaranteed by the banks and other professional credit providers with whom the original letter had

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<sup>51</sup> Vitoria, ComST II-II Q 77 A 4 (120) and Barriento Garcia, *Un siglo de moral economica*, 47-48.

<sup>52</sup> See also Ricardo F. Crespo, ‘La posibilidad y justicia del intercambio: De Aristoteles a Marx, pasando por Tomás de Aquino y Francisco de Vitoria’, in Juan Cruz Cruz (ed), *Ley y Dominio en Francisco de Vitoria* (Pamplona Eunsa 2008), 273-275.

<sup>53</sup> Vitoria, ‘On the American Indians’, *Political Writings*, Q 3 A 1 § 2 (278).

<sup>54</sup> Id.

<sup>55</sup> Grice-Hutchinson, *School of Salamanca*, 11.

been signed and issued.<sup>56</sup> The Salamancans' treatment of the matter opened with a restatement of the traditional position: interest-taking was prohibited because money was "sterile".<sup>57</sup> But they began to make qualifications so that they finally ended up positively endorsing the operations of professional bankers and *cambistas*.<sup>58</sup> Providing a loan or exchanging money would not in itself be either good or bad. It was morally dangerous as it involved the sin of avarice and therefore it was discouraged (though not completely prohibited) in exchanges between individuals.<sup>59</sup> But professional bankers and *cambistas* were providing a useful service. After all, travelling long distances with loads of money was hazardous business. It was much better to carry a paper note against which the banker in the destination would pay the respective amount. For all this, the professional actors were entitled to a fee in the form of profit (assessed by Vitoria's colleague, the canon lawyer Martin Azpilcueta as somewhere between 5 and 12 per cent).

Further steps towards a "systemic" view of money and economic exchanges were taken in Tomas de Mercado's (1525-1575) *Suma de Tratos y contratos* (1553). *Cambistas*, Mercado suggested, were part of a universal network of economic operations.<sup>60</sup> Demand and supply were now being organised at an international scale by bankers in Italy, Germany, Flanders and England so that as a result, princes began to become even theoretically unable to control price-levels in their territories. The value of the different types of paper-money in circulation was being determined by the bankers and merchants as well as by the credit policies of international banks. As these same institutions also lent the funds needed by the princes to carry out their incessant wars, the latter were often compelled to

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<sup>56</sup> See e.g. Antonio García García & Bernardo Alonso Rodríguez, *El pensamiento económico y el mundo del derecho*, in Gómez Camacho & Robledo, *El pensamiento económico*, *supra*, 81-90.

<sup>57</sup> Vitoria, ComST II-II, Q 78 A 1 § 1, 3 (153-154, 155).

<sup>58</sup> Vitoria, ComST II-II, Q 78 A 2 § 61-75 (223-235). The *cambista* provides a service that is useful for the community and for which it is lawful to require a benefit. However, unlike his Dominican predecessor Cardinal Cajetan, Vitoria extends this right beyond professional bankers to the transactions that merchants do on a permanent basis and that have the objective of facilitating long-distance trade (but not between nearby cities), *id.* § 66, 69 (227-228, 229),

<sup>59</sup> See e.g. Vitoria, Com ST II-II, Q 78 A 2 (223-224) and *Dictamen de cambiis*, discussed in Barrientos García, *Un siglo de moral económica*, *supra* note, 117-118.

<sup>60</sup> Tomas de Mercado, *Suma de tratos y contratos* (edición preparada por Restitución Sierra Bravo, Madrid, Editoria nacional 1975), 313-318. L. Baeck, 'Monetarism y teorías del desarrollo en la península Iberica en los siglos dieciséis y diecisiete', in Gomez Camacho y Robledo, *El pensamiento económico*, *supra* 176.



direct domestic revenues as payments for their debts, thus binding their hands in regard to domestic policy. This would remain a continuous problem. At a late point in his regime Philip II was compelled to pay two-thirds of his income as interest for his debts.<sup>61</sup>

The enforcement of this system took place through just war. As is well-known, in his *relectiones theologicae* on the Indian question Vitoria rejected the humanist view that war might be permissible for reasons of glory or expansion or preemptively, so as to prevent a nation from becoming too powerful. The only just cause of war was to avenge injury (*iniuria*), and injury was a violation of the relationship of commutative justice that had not been subject to orderly restitution.<sup>62</sup> This meant that war became the ultimate ratio if the rights of property or sovereignty had been violated. Vitoria and the Dominicans did not, of course, think that war should be lightly waged. The breach had to be serious and any violent action had to be preceded by a claim of restitution. Nevertheless, as is well-known, Vitoria included in his just causes for war the enforcement of the right to travel and trade with the Indians.<sup>63</sup>

In his massive *De legibus* (1613), the Jesuit Suárez argued that although private property had been set up by humans for their own utility, breaches of it were subject to punishment under natural law.<sup>64</sup> This also applied to international trade. Although trade was an institution of positive *ius gentium*, once it had been created, it became subject to protection by the right of just war. He compared it with diplomacy: although diplomacy, too, emerged from human arrangements, those arrangements were protected by natural law. As he wrote:

“...it has been established by the *ius gentium* that commercial intercourse shall be free, and it would be a violation of that system

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<sup>61</sup> M.N. Pearson, ‘Merchants and States’, in James D. Tracy (ed), *The Political Economy of Merchant Empires* (Cambridge University Press 1991), 80 and Thomas A Brady. ‘The Rise of Merchant Empires. 1400-1700: A European Counterpoint’, in *ibid*, 145-146.

<sup>62</sup> See especially Vitoria, ‘On the Law of War’, in *Political Writings*, Q 1 A 3 § 13-14 (303-304).

<sup>63</sup> Vitoria, ‘On the American Indians’, in *Political Writings*, Q 3 A 1 § 2 (278).

<sup>64</sup> Suárez, *On Laws and God the Lawgiver*, in *Selections from Three Works* (Vol II – Translation G Williams transl. Oxford University Press 1944), Bk II, Ch XIV § 13 and 16-17 (275-277, 278-279)

of law if such intercourse were prohibited without reasonable cause".<sup>65</sup>

Like diplomacy, in other words, international commerce is a "system" and like a violation of the former, a violation of the latter undermines the natural purposes for which that system has been set up. To disrupt commerce is like violating diplomatic relations, and thus punishable by (just) war.<sup>66</sup>

## V

Grotius's understanding of natural law as subjective rights followed the late scholastics in taking the turn from the search for a just order to guaranteeing the pursuit of their liberty by everyone. From now on, the work of "strict law" would operate through enabling private individuals to look after their rights in accordance with their inclinations; the State would be called upon to see to it that they would do this in an orderly fashion.<sup>67</sup> By contrast, the imperfect (social) rights remain confined in the court of conscience only, so that "...if a Man owes another any Thing, not in strictness of Justice but by some other Virtue, suppose Liberality, Gratitude, Compassion, or Charity, he cannot be sued in any Court of Judicature, neither can War be made upon him on that Account".<sup>68</sup> Princes may resort to violence only in defence of their sovereign rights or the private rights of their subjects. But they may not impose their public moralities on each other.

*De jure belli ac pacis* is precisely an account of all the perfect rights that individuals have and whose violation constitutes a just cause of war.<sup>69</sup> However, if every violation of subjective right is a potential *casus belli*, then the world is a

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<sup>65</sup> Suárez, *On Law and God the Lawgiver*, Bk II, Ch XIX § 7 (347).

<sup>66</sup> Suárez, *On Law and God the Lawgiver*, Bk II Ch XIX, § 7 (347) and on the relevant grounds of just (aggressive) war in the case of "denial, without reasonable cause, of the common rights of nations, such as the right of transit over highways, trading in common &cet.", in 'On The Three Theological Virtues: On Charity', Disp XIII: On War, Sect IV § 3 (817) as well as Josef Soder, *Francisco Suárez und das Völkerrecht. Grundgedanken zu Staat, Recht und internationale Beziehungen* (Frankfurt, Metzner, 1973), 261.

<sup>67</sup> See Tuck, *Natural Rights Theories*, 66-77.

<sup>68</sup> Grotius, *The Rights of War and Peace*, Bk II, Ch XXII, § XVI (1112).

<sup>69</sup> See e.g. Grotius, *The Rights of War and Peace*, Bk III, Ch I § II (1186).

dangerous place indeed.<sup>70</sup> In *De jure praedae*, Grotius was able to justify the VOC's aggressive policy on the ground of its natural right of self-preservation, now described as a just cause. In *De jure belli ac pacis*, that argument was generalised into a system of just war by conceptualising the international society (or indeed any society) in terms of the a horizontal system of subjective rights to which corresponded a duty on everyone not to cause "injury" to them.<sup>71</sup> The largest part of Book II of *De jure belli ac pacis* was then devoted to the elucidation precisely of what rights we have – or in other words, what the just causes of war might be. That the work has been seen as general treatise on natural law follows from the extraordinary exhaustiveness whereby he undertook this task.<sup>72</sup>

In Michel Villey's critical assessment, the system of subjective rights presented by Grotius was "perfectly suited for maintaining the security of established possessions, the security of transactions, the tranquillity necessary for economic development [and ] the limitation of violence...".<sup>73</sup> This was surely no coincidence. At the time *De jure belli ac pacis* was published (1625) the United Provinces had become unquestioned leader in world trade. The "Dutch miracle" had begun thirty years earlier as Spanish military pressure on the Dutch had been lifted. Although the Dutch monopoly over Baltic grain trade had continued virtually unchanged during the long years of the rebellion, it had been only with the turn to "rich trades" – spices from the East Indies – and the rapid development of processing industries at home that had accounted for the "miracle".<sup>74</sup> By the time Grotius had reached maturity, Amsterdam had become a world reservoir of commodities from all over the world. Most long-distance trade took place through Dutch middlemen, was stored, processed and brokered

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<sup>70</sup> As Richard Tuck has observed, Grotius endorsed "the most far-reaching set of right to make war which were available in the contemporary repertoire", *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (Oxford University Press 1999), 108.

<sup>71</sup> See, again, Haggenmacher, 'Droits subjectifs', 98-99.

<sup>72</sup> "Ces développements de théorie juridique generale sont en fait si fouillés et semblent être tellement faits pour eux-mêmes qu'on oublierait par moments – s'il n'y avait des rappels périodiques en ce sens – qu'ils doivent servir en fin de compte à déterminer des causes de guerre possibles", Haggenmacher, 'Droits subjectifs', 99.

<sup>73</sup> Villey, *Formation*, 557, 552-558.

<sup>74</sup> See Jonathan Israel, *The United Provinces. Its Rise, Greatness and Fall 1477-1806* (Oxford University Press 1995), 307-327.

in Amsterdam and delivered in Dutch vessels from their place of production to their final destinations.<sup>75</sup> The level of financial and insurance service available in the Dutch republic had no competition; the Dutch were light-years ahead in terms of the technical level of their trading system.

The miracle drew much of its force from the way public interest in the United Provinces was intertwined with the interests of the merchant classes and the growth of commerce.<sup>76</sup> Nothing illustrated this better than the establishment of the East India Company (VOC) in 1601-2 as “essentially the work of the Dutch State”.<sup>77</sup> Its coming into being was coordinated and even forced by the Estates of Holland and Zeeland at the request of the merchant elites that had been frantically competing on control of the spice trade.<sup>78</sup>

“The unique federal structure of the Dutch state, and powerful influence of civil autonomy within the republic, made it possible to devise a totally new form of commercial organization, a chartered, joint-stock monopoly, strongly backed by the state which was, at the same time, federated in chambers which kept their capital, and commercial operations separate from each other, while observing general guidelines, and policies, set by a federal board of directors”.<sup>79</sup>

The Company received its charter in March 1602 from the Estates General which also authorized it “to maintain troops and garrisons, fit out warships, impose governors upon Asian populations, and conduct diplomacy with Eastern potentates, as well as sign treaties and make alliances”.<sup>80</sup> The company became a hybrid with full juridical personality as a private law operation exercising *dominium* and a public law entity with jurisdiction in the colonies.<sup>81</sup> In due course, large areas of Indonesia, Java and Ceylon came to be administered as *gouvernementen* by the VOC with company officials bearing the title of

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<sup>75</sup> See Jonathan Israel, *Dutch Primacy in World Trade 1585-1740* (Clarendon Press, Oxford 1989), 73, 38-79.

<sup>76</sup> “[T]he regents”, Israel writes “were the wealthiest group in towns of the north Netherlands”, *United Provinces*, 344.

<sup>77</sup> Jonathan Israel, *Dutch Primacy in World Trade 1585-1740* (Oxford, Clarendon Press 1989), 72.

<sup>78</sup> The best contemporary overview of the nature of the VOC and the role of Grotius therein is of course Ittersum, *Profit and Principle*, especially xlv-lxi

<sup>79</sup> Israel, *United Provinces*, 321.

<sup>80</sup> Israel, *United Provinces*, 322.

<sup>81</sup> See further Eric Wilson, *Savage Republic, De Indis of Hugo Grotius, Republicanism and Dutch Hegemony within the Early Modern World-System (c. 1600-1619)* (Leiden, Brill 2008), 222-234.

“governors”.<sup>82</sup> The Company did not gain this status for nothing but was in exchange “expected to launch a lightning military and naval campaign against the archenemy, the King of Spain and Portugal”.<sup>83</sup> Grotius himself duly expressed this by arguing in *De jure praedae* not only that the company was waging a “just private war” but also that its acts amounted to “just public war” as its operations could be attributed to it as an agent of the United Provinces.<sup>84</sup>

The VOC format of public-private partnership was unprecedented but immediately imitated by the English East India Company as well as practically all the subsequent companies from Italy, France, Portugal, Denmark and Brandenburg-Prussia.<sup>85</sup> The form possessed many advantages of which the most important was that the costs of protection and negotiation could be now internalised within the commercial operations themselves. Use of force would be subordinated to the economic rationale while sovereign pleasure or “glory” would become inappropriate as motivations for expansion. Territorial duties would also remain functionally measured in view of the needs of trading and resource extraction. In most cases it would be sufficient for the Company to occupy key trading posts and set up entrepôts and factories and to agree with indigenous rulers for the provision of labour and merchandise. Arrighi summarizes the competitive edge of the Dutch operations in comparison to the Spanish and Portuguese as follows: the ‘Iberian enterprise’ ‘was missing . . . an obsession with profit and “economizing,” rather than with crusade; a systematic avoidance of military involvements and territorial acquisition that had no direct or indirect justification in the “maximization of profit”’.<sup>86</sup>

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<sup>82</sup> Markus P.M. Vink, ‘Between Profit and Power’: The Dutch east India Company and Institutional Early Modernities in the “Age of Mercantilism”, in Charles H. Parker & Jerry H. Bentley, *Between the Middle Ages and Modernity. Individual and Community in the Early Modern World* (Lanham, Rowman & Littlefield 2007), 295.

<sup>83</sup> Ittersum, *Profit and Principle*, lii.

<sup>84</sup> Or as Grotius puts it, “a mandate to wage war was entrusted both to the Admiral and to his captains...just as truly as if they had been in command of an army on land”. *Commentary on the Law of Prize and Booty*, Ch XIII (428).

<sup>85</sup> See Wilson, *Savage Republic*, 216-217; Erik Thomson, ‘The Dutch Miracle. Modified. Hugo Grotius’ *Mare liberum*, Commercial Governance and Imperial War in the Early-Seventeenth Century’, 30 *Grotiana* (2009), 107-130.

<sup>86</sup> Arrighi, *The Long Twentieth-Century*, 158.

To provide for flexible interaction of the economic rationale with the *raison d'état* Grotius avoided fixing the relations between the two in a definite way. It was sometimes useful to stress private initiative, sometimes public law and sovereign power. Even as the original argument for Dutch penetration in the East Indies had been made in terms freedom of trade and liberty of the seas, once the Company had established itself, it began immediately to favour a monopoly. Forced treaties, passes and protection rights were claimed to passage in areas taken over from the Portuguese in imitation of the latter.<sup>87</sup> In Chapter XIII of *De jure praedae* (that was not printed as part of *Mare liberum*) Grotius argued that although the sea could not be occupied, the Dutch, or indeed any country, could exercise a “right of jurisdiction and protection” over it. This was all the VOC really needed – to conclude agreements for distributing jurisdictional control and enforcement rights with other powers.<sup>88</sup> As Grotius put it, it was anyway “more easy to take Possession of Jurisdiction only, over some Part of the Sea, without any Right of Property”.<sup>89</sup> It was soon clear for everyone that the Dutch were not at all pursuing a principled argument for the freedom of the seas. Their negotiations with Britain in 1613 and 1615, for example, were not about free navigation but about the division of the seas between the leading maritime powers.<sup>90</sup> The Dutch arguments were always *both* about the freedom of private merchants and the rights of maritime states. They had an “unusual ability to wage war,”<sup>91</sup> so that it was only natural that their expansion would rely more on violence than trade. “Competition was primarily ‘extra-economic’, involving piracy and retaliation, diplomacy and alliances, trade embargoes, and outright armed struggle against rival merchants and towns”.<sup>92</sup>

In these respects, the Dutch policy did not differ significantly from that of other European powers in the 17<sup>th</sup> century. All of them advocated free trade and free

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<sup>87</sup> Vink, ‘Between Profit and Power’, 294-295.

<sup>88</sup> Grotius, *Commentary on the Law of Prize and Booty*, Ch XIII (339, 329) and Lauren Benton, *A Search for Sovereignty. Law and Geography in European Empires* (Cambridge University Press 2010), 120-137.

<sup>89</sup> Grotius, *The Rights of War and Peace*, Bk II Ch III § XIII.1 (466).

<sup>90</sup> Benno Teschke, *The Myth of 1648. Class, Geopolitics and the Making of Modern International Relations* (London, Verso 2003), 201.

<sup>91</sup> Jan Glete, *War and the State in Early modern Europe. Spain, the Dutch Republic and Sweden as Fiscal-Military States, 1500-1660* (London, Routledge 2002) 143.

<sup>92</sup> C.J. Katz, *From Feudalism to Capitalism* (New York 1989) quoted in Teschke, *Myth of 1648*, 202.

passage as long as they were ascending; once established, their political interest was in monopoly.<sup>93</sup> For the Dutch as well as those other powers, economic progress was inextricable from State-building and it would be hard (and perhaps pointless) to identify one part of the project as conceptually or ideologically prior to the other. Trade served statehood, and statehood served the interests of private traders. This was the very engine on which Europe's ascent to world dominance at this time was based.

## VI

World-system analysts disagree about when one should date the beginning of "capitalism", the main rift being between Braudel's suggestion of the 13<sup>th</sup>, Wallerstein's 16<sup>th</sup> and Teschke's proposal of 18<sup>th</sup> to 19<sup>th</sup> centuries.<sup>94</sup> As we have seen, the basic legal elements of property and contract that we usually link with "capitalism" were already present in the Spanish scholastics. Grotius and his followers detached them from what was left of the Aristotelian framework and reinstated them in the language of the legal form. It is unnecessary to decide here whether the origin of "capitalism" lay in "primitive accumulation" that Marx and Wallerstein linked with the expansion of commerce in the 16<sup>th</sup> century or only in the consolidation of a new type of productive relations that emerged as a consequence of changes in agriculture, as suggested by McNally and Teschke.<sup>95</sup> Awareness of changes in patterns of economic activity is sufficient for understanding the need of legal innovation during early modernity. But the emphasis on conceptions of liberty and subjective rights could and would lead in many different directions. As Braudel observes, "there was not one capitalism

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<sup>93</sup> See also Andrea Weindl, 'Grotius' Mare liberum in the Political Practice of Early-Modern Europe', 30 *Grotiana* (2009), 138-147.

<sup>94</sup> For the discussion, see Fernand Braudel, *Civilization and Capitalism 15<sup>th</sup>-18<sup>th</sup> Century. Vol II: The Wheels of Commerce* (University of California Press (1992), 231 *et seq*); Immanuel Wallerstein *The Modern World-System I: Capitalist Agriculture and the origins of the European World-Economy in the Sixteenth Century. With a New Prologue* (University of California Press 2011); Teschke, *The Myth of 1648*, 129-146.

<sup>95</sup> See David McNally, *Political Economy and the Rise of Capitalism. A Reinterpretation* (University of California Press 1990); Teschke, *The Myth of 1648*, 139-146.

but several European capitalisms, each with its zone and its circuits".<sup>96</sup> The Spanish and Dutch, and later French and English political and economic worlds all had their historical particularities that were reflected in the different ways in which the relations between individuals and statehood, between political and economic aspects of modernity would organise themselves.

The Dutch contribution to this modernity consisted of an extremely close connection between the merchant elite and the State. The result was a governmental organization, the United Provinces, that "fused the advantages of capitalism and territorialism" far more efficiently than any of its rivals.<sup>97</sup> And so there was no contradiction when Grotius inserted in *De jure belli ac pacis*, alongside a theory of subjective rights, an authoritarian theory of statehood, one that made Jean-Jacques Rousseau famously attack Grotius as offering a system in which right was derived from fact so that "it [was] possible to imagine a more logical method but not one more favourable to tyrants".<sup>98</sup> States, in Grotius, emerged from the fact of human sociability.<sup>99</sup> Nature led humans to contract, including in order to establish a political communities. But although the *foundation* of civil community lay in nature, natural rights had no real role to play inside it. Once the contract was made, the life of the community was determined by sovereign power.<sup>100</sup>

"For those who had incorporated themselves into any Society, or subjected themselves to any one Man, or Number of Men, had either expressly, or from the Nature of the Thing must be understood to have tacitly promised, that they would submit to whatever either the greater part of the Society, or those on whom the Sovereign Power had been conferred, had ordained".<sup>101</sup>

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<sup>96</sup> Fernand Braudel, 'European Expansion and Capitalism: 1450-1650', in *Chapters I Western Civilization* (New York, Columbia University Press 1961), , 286, quoted in Wallerstein, *The Modern World-System I*, 77.

<sup>97</sup> Arrighi, *The Long Twentieth Century*, 139.

<sup>98</sup> Jean-Jacques Rousseau, *The Social Contract* (M Cranston ed, Harmondsworth, Penguin 1968), 51.

<sup>99</sup> Grotius, *Rights of War and Peace*, Preliminary Discourse XVII (93)

<sup>100</sup> See especially Annabel Brett, , 'Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius', 45 *The Historical Journal* (2002), 39-44.

<sup>101</sup> Grotius, *Rights of War and Peace*, Preliminary Discourse XVI (93)



Natural rights legitimized the sovereign and, through the *pacta sunt servanda*, provided it with unlimited legislative powers.<sup>102</sup> But then their normative power was exhausted. Although Grotius accepted something like “state sovereignty”, most of the long discussion of the matter in *De jure belli ac pacis* attacked the view that the “people” itself might in any way be thought of as the “proper” holder of sovereignty.<sup>103</sup> And then there was Grotius’ almost total rejection of the right of resistance: “for if that promiscuous Right of Resistance should be allowed, there would be *no longer a State* but a Multitude without Union such as the *Cyclops were, every one gives Law to his Wife and Children*”.<sup>104</sup> Resistance was legitimate only in case of “extreme and inevitable”, that is to say mortal, danger.<sup>105</sup> Otherwise, subjects should either obey or emigrate.

That *De jure belli ac pacis* contained *both* a theory of an authoritarian State and an of almost unlimited private rights involved no contradiction. Sovereigns were needed precisely to protect rights in a period of religious dissidence. In Holland, too, at the turn of the 17<sup>th</sup> century, “rebellions were a recurring feature of urban life”.<sup>106</sup> Commerce and economic progress need security and predictability.

“[T]he development of strong states in the core area of the European world was an essential component in the development of modern capitalism...The main objective of the monarchs was the restoration of order, a prerequisite to economic resurgence”.<sup>107</sup>

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<sup>102</sup> For commentary, see Brett, ‘Natural Right and Civil Community’, 42-43. Likewise, Pauline Westerman, *The Disintegration of Natural Law Theory. Aquinas to Finnis* (Leiden, Brill 1998), 158-161.

<sup>103</sup> Grotius, *The Rights of War and Peace*, Bk I Ch III § VIII-XXIV (260-335). The fact that Grotius labels the state the “common” subject of sovereignty does not mean that he would adopt the modern notion of “State sovereignty”. Indeed, as Haggemacher observes, the “common subject” of sovereignty enjoys only a fleeting, ghostly existence and there is no sense that states would be “independent” or “equal”; sovereignty could exist even when a state was a protectorate to another state. *Grotius et la doctrine de la guerre just*, (Paris, PUF 1984), 539-547.

<sup>104</sup> Grotius, *The Rights of War and Peace*, Bk I Ch IV § I (338). See further *id.* Bk II Ch XXII § XI (1105-6).

<sup>105</sup> Grotius, *The Rights of War and Peace*, Bk I Ch IV § VII (360).

<sup>106</sup> Henrik van Nierop, ‘Corporate Identity and the Revolt in the Towns of Holland’, in Charles H. Parker & Jerry H. Bentley, *Between the Middle Ages and Modernity. Individual and Community in the Early Modern World* (Plymouth, Rowman & Littlefield 2007), 57.

<sup>107</sup> Wallerstein, *The Modern World-System*, I 134.

A well-functioning economic system required a loyal bureaucracy, a strong military and a theory of powerful kingship.<sup>108</sup> And it needed a well-operating legal system that would guarantee the security of private property and the speedy and reliable handling of commercial disputes.<sup>109</sup> Contemporaries were not slow to notice that these conditions were present extraordinarily well in the United Provinces. An influential English analyst, for example, listed in 1660 among the causes of Dutch wealth, alongside the practical experience of their merchants and their technologies of commerce and shipping, the “lowness of their customs”, their “use of banks” and “toleration of different opinions”.

“Their law-merchant, by which all controversies between merchants and tradesmen are decided in three or four days time, and that not at the fortieth part, I might say in many cases not the hundredth part, of the charge they are with us... [and] The law that is in use among them for transferring of bills for debt from one man to another: this is of extraordinary advantage to them in their commerce...Their keeping up of public registers of all lands and houses...[as well as]...the lowness of interest of money”.<sup>110</sup>

Writing of the emergence of Dutch world hegemony, Wallerstein observes that a new system of public-private relations was being formed in which:

“...economic decisions are oriented primarily to the area of the world-economy, while political decisions are oriented primarily to the smaller structures that have legal control, the states (nation-states, city-states, empires) within the world-economy”.<sup>111</sup>

The world to which Grotius gave legal articulation was neither one of *raison d'état*, war and statehood, nor of individual rights, property and a world-wide system of commercial exchanges. It was *both*. The two sides – sovereignty and

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<sup>108</sup> Wallerstein, *The Modern World-System*, I 136-157.

<sup>109</sup> See Douglass C. North & Robert Paul Thomas, *The Rise of the Western World. A New Economic History* (Cambridge University Press, 1973) whose account concentrates on how the Dutch economy and legal system minimized transaction costs, especially those relating to the locating of buyers and sellers (a well-functioning market), speedy carrying out of exchanges and efficient enforcement of contracts, 132-145.

<sup>110</sup> Josiah Child, *A New Discourse of Trade* (Glasgow, Foulis 1751 [reprint 2011]) 4-5. The main point of the book was an appeal for the abatement of interest-rates as the principal cause of economic success.

<sup>111</sup> Wallerstein, *The Modern World-System* I, 67.

the market – operated in close connection, reacting to changes in each other so that the operation of the whole began to be understood as a “system”.

It was to express these systemic relations that in most 17<sup>th</sup> century European chancelleries a new way to speak of statecraft emerged – “mercantilism”. It is well-known today that there was never one single policy under that name and that the very label of “mercantilism” was invented by later critics, such as the Marquise de Mirabeau and Adam Smith. Contrary to received wisdom, the most useful way to understand that 17<sup>th</sup> and early 18<sup>th</sup> century vocabulary is not as an economic theory but, with Larrère, as part of the theory of the modern State. Moreover, as she also notes, “[t]he domain of rationality of mercantilism is the same as that of natural law” – though without an initial assumption of human sociability.<sup>112</sup> The new vocabulary, in other words, took over from natural law the idea of a sphere of necessary social relations whose mastery would be an intrinsic part of successful statecraft. It thus came to support a political doctrine of “economic Machiavellism” that sought to provide for the strength and security of the State by seeing to an optimally effective system of domestic exchanges in an international world dominated by an intensely competitive zero-sum struggle over resources.<sup>113</sup> This allowed for a wide range of domestic policies united only by a frantic search for autarchy and conceiving of international commercial relations as a kind of war by other means.<sup>114</sup> For example, it was natural that the economic policies by France and England, though both aspects of the “jealousy of trade”, would diverge widely in response to their specific historical, geographical and above all political and constitutional experiences.<sup>115</sup>

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<sup>112</sup> Catherine Larrère, *Invention de l'économie au XVIII<sup>e</sup> siècle. Du droit naturel au physiocratisme* (Paris, PUF 1992), 96, 97. A useful summary of five aspects of economic thinking usually associated with “mercantilism” is in Lars Magnusson, *Mercantilism. The Shaping of an Economic Language* (London, Routledge 1994), stressing 1) emergence of an express debate on wealth-creation and distribution; 2) use of “Baconian” scientific language; 3) a behaviouralist interpretation of society, 4) the view of economy as a “system” and 5) focus on the interplay of supply and demand, 11-12.

<sup>113</sup> Magnusson, *Mercantilism*. 96.

<sup>114</sup> Larrère, *Invention de l'économie au XVIII<sup>e</sup> siècle*, 95-134.

<sup>115</sup> Economic statecraft in the world of emerging nation-states is the theme of the essays in the very useful Istvan Hont, *Jealousy of Trade. International Competition and the Nation-State in Historical Perspective* (Harvard University Press 2006).

Nevertheless, despite the differences, “[a]ll variants of mercantilism had one thing in common: they were more or less conscious attempts on the part of territorial rulers to imitate the Dutch...”.<sup>116</sup> I have above already cited one admiring commentator, Josiah Child (1630-1699), who later became a shareholder and director of the English East India Company (EIC). Child himself was adamant that in the competition between States, trade was as important an instrument as war and that for England to avoid remaining a second-rate power, dependent on the continent, it was crucial that the Dutch trade monopoly in the Indies be broken, by war if necessary, as Child’s colleague Charles Davenant argued.<sup>117</sup> The end of the 17<sup>th</sup> century saw two colonial wars between England and the United Provinces but the English victory could not have been attained only with arms and without the success of the EIC in procuring resources that would fuel the country’s way to industrialism and political hegemony.<sup>118</sup> The economic and legal model of the EIC as a joint stock company chartered by the Crown had been received from its Dutch counterpart. Since 1657 it was set up on a permanent basis and in the course of its tumultuous history manifested many of the specific features of English commercial enterprise, including minimal participation by public interests (its operation was directed by shareholder-appointed executives and not, like in the case of the VOC, provincial councils) – until its over-ambitious schemes as a territorial power in India two centuries later finally necessitated its take-over by the Crown.<sup>119</sup>

*De jure belli ac pacis* was not only fully compatible with the kind of commercial statecraft exemplified by the VOC and the EIC but provided an elaborate ideological grounding for it. It offered a theory of private natural rights as the basis on which the companies were constituted and made their claims to operate globally while protected and guaranteed by the charter-endowing sovereign. More generally, the type of *raison d’état* that was inherent in natural right

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<sup>116</sup> Arrighi, *Long Twentieth Century*, 144.

<sup>117</sup> Magnusson, *Mercantilism*, 96-98.

<sup>118</sup> The company accounted between 13 and 15 per cent of all of British imports between 1699 and 1774. Nick Robins, *The Corporation that Changed the World. How the East India Company Shaped the Modern Multinational* (London, Pluto Press 2004), 29.

<sup>119</sup> See John Keay, *The Honourable Company. A History of the East India Company* (London, Harper & Collins 1991).

thinking made sovereignty the guardian of the pre-established social order, expressed in the horizontal system of private possessions and exchanges. It was thus superbly suited as a doctrinal grounding of economic statecraft. In the economy of the *De jure belli ac pacis* it is the very point of statehood to guarantee that pre-existing order of private rights by providing “punishments” in reaction to “injuries”, understood as right-violations that in practice took place especially in the establishment of trade routes and commercial contacts. In this way Grotius “ ma[de] commerce a central location for debate about the intersection of juridical discourses of sovereignty, natural law discourses of justice and reason of state discourses of necessity”.<sup>120</sup>

It was perhaps Grotius’ greatest achievement that he was able to articulate the emerging system of economic statecraft in terms of the general rules of law providing for subjective rights on the one hand and a complex structure of State authority to coordinate those rights and see to their enforcement on the other. Already the Spanish scholastics had begun to view the operations of professional merchants and *cambistas* as a “system”, separate from the moral-religious world that governed the activities of ordinary individuals. In an increasingly complex political world, it had begun to seem necessary to examine the systemic context where the actions of merchants and statesmen received meaning. In Grotius’ case, the same move was undergirded by his effort to fit self-love within a system of sociability and to argue that, rightly understood, the former was actually an aspect of the latter. There is a strong providential argument behind Grotius’ interest in individual rights and commercial exchanges. As he wrote:

“God has not bestowed his Gifts on every Part of the earth but had distributed them among different Nations, that Men wanting the Assistance of one another, might maintain and cultivate Society. And to this End has Providence introduced Commerce”.<sup>121</sup>

When Michel Villey calls Grotius the “legislator of modern Europe” what he means is precisely that the subjective rights Grotius proposes, together with the

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<sup>120</sup> Erik Thomson, “The Dutch Miracle, Modified. Hugo Grotius’ *Mare Liberum*, Commercial Governance, and Imperial War in the Early-Seventeenth Century”, 30 *Grotiana* (2009), 108.

<sup>121</sup> Grotius, *The Rights of War and Peace*, Bk II Ch II § XIII (444).

supporting rules on sovereignty and public authority, constitute an expression, at the level of legal doctrine and practice, of the changes that were taking place in early modern European societies.<sup>122</sup> By extending subjective rights and the legal institutions based on them (property, sovereignty, contract) to all of social life, he thereby gave up the analysis of individual actions by attention to the way they may have expressed the virtue of “justice” in the actor. The appropriate standard of criticism is now provided by formal and general rules (of property and personal inviolability above all) that exist as parts of an all-encompassing rights-system. As long as the systemic requirements are upheld, that is to say, as long as law is followed, there is no basis for a public critique of action on its merits (however dubious it might otherwise seem).<sup>123</sup>

## VII

The natural law tradition, as adapted by Grotius from Dominican theology, developed in the course of the 17<sup>th</sup> and 18<sup>th</sup> centuries in two partly opposing directions that epitomised two different ways of understanding political and economic relations inside and between European powers. On the continent, natural law emerged originally in competition with the vocabulary of the *raison d'état* but became gradually reconciled with it. We saw how Grotius achieved this. In Germany and France natural law provided a vocabulary whereby state power could be articulated and enhanced in an increasingly competitive domestic and international environment. As a science of government it sought to help the monarch to organise and rule over the civil society, including its economic development. In England, by contrast, natural law sought only to give

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<sup>122</sup> Villey, *Formation*, 527.

<sup>123</sup> Michel Villey, *Formation*, especially 547-558. In *De jure belli ac pacis* Grotius frequently resorts to the distinction between “internal” and “external” obligations, most famously when he distinguishes between just war and “solemn public war”, the former coming under natural law, the latter under *jus gentium*. This is not strictly a distinction between law and morality – both are spheres of law. but it does involve a distinction between that which may be enforced by public authority (external) and that which cannot (internal). Grotius, *The Rights of War and Peace*, Bk III Ch X § III (1416). See also Preliminary Discourse, XLII (113). For useful commentary, see Haggemacher, *Grotius*, 579-588 and Emmanuelle Jouannet, *Emer de Vattel, et l'émergence doctrinale du droit international classique* (Paris, Pedone 1998), 177-183.

articulation to the spontaneous relations within civil society, providing a legal and moral foundation to the economic system therein.

The most important German representative of the Grotian tradition, Samuel Pufendorf (1632-1694) developed his theory of natural law into an autonomous system that would operate independently from theology and civil law and produce universal, scientific rules of behaviour. For that purpose, the first chapter of his *De jure naturae et gentium* (1672) sketched a view of “moral entities” (*entia moralia*) that canvassed a view of the cultural and social world in which all humans lived and operated.<sup>124</sup> As a “science of morality” natural law would articulate the rules of behaviour in that social world. Pufendorf did not share the view of Grotius that humans were naturally attached to each other. But this did not lead him, with Hobbes, to view the state of nature as one of unlimited war, either. The originality of Pufendorf’s work lay precisely in his suggestion that a substantive set of natural rights and obligations was operative already in the natural state and independently of any contract.<sup>125</sup> Human beings had been created free and equal. Among such creatures, norms could only arise by “imposition”, by “superadding” a normative meaning to things and forms of behaviour.<sup>126</sup> This did not take place in an arbitrary fashion, but in response a human situation that was everywhere broadly similar. It was characterised by self-love, weakness, and rationality. Among weak but intelligent beings who were above all interested in self-preservation, cooperation – “sociability” – was a logical necessity. The first rule of natural law thus enjoined all humans to be

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<sup>124</sup> Samuel Pufendorf, *De jure naturae et gentium. Libri octo* (Vol II: The Translation of the edition of 1688 by CH and WE Oldfather, Oxford, Clarendon Press 1934) I I (3-14). On Pufendorf’s importance as the founder of an autonomous social or cultural science or “*Geisteswissenschaften*”, see e.g. Simone Goyard-Fabre, *Pufendorf et le droit naturel* (Paris, PUF 1993), 47-65; Pierre Laurent, *Pufendorf et la loi naturelle* (Paris, Vrin 1982), 117-132. Very useful is also Larrère, *Invention de l’économie*, 17-57.

<sup>125</sup> Pufendorf’s concept of the natural state is not based on speculations of how life might have been in the past. Instead, it is a rational reconstruction on the basis of what we know of humans today. It is a kind of a thought-experiment so as to reach the conceptual origins of present social institutions.

<sup>126</sup> Samuel Pufendorf, *De jure naturae ey gentium. Libri octo* (Vol II: The Translation of the edition of 1688 by CH and WE Oldfather, Oxford, Clarendon Press 1934) I I § 4 (5-6), II II § 3 (158). For the scientific urge behind Pufendorf’s presentation of natural law, see e.g. Kari Saastamoinen, *The Morality of the Fallen Man. Samuel Pufendorf on Natural Law* (Helsinki, Studia Historica 1995), 54-62.

“sociable” and do whatever was necessary for that purpose.<sup>127</sup> Sociability was then not a natural property, as Grotius had assumed, but an inference that self-loving humans ought to make to ensure the fulfilment of their needs. It was based on an autonomous utilitarian calculation, valid immediately, even outside political community.<sup>128</sup> From the same reasoning also sprung institutions such as dominion and proprietorship that were needed by “the condition and peace of the multiplied human race.”<sup>129</sup> If human beings had originally shared everything, this was a function of the *absence* of private ownership and sovereignty – a “negative” instead of a positive community. It posed no obstacle for the taking of possession of things and agreeing on exchanges through “pacts” even before any formal state had been set up. No natural love or affection was needed. Mere attention to individual interests would dictate cooperation on the basis of utilitarian calculations.<sup>130</sup> To illustrate this Pufendorf observed that nations that still lived in a state of nature among themselves were nevertheless “joined by treaties and friendship [and not] a mutual state of war”.<sup>131</sup> In fact, Pufendorf, held, there was no other international law than that based on the law of nature – what dictates of utility among nations required.<sup>132</sup>

Humans were thus always part of a social world where they owned things and contracted over them, filling their mutual needs through engaging in commercial relations. But “the natural peace is but a weak and untrustworthy thing, and...a poor custodian of man’s safety”.<sup>133</sup> Something else – namely political States – were needed to protect established social relations, including relations of

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<sup>127</sup> “Every man, so far as I him lies, should cultivate and preserve toward others a sociable attitude, which is peaceful and agreeable at all times to the nature and end of the human race”. Samuel Pufendorf, *De jure naturae ey gentium*. II III § 14 (208). For the qualities of human beings in the natural state (“self-love and desire to preserve himself” as well as “weakness and native helplessness”), see *ibid.* II III § 14 (205-207)

<sup>128</sup> Pufendorf, *De jure naturae et gentium*, II III § 15 (207-208). See also Larrère, *Invention de l'économie*, 26.

<sup>129</sup> Pufendorf, *De jure naturae et gentium*, II II § 11 (175-6), II III § 22 (225). For the division of properties from the original state of “negative community” in Pufendorf, see *id.* IV IV § 6-15 (539-557). For a good summary of those steps, see Stephen Bucle, *Natural Law and the Theory of Property. Grotius to Hume* (Oxford, Clarendon 1991), 97-107.

<sup>130</sup> See also Istvan Hont, “The language of Sociability and Commerce: Samuel Pufendorf and the Foundations of the ‘Four-Stages’ Theory”, in *Jealousy of Trade*, 159-184.

<sup>131</sup> Pufendorf, *De jure naturae et gentium*, II II § 8 (171) and also VII I § 6 (958).

<sup>132</sup> Pufendorf, *De jure naturae et gentium*, II III § 23 (226-229).

<sup>133</sup> Pufendorf, *De jure naturae et gentium*, II II § 12 (176).



property and contract, against ambition and ignorance, or just plain human wickedness.<sup>134</sup> The apex of Pufendorf's world was the State – after all he is well known as “one of the first German theoreticians of the reason of state”.<sup>135</sup> The state would grow over civil society to guarantee and enforce the rudimentary system of property and economic exchanges therein. Like Grotius, Pufendorf combined an essentially economic view of civil society with an authoritarian view of government, the latter designed to provide for the security and advancement of the social relations established in the former.

The state arose to protect the calculative reason of civil society. This was the purpose which to secure Pufendorf's followers turned natural law into a technique of State government. For that purpose, chairs of natural law were rapidly endowed by German princes at their universities and the occupants of those positions were expected to instruct their sovereigns in the vicissitudes of Baroque statecraft. Later in life Pufendorf, too, became historiographer and counsel to the courts of Sweden and Prussia, writing histories so as to lay out the “real interests” of the state. This would be based on comparative studies so as to give concreteness to natural law in terms of the wise and contextually sensitive government of each political community – something Pufendorf had already provided in his early account of the constitution of the Roman-German empire.<sup>136</sup>

Pufendorf began the stream of civil philosophy at German universities that in more or less authoritarian and liberal variants saw states as instruments for the attainment of the “happiness” or *Glückseligkeit* of their populations.<sup>137</sup> The academic tradition of *jus naturae et gentium* pushed law into a historical and comparative science that explained the emergence of social relations of property and contract from secular sources, human needs and sociability above all. Though historical differences existed, this process, it was suggested, provided

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<sup>134</sup> Pufendorf, *De jure naturae et gentium*, VII I § 7-11 (959-965°).

<sup>135</sup> Alfred Dufour, ‘Pufendorf’, in J.H. Burns & Mark Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (Cambridge University Press, 1991), 562.

<sup>136</sup> See Samuel Pufendorf, *The Present State of Germany* (M. Seidler ed. Indianapolis, Liberty Fund 2007 [1667]), especially Ch VIII (“Of the German State-Interest”). See also Dufour ‘Pufendorf’, 583-588.

<sup>137</sup> For a review of the German civil philosophy tradition, see Ian Hunter, *Rival Enlightenments. Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge University Press 2001).

the foundation for universally applicable directives of statecraft.<sup>138</sup> However, after providing a theoretical *justification* for absolutist statehood, the tradition had largely expended its power. Towards mid-and late-18<sup>th</sup> century, it was gradually replaced by the emergence of the more pragmatic vocabularies of *cameralism* as well as the sciences of *Staatskunst* and *Polizeiwissenschaft* as new types of economic statecraft that examined the conditions of happiness-production with a view to generating an unending stream of regulations for good government. It was only towards the 1790s and the first decades of the 19<sup>th</sup> century that the reception of new French and Scottish literatures opened the way in Germany for understanding the economy independently of the state machinery and by focusing on the needs of individuals (instead of the happiness of the state and its population) that a novel science of *Nationalökonomie* would emerge.<sup>139</sup> Focus would now be on the “free” activity of individuals instead of the regulatory operations of public power.

Like the centrality of statehood earlier, the move to economic liberalism later could be based on what Grotius and his followers had written on the systemic relations of civil society. For Pufendorf, as we have seen, sociability operated not as a natural property but an inference that weak and needful human beings had to make in order to lead happy lives. He also postulated the existence of a cultural and social world prior to statehood that was a world of commerce and economic calculation. The justification of statehood would now be received from the need to see to it that the objective laws of that world could operate properly at home and abroad.

## VIII

The reduction of legal theory into a theory of subjective rights, as carried out by Grotius did, as Emmanuelle Jouannet has pointed out, pave the way to “a certain

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<sup>138</sup> For the reasons why natural law became the “leading social philosophy between 1600 and 1800”, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band 1600-1800* (Munich Beck, 1988), especially 271-277.

<sup>139</sup> For a general assessment, see Kenneth Tribe, *Governing Economy. The Reformation of German Economic Discourse 1750-1840* (Cambridge University Press 1988), 133-182.

type of modernity”.<sup>140</sup> I have argued above that Grotius did not “invent” the theory of subjective rights and that he connected it with an older idea of natural sociability that tempered some of the more far-reaching consequences of his reduction. The implications of Grotius’ views were also ambivalent because they could be also used to buttress an authoritarian view of statehood, as indeed both Grotius himself and the tradition he helped to inaugurate at German universities did. It was only once the subjective rights would begin to emerge as an autonomous “system” whose operation was independent of the intervention of the state that it could be used to support a robust view of a civil society that could be juxtaposed against the derivative realm of public law and statehood.

That view would emerge gradually from mid-18<sup>th</sup> century France where the development of a robust natural law had been undermined by the absolutist tradition of Louis XIV and the capture of its vocabulary by Protestant writers using it as a platform over which they could attack the latter’s alleged efforts at “universal monarchy”.<sup>141</sup> When criticism of Louis’ policies began finally to emerge in France at the turn of the 18<sup>th</sup> century, it was written in the language of faith and virtue that were directly opposed to the predominance of commercial interests in public policy.<sup>142</sup> In the struggle between “ancients” and “moderns”, natural law fell on the side of the latter where its most important articulation lay in the “doux commerce” thesis, made famous by Montesquieu, although it had already been invoked as part of Abbé de Saint-Pierre’s *Project for Perpetual Peace* (first edition 1712/1713). Saint-Pierre had based it on the essentially Hobbesian notion that joining together each nation could best support its own interest, and thereby all would prosper. This was the assumption also behind his proposed Union of European States that would guarantee existing dynastic stability and territorial possessions and that would therefore be much more in the interests of its members than the old system of

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<sup>140</sup> Jouannet, *Vattel*, 176.

<sup>141</sup> See e.g. Samuel Pufendorf, *Of the Nature and Qualification of Religion in Reference to Civil Society* (1687) (Indianapolis, Liberty Fund 2002), 11-12, § 5-6 (17-18); Leibniz, ‘Mars Christianissimus’, (1683) in *Political Writings* (P Riley ed., Cambridge University Press 1972), 121-145.

<sup>142</sup> See e.g. Fénelon, ‘Lettre à Louis XIV’ in *Lettre à Louis XIV et autres écrits politiques* (Paris, Bartillat 2011 [1693/4]), 45-63 and discussion of Archbishop Fénelon in this context, Hont, *Jealousy of Trade*, 25-27.

fragile alliances and the balance of power.<sup>143</sup> Saint-Pierre's peace plan also contained provision for Europe-wide freedom of trade, something that he insisted against the Colbertists of the *ancien regime* was in the ultimate interests of all European monarchs.<sup>144</sup>

But it was not until the Physiocrats in the middle of the century that the law of nature and of nations was finally integrated within a series of assumptions about the operation of political economy. The Physiocrat movement, led by the medical doctor Francois Quesnay was adamant that the system of economic circulation that operated between the three social classes – agricultural producers, landowners and manufacturers – functioned in accordance with natural laws and that once the obstacles to their free operation were removed, a thriving economy would emerge to benefit the whole society:

“The natural laws of the social order are themselves the physical laws of perpetual reproduction of those goods necessary to the subsistence, the conservation, and the convenience of men”.<sup>145</sup>

The physiocrats were vigorously critical of monarchic cupidity and insisted on what they called “legal despotism” – that is to say that laws, once they were aligned with the natural requirements of the productive enterprise, were to rule society. They were for a centralized government, but one that would direct the realization of private interest the public purpose.<sup>146</sup> For this purpose, they also advocated free trade against the old school that imagined trade operating in a zero-sum environment and was thus prone to supporting a Neo-Machiavellian economic policy. The division of labour that would follow naturally from the lifting of trade restrictions would not, as the mercantilists had feared, lead to the

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<sup>143</sup> Abbé de Saint-Pierre, *Projet pour rendre la paix perpétuelle en Europe*, tomes I-II (Utrecht, Schouten), especially *Premier discours*, 1-61. For the political Hobbesianism of Saint-Pierre, see further Merle L. Perkins, *The Moral and Political Philosophy of the Abbé de Saint-Pierre* (Geneve, Droz 1959), 51-60; Hont, *Jealousy of Trade*, 27-28.

<sup>144</sup> According to the plan, the members of the union were to draft laws that would “make commerce “perpetual, sûr, libre, égal, et parfaitement inalterable”, as quoted in Perkins, *The Moral and Political Philosophy*, 73.

<sup>145</sup> François Quesnay, ‘Despotisme de la Chine’, quoted in McNally, *Political Economy and the Rise of Capitalism*, 123.

<sup>146</sup> An excellent discussion of the “paradox of the physiocrats”, the way they supported the apparently contradictory strategies of strong central power and strong rights of property and free trade is included in McNally, *Political Economy and the Rise of Capitalism*, 85-151.

hegemony of the nation able to maintain autarchy, with the rest reducing to serving auxiliary roles. It would compel all countries to raise the productivity of their agriculture to meet domestic needs and direct trading to manufactured goods. This would be advantageous to all and no longer conceived as commercial statecraft.<sup>147</sup>

It was from the Physiocrats from whom the young Adam Smith (1723-1790) received his famous critique of the “mercantile system”, including the use of monopolistically oriented trading companies such as VOC and EIC . Smith considered himself – rightly – a proponent of the tradition of Grotius and Pufendorf and especially a continuator of the work of the latter.<sup>148</sup> In his first large work, the *Theory of Moral Sentiments* (1759) Smith sought to derive the principles of morality and political justice from the empirical feelings of “sympathy” that human beings felt to each other. Together with other representatives of the Scottish enlightenment, he was taking from the natural law tradition the project to create a scientific view of human interactions that could be articulated in a universal theory of civil society. Having accomplished that task, towards the end of the work, he declared that he would

“...in another discourse, endeavour to give an account of the general principles of law and government, and of the different revolutions they have undergone in the different ages and periods of society, not only what concerns justice, but in what concerns police, revenue, and arms, and whatever else is the object of law”.<sup>149</sup>

Smith then went to Glasgow to give his lectures in jurisprudence. In that context, Smith developed his “four-stage theory” of human societies, that is to say, a theory of the way all societies would develop from hunter-gatherers and agriculturalists to “commercial society” resembling present-day England and Scotland. This also included a kind of philosophical history of law that

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<sup>147</sup> See e.g. Michael Sonenscher, *Before the Deluge. Public Debt, Inequality, and the Intellectual Origins of the French Revolution* (Princeton University Press 2007), 204-208.

<sup>148</sup> See Hont, ‘The Language of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the “Four-Stages” Theory’, in *Jealousy of Trade*, 159-184; Nicolas Phillipson, *Adam Smith. An Enlightened Life* (Yale University Press 2010), 43-55.

<sup>149</sup> Adam Smith, *The Theory of Moral Sentiments* (P. Moloney ed. New York, Barnes & Noble 2004 [1759]), 466.

understood particular types of law as appropriate for particular societal stages.<sup>150</sup> The effort to develop a historical view of natural law had already been made by the Spanish scholastics as well as Grotius, Pufendorf and the whole natural law tradition in terms of the emergence of property and sovereignty out of an initial state of nature. Smith's four-stage theory could use data that had been received from all over the world, including from the American Indians, so as to create a scientific, almost empirical view on the natural progress of societies and their laws – a “science of the legislator”, in other words.

Smith himself never produced the volume on legal theory he canvassed at the end of the *Theory of Moral Sentiments*. Instead, the outcome of nearly two decades of additional work on law and morality was the *Wealth of Nations* (1776) – the end-point of a succession of theories of human sociability not as an effect of natural love but of calculation. “It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their self-interest”.<sup>151</sup> The most famous sentence in the book links it squarely with the natural law tradition, and with the effort to create an understanding of the operation of civil society that would presuppose neither divine providence nor innate sociability and would be respectful of the character of human individuals as we know them. This view – *homo economicus* – operates both as a logical and an empirical construction in a way that purports to possess universal validity. As it arose at the end of the 18<sup>th</sup> century, and became the predominant vocabulary of human interaction in the 20<sup>th</sup>, it finally fulfilled the promise that had always drawn ambitious men to natural and international law. This was to provide a science of human governance that would lift the moral burden from the shoulders of the governors and re-describe their power as merely the consequence of the operations of a compelling system.

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<sup>150</sup> See further, Peter Stein, *Legal Evolution. The Story of an Idea* (Cambridge University Press 1980), 29-50.

<sup>151</sup> Adam Smith, *The Wealth of Nations* (New York, Knopf:Everyman's, 1991 [1776]), 13.