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'Mercatores isti regulandi': Monopolies and moral regulation of the market in Pedro de Oñate's *De contractibus*

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Summary

Compared to the writings of other *teólogos-juristas* belonging to the so-called School of Salamanca, Pedro de Oñate's (1567-1646) *De contractibus* has met with little if almost no interest in the literature. It nevertheless marks an epochal achievement in the history of juridical and economic thought. Published between 1646 and 1654, Oñate's *De contractibus* epitomizes five centuries of scholastic thinking about the moral regulation of the market. It is a spectacular work, addressing hundreds of problems related to contractual agreements and commercial life in general. This paper offers an overview of Oñate's lengthy assessment of monopolistic practices, including price-fixing cartels, import barriers, the creation of artificial scarcity, and legal monopolies, including the conceptualization of intellectual property. Two major conclusions can be reached from the close-reading of Oñate's treatment of monopolistic practices. First, Oñate's opinions are marked by an even starker emphasis on individual rights, property and freedom than those of his colleagues working in major cities on the other side of the Atlantic. Second, his analysis is not only the reflection of his extraordinary knowledge of centuries of scholastic thinking about the morality of the market, but also of his practical experience in the New World.

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1 Introduction

This article analyzes Pedro de Oñate's (1567-1646) lengthy treatment of the (un)lawfulness of various types of monopolies and speculation, including his conceptualization of intellectual property, which he treats as an example of statutory monopolies. Oñate grew up in Valladolid and took courses in arts, theology and law at the Universities of Alcalá and Salamanca before entering the Jesuit Order in 1586[1]. In 1592 he moved to the New World, where he held several important offices, for instance as the superior of the Jesuit province of Paraguay and as a professor of theology at the *Colegio Máximo de San Pablo* in Lima. Occasionally, he delivered consultations, for instance to denounce the inhumane working conditions of miners in Huencavelica[2]. The scarcity of information about his life stands in stark contrast to the detailed character of his discussion of hundreds of problems related to contractual agreements. They are contained in his treatise *De contractibus*, a massive work in three volumes and four parts published posthumously in Rome between 1646 and 1654. It has met with little if almost no interest in the literature, at least compared to the works of other 'theologians-jurists' belonging to the School of Salamanca[3].

As will be shown in this article, Oñate's analysis of the contractual framework of business and economics is not just a theoretical reflection of centuries of scholastic thinking about the morality of the market. It also contains a great many references to his practical experience in the New World. On several occasions, Oñate condemns governors and merchants engaging in abusive practices which he witnessed in the Viceroyalty of Peru. His exposition contains references to the colonial economy, in particular, which was based on international trade hubs such as the ports of Panama and the exploitation of mining resources in places like Potosí. Oñate's opinions are marked by the emphasis on property and freedom that is typical of Jesuit theologians' moral-juridical writings in the early modern period, but his rejection of monopolistic practices is

1 The scant biographical details are based on G. Furlong, *Nacimiento y desarrollo de la filosofía en el Río de la Plata 1536-1810*, Buenos Aires 1952, p. 61 and R. Vargas Ugarte, *Historia de la Compañía de Jesús en el Perú*, Burgos 1963, vol. 2, p. 273.

2 K. Lane, *Potosí, The silver city that changed the world*, Oakland 2019, p. 142-143.

3 Th. Duve, J.L. Egío and C. Birr (eds.), *The School of Salamanca: a case of global knowledge production*, Leiden – Boston 2021, including references to further literature.

even stronger. The way he evaluates specific practices betrays not only a sound knowledge of what happened on the ground, but also a solid grasp of law and economic analysis. He must have been an independent mind, who was not afraid to make the voice of moral conscience sound loud.

2 Contractual freedom and justice

While fairly little is known about Oñate's life, his seminal contribution to the general theory of contract has increasingly been recognized over the last couple of decades[4]. Following in the footsteps of an extraordinary generation of Jesuit legal thinkers including Luis de Molina (1535-1600) and Leonardus Lessius (1554-1623), Oñate consecrated the principle that contractual obligation is based on free, voluntary consent[5]. He uncompromisingly holds that the will (*voluntas*) is the matter of all things in contractual affairs. His treatment of general contract law, which comprises no less than six hundred and fifty pages in the first volume of *De contractibus*, abounds with references to the Latin terms for both the noun and the verb 'will' (*voluntas/velle*). In his view, contractual obligation is entirely dependent on the will of the contracting party, from the moment he is willing to incur it and to the extent that he is willing to incur it (*nemo ex contractu se obligat nisi qui vult et quando vult et quantum vult*). The will is the lynchpin of contract law, with Oñate invoking property law to motivate this voluntaristic principle. Drawing on the Roman law maxim that everybody is the moderator and arbiter of his own things[6], he develops a voluntaristic theory of contract that is closely related to a liberal conception of private property. He combines Biblical anthropology with Roman law to formulate a principle of contractual liberty that differs from nineteenth century, positivistic accounts of liberalism, but which is nevertheless astonishingly voluntaristic:

> God left man the freedom to take care of himself, as is expressed in Ecclesiastes 15,14, one of the reasons being, no doubt, that He left it to man's will to bind himself when he wanted (*reliquit Deus in voluntate eius ut se obligaret quando vellet*). Now actions do not operate beyond the will

4 V.O. Cutolo, *La primera obra de derecho escrita en la Argentina del siglo* XVII, Revista del Instituto del Derecho Ricardo Levene, 21 (1970), p. 113-118; I. Birocchi, *Causa e categoria generale del contratto*, Turin 1997, p. 271-289; W. Decock, *Theologians and contract law: the moral transformation of the* ius commune (*c. 1500-1650*), Leiden – Boston 2013, passim.

5 Decock, *Theologians and contract law* (*supra*, n. 4), p. 168-170. For reasons of space and focus, the references to the primary texts are not repeated in the brief synthesis offered here.

6 C. 4,35,21.

> and the intention of the agents, but in accordance with their will and intention (*iuxta voluntatem et intentionem*)[7].

Without a will-centered principle of freedom of contract, Oñate continues,

> man would not be the true and perfect owner of his goods (*dominus rerum suarum*), that is, unless he could give them when he wants, to whom he wants (*cui vult*), in whatever way he wants (*quomodo vult*), and unless he has the additional capacity to enter into contractual obligation when he wants and in whatever way he wants (*quando et quomodo vult*)[8].

Oñate is fully aware of the fact that his ideas constitute a radical break with the formalistic way in which the Romans conceived of contracts. He adheres to a general, consensualist definition of contract as a combination of promise and acceptance (*omnes contractus ex promissione et acceptatione constant*), whereas the Romans did not bother about conceptualizing binding agreements in such abstract terms, let alone about developing an abstract notion of freedom of contract[9]. In Oñate's eyes, thanks to canon law, Spanish law and natural law, the Roman law of contracts had been rewritten, restoring freedom (*libertas*) to the contracting parties by concentrating on their will rather than on formalistic rules about *stipulationes* or the difference between nominate and innominate contracts. Contrary to the argument used by the Romans and their humanist followers in the sixteenth century, he and other scholastics of his day thought that a general principle of bindingness of agreements by virtue of mutual consent reduced the overextension of the courts rather than aggravating the problem[10]:

> Natural law, canon law and Hispanic law entirely agree and innumerable difficulties, frauds, litigations and disputes have been removed thanks to such great consensus and clarity in the laws. To the contracting parties,

7 P. de Oñate, *De contractibus*, Romae, Ex typographis Francisci Caballi, 1647, vol. 2, tract. 9, disp. 29, sect. 6, num. 74, p. 108: 'Reliquit Deus hominem in manu consilii sui Eccles. 15, 14 sine dubio inter alia, quia reliquit Deus in voluntate eius ut se obligaret, quando vellet, et sicut actiones agentium non operantur ultra voluntatem et intentionem eorum, ita operantur iuxta voluntatem et intentionem eorum'.

8 Oñate, *De contractibus* (*supra*, n. 7), vol. 2, tract. 9, disp. 29, sect. 6, num. 76, p. 108: 'Quia alias non esset homo vere et perfecte dominus rerum suarum si non posset eas dare quando, et cui vult, et quomodo vult, et obligationem etiam contrahere, quando et quomodo vult'.

9 Decock, *Theologians and contract law* (*supra*, n. 4), p. 177-178.

10 Decock, *Theologians and contract law* (*supra*, n. 4), p. 163-164.

> liberty has very wisely been restored (*contrahentibus libertas restituta*), so that whenever they want to bind themselves through concluding a contract about their goods, this contract will be recognized by whichever of both courts before which they will have brought their case and it will be upheld as sacrosanct and inviolable. Therefore, canon law and Hispanic law correct the *ius commune* [Roman law], since the former grant an action and civil obligation to all bare agreements, while the latter denied them just that[11].

The voluntaristic account of contract law developed by Oñate is not the end of the story, though, as it probably would be for will theorists in the nineteenth century – one thinks of Justice Joseph Story's famous dictum that 'whether bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations, not for courts of justice, but for the party himself to deliberate upon'[12]. According to Oñate, there is a moral framework that must be respected by the contracting parties – and the courts. For one thing, there are statutory rules that bind individuals since they are citizens belonging to a state that seeks to protect the common good. For another, they are Christians, bound to observe the essential principles of biblical and natural morality. In the field of contract law, fairness in exchange is such a principle, and it does limit the contracting parties' bargaining power. They cannot try and overreach each other. Natural reason obliges the parties within the contract to care for each other by respecting equality in exchange. Contracts should not be one-sided or unconscionable, because they have been introduced as a way of promoting each contracting party's interest. This can only be guaranteed, according to Oñate, if the virtue of commutative justice is observed[13]:

> Given the division of things, natural law suddenly sneaked in again, ordering that natural equity (*naturalis aequitas*) be observed in these exchanges. It prescribed, not only that you should not do unto others

11 P. de Oñate, *De contractibus*, Romae, Ex typographia Francisci Caballi, 1646, vol. 1, tract. 1, disp. 2, sect. 5, num. 166, p. 40: 'Unde lex naturalis, lex canonica et lex hispaniae omnino consentiunt et innumerae difficultates, fraudes, lites, iurgia hac tanta legum consensione et claritate sublata sunt, et contrahentibus consultissime libertas restituta ut quandocumque de rebus suis voluerint contrahere et se obligare, id ratum sit in utroque foro in quo convenerint et sancte et inviolabiliter observetur. Quare ius canonicum et ius hispaniae corrigunt ius commune, concedentes pactis nudis omnibus actionem et obligationem civilem, quam illud negabat'.

12 J. Story, *Commentaries on equity jurisprudence*, 13th ed., ed. by M.M. Bigelow, Boston 1886, vol. 1, ch. 6, par. 244, p. 255.

13 Decock, *Theologians and contract law* (*supra*, n. 4), p. 511-512.

> what you would not have them do unto you, but also that equality be observed between the objects of these exchanges (*aequalitas rei ad rem*), as is required by commutative justice (*iustitia commutativa*). Natural law further prescribed that equality must be restored through restitution if it has been violated; also, that agreements, once concluded, must be performed with great fidelity, and that infringers must be restrained through appropriate penalties[14].

In practice, the principle of commutative justice is made operational through the doctrine of just pricing[15]. The just or equal price (*pretium iustum seu aequale*) serves as a yardstick to assess the balanced character of the transaction and its respect of the principle of equality in exchange. This is not the place to go into the details of Oñate's compelling and lenghty treatment of the just price theory. However, for the purpose of clarifying his thoughts on monopoly, it is important to recall that he adopts the standard notion that the just price can be the product either of the public authorities' intervention (*pretium legitimum*, viz. the statutory price or the so-called 'legal price'), of the common estimation of the market participants (*pretium forense*, also called *pretium vulgare* and *pretium naturale*, viz. the market price), or, in exceptional circumstances where no market has been established yet for a specific good, of an invididual bargain (*pretium conventionale*)[16]. Again following traditional scholastic economic thought, Oñate explains that the market price manifests a certain latitude (*latitudo*), hence covering a range of prices, which are all to be considered just, including the lowest (*pretium infimum seu pium*), middle (*pretium medium*) and highest just price (*pretium rigorosum*).

What makes Oñate's exposition on just pricing particularly interesting, is his emphasis on the subjective, human nature of the just price. Economic value is

14 Oñate, *De contractibus* (*supra*, n. 11), vol. 1, tract. 1, disp. 1*pr.*, num. 10, p. 2: 'Quia supposita rerum divisione subintravit protinus naturale ius, in his commutationibus naturalem aequitatem servandam esse, praecipiens: non solum ut, quod tibi non vis, alteri ne feceris, sed etiam, ut in his servetur aequalitas rei ad rem, quam iustitia commutativa praescribit, et ut si violata fuerit per restitutionem resarciatur, et pacta conventa servari magna fide praecipiens, et violatores congruis esse poenis cohibendos.'

15 Decock, *Theologians and contract law*, p. 519-535.

16 P. de Oñate, *De contractibus*, Romae, Apud Angelum Bernabo, 1654, vol. 3.1, tract. 21, disp. 63, sect. 1, p. 34-37. Oñate's doctrine of just pricing has been studied, albeit not exhaustively, by the Romanian-Argentinian economist Oreste Popescu, see for instance O. Popescu, *El padre Pedro de Oñate (1567-1646) y su importancia en la historia del pensamiento económico latinoamericano*, Revista del Instituto de Investigación Musicológica 'Carlos Vega', 11 (1990), p. 31-38, and O. Popescu, *Studies in the history of Latin American economic thought*, London 2005, p. 32-56.

not to be considered from an absolute, metaphysical point view, but in relation to human need. 'Value is not something intrinsic and essentially inherent in the merchandise', Oñate insists[17], 'but an estimation by human beings taking into consideration all circumstances that must be taken into account by just reason; it results out of the comparison of the good with the price'. It is not God's knowledge but men's opinions that determine the justice of the just price. He goes to great lenghts to reject the opinion according to which God knows the true price of all goods, without the need to accept a latitude, since he has the perfect information about the market circumstances determining the prices of all goods. Incidentally, this opinion, which Oñate rejects, very much resembles the idea, put forward by modern mathematicians-economists such as Friedrich Hayek, of the perfect equilibrium price. It was also defended by the famous Jesuit Juan de Lugo (1583-1660), who is not mentioned by Oñate[18].

One of the consequences of this human, subjective understanding of just pricing is that the notion of objective truth makes no sense in assessing the morality of market practices. 'It does not matter whether that opinion of men and the people in estimating saleable goods is either true or false', Oñate affirms[19], 'for even a false opinion leads to the establishment of a true and just price'. The opinion or estimation of the value of goods is based on the consideration of several factors, including the scarcity of goods, the money level, the number of buyers and sellers, the general need for the good in the republic, and the average expenses incurred by professional merchants[20]. The importance of the level of money can be witnessed in Peru, Oñate explains, where prices of the same good are higher near Potosí, where a lot of money circulates, than in Lima[21]. His experience in Peru also leads Oñate to insist that all the above-mentioned factors have to be accounted for comparatively. For even if there is an extraordinary large supply of goods in port cities such as Panama, where Peruvian and Spanish merchants meet, and relatively low demand, prices nevertheless remain high because of the abundance of money[22].

17 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 63, sect. 2, p. 39, nr. 27: 'Valor non est aliquid intrinsecum et reale in rebus venalibus, sed aestimatio ipsa hominum attentis omnibus circumstantiis quae iusta ratione attendi debent, et ex comparatione rei ad pretium resultans'.

18 For further discussion of this issue, see W. Decock, *Le marché du mérite, Penser le droit et l'économie avec Léonard Lessius*, Bruxelles 2019, p. 96.

19 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 63, sect. 2, p. 39, nr. 29: 'Neque interest vera ne sit an falsa illa hominum et vulgi opinio in aestimandis rebus vendibilibus, nam etiam quae falsa est verum pretium et iustum efficit'.

20 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 63, sect. 2, p. 44-47.

21 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 63, sect. 2, p. 46, nr. 64.

22 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 63, sect. 2, p. 46, nr. 66.

Moreover, all kinds of contextual elements can cause the price of the same good to fluctuate considerably, especially because of the mode in which they are sold (*modus vendendi*), for instance through auctions[23].

When establishing a price by statute, the public authorities should take those criteria that are the basis of the common estimation as the basis of their own intervention. This might seem counter-intuitive, because the people (*vulgus*) are generally not to be followed. In economic contexts, though, the common estimation by the people is trustworthy, Oñate explains, because it is the result of conflicting interests and opinions[24]. Buyers want to purchase as cheap as possible, whereas sellers want to sell at the highest price. In other words, competition is what guarantees the justice of the market price. Another question altogether, is what price has to be adopted in case the legal and the natural price are conflicting. Following standard scholastic doctrine, Oñate confirms the principle that, in doubt, the measure taken by the public authorities, who supposedly acted in the common interest, prevails over the market price (*in dubio parendum est legi taxanti*)[25]. However, his lengthy discussion of the matter in a separate *disputatio* is all about qualifying this rule. In the absence of good governance, individuals can decide to take the law in their own hands and apply the natural price rather than the official one. For example, Oñate refers to small inn- and shopkeepers – apparently called 'pulperos' by locals in Peru – who are not able to make a decent living by charging the official rates and prices imposed by the government[26].

3 Cartels and import barriers

Against the background of his general doctrine of contract, which rests on the twin pillars of freedom and fairness, Oñate went on to discuss thousands of practical cases related to the morality of the market. With a socio-economic context marked by the rising power of global trade companies, the exploitation of natural resources in newly conquered territories, and social unrest following rising price levels, it is no surprise to find that price-fixing, dominant positions and various kinds of monopolistic practices were of special concern to early modern scholastics, and Oñate, in particular. In Oñate's case, concerns were heightened by the concentration of both market power and regulatory

23 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 63, sect. 4, p. 52-54.
24 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 63, sect. 2, p. 45, nr. 60.
25 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 65, sect. 1, p. 90, nr. 19.
26 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 65, sect. 1, p. 89, nr. 13.

force in the hands of a few local administrators in Peru and other colonial areas. Much in the vein of other Jesuits such as Molina and Juan de Mariana, he displayed a certain mistrust in public authorities, which was also related to his constitutionalist views of political power[27]. More often than not, public officials are more interested in advancing their own interest rather than that of the common good, and so on several occasions Oñate rebukes their interventionist behavior.

His disputation on monopolies in the chapter on sales in the third volume of his *De contractibus* opens with scathing remarks about the deleterious effects of anticompetitive practices, which he sees as the result of fraudulent behavior, often promoted by public officials. The disputation ends – after an analysis covering no less than fifteen folio-pages – with a *peroratio* that compares the devastating effects of monopolies to those of pandemics, requiring strong medicine by public authorities and confessors alike. In line with other early modern scholastics, Oñate distinguishes between four types of monopolies, largely based on the way they are created: statutory monopolies, price-fixing cartels, and dominant positions created either by cornering the market or by raising barriers to imports. Weighed up against the analysis of monopolistic practices in other Jesuit authors such as Molina and Lessius, Oñate's treatment of these issues turns out to be not only much lengthier, but also more moralistic and restrictive in its undertone.

Interestingly, Oñate's quite rigorous approach to monopolistic practices is not just informed by a general sense that individual virtuousness must be cultivated and respected in business practice. His opinions on monopoly also appear to be related to his particularly strong voluntaristic and freedom-centered account of contract law. This is obvious from the arguments used by Oñate in condemning two forms of monopolistic behavior that were rejected by the absolute majority of the scholastic theologians-jurists: cartels and import barriers. Trusts or cartels are the result of an agreement between merchants not to sell a particular good below a certain price or, conversely, of a contract between buyers who decide not to purchase a particular good beyond a certain price – Oñate envisages both cases. Import barriers are the result of the behavior of a sellor who tries to increase price levels by preventing other merchants from entering the market – this behavior can be fraudulent or not, with Oñate considering both scenario's. Even more so than his colleagues Molina and Lessius, Oñate emphasizes the human suffering among the less well-off resulting from

27 A. Perpere Viñuales, *Pedro de Oñate, discípulo de Francisco Suárez en Latinoamérica, Su reflexión sobre el origen, los límites y las funciones del rey*, Cauriensia, 12 (2017), p. 213-226.

these fraudulent practices[28]. Accordingly, his condemnation of cartels and import barriers is firm, as will be shown in the next paragraphs. Price-fixing among buyers or sellers is not only illegitimate because it violates the rules of just pricing. Cartels also violate the principle of freedom of contract.

In his scathing critique of price-fixing agreements, Oñate refers several times to the notion of freedom (*libertas*)[29]. 'The justice of a sales transaction depends on two cumulative conditions', he explains[30], 'firstly, the contracting parties must observe the just price, and, secondly, they must agree on that price in a free manner (*libere*), in the absence of coercion and fraud'. Consequently, Oñate disagrees with scholars such as Molina and Lessius arguing that price-fixing is lawful, at least from the point of view of commutative justice, as long as the highest just price (*pretium rigorosum*) is not being exceeded. In Oñate's eyes, a fraudulent price remains a fraudulent price, even if it remains within the latitude of the just price, because that price is based on vitiated consent and a lack of liberty on the part of the buyers. Violating contractual freedom is contrary to the principle of justice in exchange, since 'commutative justice does not less prohibit you from stealing my liberty than it prohibits you from stealing my money or my reputation'[31]. Cartels that aim to establish the rigorous just price are therefore not just going against the virtue of charity, but also against the virtue of commutative justice, resulting in obligations to make restitution on the basis of injury and the violation of freedom (*ratione iniuriae et violatae libertatis*)[32].

While paying due respect to the authority of Molina and Lessius, presenting himself at some point as 'being urged to render judgment as an insignificant disciple among great doctors'[33], Oñate goes on to offer a wider interpreta-

28 E.g. Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 1, nr. 24, p. 143, and *l.c.*, sect. 4, nr. 69, p. 152-153.

29 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 2, nr. 40, p. 146: 'Ambo desunt in monopola, ut iuste vendat, et pretium iustum et libertas conveniendi in illud, quae etiam est pretio aestimabilis. Et ratione utriusque peccant contrat commutativam iustitiam'.

30 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 2, nr. 40, p. 146: '… ad iustitiam venditionis duo copulative requiruntur; alterum ut contrahentes iusto pretio commutent; alterum, ut in illud conveniant libere sine vi et fraude'.

31 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 2, nr. 36, p. 146: 'Certe commutativa iustitia non minus vetat ne a me auferas libertatem meam quam ne auferas nummos meos aut honorem meum'.

32 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 2, nr. 33 *jo.* nr. 37, p. 145 and p. 146.

33 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 2, p. 146, nr. 36: 'cogor iudicium ferre inter magnos doctores pusillus discipulus'.

tion of the prohibition on import barriers than his eminent predecessors[34]. While the latter considered import barriers that were not the result of fraud or coercion as a legitimate source of higher profit margins, Oñate condemned each and every form of import barriers leading to artificial scarcity and higher prices. Even if it is just through persuasion and not through fraud or deceit that they keep off other sellers, those who contribute to creating import barriers are bound to make restitution of their profits. 'They create scarcity in the republic', Oñate explains[35], 'and they are the cause of the rising market price there'. Without the import barriers, the price would have been lower, meaning that the artifically high price is not the true and just price in the republic at that moment. Rather, that price is the product of deceit (*pretium dolosum*), damaging the citizens and the republic[36]. This socio-political concern constitutes a recurring argument against monopolistic behavior, which Oñate further describes as 'cunningly depriving the republic, the poor and the citizens of their property' by inordinately giving priority to one's own profit over that of the common good of the republic[37].

4 Legal monopolies and the protection of intellectual property

Against the background of the weigth of the mining industry in Peru and the paramount significance of the state-led exploitation of natural resources in colonial territories more generally, it is perhaps not a coincidence that the first section of Oñate's disputation *De monopoliis* is dedicated to 'legal monopolies' (in the sense of statutory monopolies), based on a special concession by the competent public authority, viz. on a *privilegium*. These privileges were widely discussed by the Jesuits, but, as can be seen in Lessius, they were often considered secondary to price-cartels. In this regard, it is worthwhile noting that the very structuring of disputations in scholastic treatises of the early modern period does reflect particular circumstances and empirical realities. By the

34 Ludovicus Molina, *De iustitia et iure*, Venetiis, Apud Sessas, 1607, tract. 2 (*De contractibus*), disp. 345, p. 230, nr. 4, par. *Si tamen fraudibus*; Leonardus Lessius, *De iustitia et iure*, Antverpiae, ex officina Plantiniana, apud Balthasarem Moretum, 1621, lib. 2, cap. 21, dub. 21, p. 296, nr. 153.

35 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 4, p. 152, nr. 67: 'Inducunt caritatem in rempublicam, et sunt causa ut pretium forense in ea augeatur'.

36 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 4, p. 152, nr. 68.

37 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 4, p. 152-153, nr. 69: '… quia hoc est astu quodam rempublicam et pauperes et cives suis bonis spoliare (…); et quia qui hoc facit, praeponit lucrum suum privatum bono communi reipublicae, quod inordinatum est'.

same token, Molina, who counselled Portuguese businessmen and authorities, paid a lot of attention to the legal monopoly on the spice trade with India, awarded by the Portuguese Crown, before going on and discussing other monopolistic practices[38].

The scholastics agreed that legal monopolies were unproblematic as long as they served the common good and respected the general rules of just pricing. More specifically, the price at which beneficiaries of a legal monopoly should sell their goods must be established by the authorities. 'The price of goods which have been conceded by the magistrates to a monopolist must be fixed by them at their true value after mature and careful reflection', Oñate points out[39], warning that 'monopolists should not be given the opportunity to abuse their privilege at the expense of the republic'. Public officials should take into consideration the just market price (*justum pretium forense*) normally obtained in their particular republic, that is in the absence of a statutory monopoly. What is more, Oñate courageously applies these rules to a moral-juridical assessment of monopolistic practices observed in Peru. Apparently, a monopoly on the salt trade had been granted by the authorities which did not meet the necessary conditions. As a result, the citizens, especially the poor, suffered from this legal monopoly, with meat and fish stores being particularly affected by the artifical increase in salt prices[40]. Rather than serving the republic, the king provided for his own interest and that of public servants. He did not even grant a legal monopoly for the salt trade to a businessman, but simply kept it to his own or his administrators.

Oñate extends his condemnation of the legal monopoly on salt to other unjust monopolies which he observes in Peru. He protests against the usurpation of statutory monopolies for selling grain, wine and oil by local Peruvian

38 Molina, *De iustitia et iure* (*supra*, n. 34), tract. 2 (*De contractibus*), disp. 345, p. 229, nr. 3.

39 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 1, p. 141, nr. 12: '… merces huiusmodi monopolae concessae a magistratibus ipsis taxentur debito pretio mature et diligenter considerato, ne monopolis praebeatur occasio illa licentia in perniciem reipublicae abutendi…'.

40 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 1, p. 142, nr. 18: '… utraque conditio iusti monopolii illi [sc. privilegio monopolii salis] deest et enormiter violatur, dum pretium salis immoderate pretium futurum salis excedit et in reipublicae bonum non cedit, sed maximam vexationem ipsius, maxime pauperum, et eorum qui saliendis carnibus et piscibus commodissimam reipublicae operam navarent'.

administrators (*corregidores Peruani*)[41]. They even attribute themselves the trade in goods such as coke (*coca*), bread and rams, Oñate goes on, warning the governors that they are obliged to make restitution if their monopolies are not in the interest of the common good or violating the principles of just pricing. On the other hand, he seeks to reassure his Spanish readership by confirming the validity of legal monopolies effectively granted for the sake of the common good. Such monopolies, known in Spanish as *estancos*[42], do not violate natural law. Within the Spanish realm, in particular, people do not have to bother too much about the alleged general prohibition on monopolies deriving from an imperial constitution laid down by Emperor Zeno (C. 4,59). Roman law is no longer directly applicable in Spain, according to Oñate[43]. Even if Spanish royal law could be considered as having partly adopted the so-called *Lex unica* of the title *De monopoliis* in Justinian's Code (= C. 4,59), the Spanish kings had the right to grant dispensation from the general law or could simply abrogate older law by the enactment of new legislation.

So which statutory monopolies did Oñate consider legitimate? Answering this question leads us to a short but compelling passage in his treatment of monopolies that modern lawyers would more easily associate with the origins of intellectual property law rather than the law of sales. In the footsteps of Lessius and Molina, Oñate thinks of printing privileges and patents as quintessential examples of legal monopolies that truly serve the common good. They stimulate innovation and guarantee a just compensation (*justum sui laboris pretium*) for the authors', printers' and inventors' labour and efforts. For a limited period of time, patents allow authors, printers and inventors to have the exclusive right to sell their books or inventions. 'By not wanting to share their private knowledge with others', Oñate explains[44], 'it is as if they were exercizing their own right, since that knowledge is like their private property'. Strangely enough, Oñate does not further develop this compelling phrase where intellectual property rights and the ownership of material goods are put on a par. It

41 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 1, p. 142, nr. 19: '… colligo Correctores huius Peruani regni, qui passim in suis ditionibus monopolii privilegium sibi usurpant per summam vim et iniuriam prohibentes ne quis praeter ipsos triticum, vinum et oleum vendant, vel cocam quam vocant vel panes coctos vel arietes indicos ad importandum vel exportandum locent et alia similia, gravissime et cum onere restituendi peccare …'.

42 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 1, p. 140, nr. 7.

43 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 1, p. 142, nr. 21.

44 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 1, p. 141, nr. 12: 'illi quasi iure suo utuntur, scientiam privatam aliis communicare nolentes: sunt enim quasi privata bona sua'.

deserves mentioning, though, that a contemporary of Oñate, the Jesuit Juan de Lugo, who published an influential treatise *De iustitia et iure* in 1642, the year before he was created a Cardinal by Pope Urban VIII, did elaborate on the necessity to introduce patents for the greater good of the republic in his work[45]:

> For the sake of supporting and promoting the eagerness and hard work (*industria*) of authors and printers, such privileges are rightfully granted to them, usually for a period of ten years. By the same token, it is only right that, by way of compensation for their invention, that power is conceded to inventors of machines and other techniques useful to the republic. For this is the fruit of the author's hard work (*industria*) and it would not be fitting that others reap an equal benefit from the author's unremitting cleverness at his expense.

By the mid-seventeenth century, then, the Jesuit 'teólogos-juristas' fully understood the vital connection between legal monopolies and the stimulation of innovation-based entrepreneurship. Perhaps it is not a coincidence that both Oñate and Lugo were Jesuits with a special relationship to Peru – allegedly, Juan de Lugo was fond of the so-called 'Peruvian barks', introducing them in drug stores in Rome because of their strong medicinal qualities, notably thanks to the large quantities of quinine they contained. Incidentally, the Peruvian barks, often considered as a major breakthrough in the history of medicine, also became known as the 'Jesuits' barks' or the 'Cardinal's powder' after Juan de Lugo's seminal role in promoting them[46].

5 Excessive *industria* and the creation of artificial scarcity

While in the previous examples sellers enjoy exceptional market power by virtue of state privilege (legal monopolies), on the basis of a conspiracy (cartels), or by excluding other market participants (barriers to entrance), there is a

45 J. de Lugo, *De iustitia et iure*, vol. 2, disp. 26, sect. 12, p. 342, nr. 171, also cited in Decock, *Le marché du mérite* (*supra*, n. 18), p. 144: 'Ad fovendam ergo et promovendam alacritatem et industriam auctorum et typographorum, merito eiusmodi privilegia eis solent ad decennium concedi. Sicut et inventoribus alicuius machinae vel artificii reipublicae utilis iustitissime in praemium suae inventionis talis facultas conceditur; est enim fructus industriae, et non decet ut alii cum auctoris praeiudicio lucrum aequale ex eius vigiliis reportent'.

46 L.J. Bruce-Chwatt, *Three hundred and fifty years of the Peruvian fever bark*, British Medical Journal, 296 (1988), p. 1486-1487.

fourth case of monopolistic behavior that the scholastics tried to come to grips with: the creation of artificial scarcity, especially through the – industrious – process of buying up a maximum of supply of a certain good (*coëmptio*). In such cases, a conflict arises between two policy considerations that pervade the economic ethics of Jesuits such as Molina, Lessius and Oñate: the need to stimulate industrious behavior (*industria*), on the one hand, and the necessity to protect the common good (*bonum commune*), on the other. As has been argued elsewhere, Molina and Lessius went very far in protecting *industria*[47]. They did consider the practice of *coëmptio* problematic from the point of view of the principles of charity (*charitas*) and legal justice (*iustitia legalis*). But they concluded that the creation of artificial scarcity did not result in a violation of the virtue of justice as related to transactions between individuals (*iustitia particularis*), provided that the *coëmptio* did not result in a price going beyond the rigorous just price. Consequently, they were of the opinion that merchants were not bound to make restitution of the profits obtained. They nevertheless accepted that political authorities could punish this kind of monopolistic behavior in order to protect the common good, which is the object of 'legal justice'. Lessius' reasoning had a profound impact on Hugo Grotius (1583-1645) and other natural law thinkers such as Heinrich von Cocceji (1644-1719)[48].

Oñate, however, remained unimpressed by the authority of his predecessors. In a lengthy discussion on *coëmptio*, he attacks various situations in which sellers have acquired the power to determine prices arbitrarily by cornering the market. Not only does he condemn the situation in which such practices lead to prices that go beyond the highest just price – practices typical of what he calls *atravessadores* or *recatones*, the Spanish equivalent of the *dardanarii* (speculators)[49]. He also rebukes the situation in which the sellers gain so much market power that they are able to set a price that falls within the range of just prices, be it the rigorous, the medium or lowest just price[50]. Fully aware of the fact that cornering the market was the result of efforts and energy deployed by the merchants (*data opera emunt*)[51], he nevertheless gives priority to the protection of the common good, considering that artificial scarcity is a plague to society, even if it leads to prices that do not go beyond the regular market price. Contrary to Molina and Lessius, he is of the opinion that such merchants do not just violate the virtue of charity, but also the virtue of commutative justice.

47 Decock, *Le marché du mérite* (*supra*, n. 18), p. 123-146.

48 W. Decock, *Max Weber, Monopole und der Geist der europäischen Rechtsgeschichte*, Archiv des Völkerrechts, 59 (2021), p. 97-110.

49 See Roman law, e.g. D. 47,11,6.

50 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 148, nr. 47.

51 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 147, nr. 41.

The reason being, according to Oñate, that by cornering the market, they exert coercion on the buyers, leading to vitiated consent. The following passage is revealing of Oñate's emphasis on freedom of consent, since he explains that[52]:

> Even if the price is just, coercion remains illicit and goes against justice, because it takes away the liberty of concluding a contract (*libertatem contrahendi*) with whom you want and at the price you want, provided the price remains within the latitude of the just price.

So, even if, at first sight, Oñate's rigorous attitude simply resembles that of the medieval canon law tradition, which strongly condemned the creation of artificial scarcity[53], a return to the spirit of canon law can only be part of the explanation behind his rigorous attitude. Incidentally, his reasoning contains many explicit references to Roman law, but there are no direct references to the *Decretum Gratiani* or the *Liber Extra*, even if Oñate cites Martín de Azpilcueta, the famous sixteenth-century canon lawyer[54]. The ultimate reason why Oñate condemns *coëmptio*, as is obvious from the above quote, is because it leads to a situation of asymmetrical market power that compromises the freedom of the will on the part of the buyers which is necessary to conclude valid contracts. Ultimately, Oñate's assessment about the illegitimacy of cornering the market is directly related to his overall emphasis on free will and voluntariness as the basis of contract law. As in the case of cartels and import barriers, Oñate disagrees with Molina and Lessius precisely on account of his even more radically voluntaristic account of contractual obligation. After stressing that even dominant positions leading to the unilateral imposition of a less than rigorous price are unjust in his eyes, he acknowledges that he has not found any other scholar expressing his opinion[55],

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52 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 148, nr. 45: 'Coactio etiam pretio iusto illicita est, et contra iustitiam, quia aufert libertatem contrahendi quo cum velis et quo pretio velis intra latitudinem iusti'.

53 E.g. canon *Quicumque* (C. 14 q. 4 c. 11). See also O.I. Langholm, *Monopoly and market irregularities in medieval economic thought: traditions and texts to* AD *1500*, Journal of the History of Economic Thought, 28 (2006), p. 395-411, and D. von Mayenburg, *Wörter für Wucher:* ius commune *and the sixteenth century debate on the legitimacy of South German trading houses*, in: S. Gialdroni et al. (ed.), *Migrating words, migrating merchants, migrating law, Trading routes and the development of commercial law*, Leiden – Boston 2019, p. 176-231.

54 On the importance of Azpilcueta in this discussion, see Decock, *Le marché du mérite* (*supra*, n. 18), p. 137.

55 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 148, nr. 47: 'Fateor me apud neminem in terminis invenisse, sed ratione cogor eam tenere, quia principium

> but reason urges me to adopt this view, since one principle is certain in this matter, namely that a person who coerces another one into buying or selling, even at the just price, is sinning against justice by taking away that person's liberty (*libertas*) to buy from whom he wants.

6 Stock management and the art of doing business

Condemning strategies of *coëmptio* aimed at creating artificial scarcity on the grounds that such practices vitiate the buyers' consent, Oñate is nevertheless careful to distinguish such cases from situations in which merchants simply withdraw their goods from the market in order to sell them at a future point in time when prices are more advantageous. When merchants speculate on higher future prices and decide not to bring their supply on the market right now – a practice he designates with the Latin terms *suppressio* or *reservatio* – this is just a matter of prudence and business acumen. But Oñate makes two reservations. Firstly, this speculative behavior should not result in overall scarcity on the market, otherwise the prudent merchant can be considered as a monopolist. On this occasion, he defines scarcity of supply as a situation in which the poor and the citizens have no longer access to basic goods – they do no longer know where to find something to eat[56]. Moreover, merchants should not deceive perceptions of other market participants by making them wrongly believe that certain goods are no longer available[57]. While applying the distinction between illegitimate forms of *coëmptio*, on the one hand, and legitimate strategies of *suppressio*, on the other, may prove difficult in business practice, maintaining it on a theoretical level matters to Oñate because it allows him to express his appraisal of prudent market behavior while simultaneously remaning faithful to his radical rejection of monopolistic practices.

In the footsteps of Molina and Lessius, Oñate is actually eager to stress that merchants are expected to behave prudently. They must follow the evolution of the market very closely in order to benefit from it at the right moment – seize the *kairos*, as it were[58]. As long as they are not intent on creating artificial scarcity, they are simply exercizing their own right (*suum ius*), taking advantage of their hard work (*industria*) and engaging in the habitual art of

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est certum in hac materia, eum, qui cogit alium emere vel vendere, etiam pretio iusto, peccare contra commutativam auferendi [sic] ei libertatem emendi a quocumque velit'.

56 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 148, nr. 48.

57 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 150, nr. 54.

58 B. Baert, *From Kairos to Occasio through Fortuna, Text – Image – Afterlife*, Turnhout 2021.

doing business (*ars mercatoria usitata*)[59]. Exercising the art of business in this way, Oñate adds, is not only not against the interest of the republic, but sometimes even clearly in favor of it. Against contrary views expressed by other scholastics such as Bartolomé Salon, an Augustinian frair, and apparently less business-prone Jesuits such as Fernaõ Rebello and Juan de Salas, Oñate insists that speculative behavior on the part of merchants is conducive to the common good, since it leads them to withhold goods from the market when they are too abundant, and put them on the market when shortages arrive[60]. They are constantly adapting their strategies to the market, the evolution of which is apparent in the dynamic of changing price levels. In doing so, they actually serve the interests of their fellow citizens. Again, much to the advantage and utility of the republic, Oñate insists, these merchants are simply exercizing their right (*suum ius*) and their trade (*sua ars*).

It turns out, then, that Oñate neatly differentiates between various types of dominant positions, condemning only those situations where the balance of power radically shifts in favor of one of the contracting parties, leading to a thoroughly asymmetrical situation that leaves the other party no choice but to consent to contractual conditions that are clearly unnatural and not in his favor because he no longer has an alternative. While this remains difficult to assess in practice, at some point Oñate suggests that speculative behavior is entirely legitimate as long as those who engage in it remain themselves subject to market forces. They are expected to avail themselves of changes in price levels, but they must not become so dominant that they themselves can become active influencers of price levels. A comparison is necessary, according to Oñate, between the total amount of goods of a certain type available in the market and the specific amount that is kept by a particular businessman. As long as the businessman holds a relatively small stock compared to the overall supply, his practices of *coëmptio*, *reservatio* and *suppressio* remain

59 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 148, nr. 48: 'Quia hi non sunt monopolae, quia non coëmunt omnes merces alicuius generis, ut supponimus, nec alios prohibent vendere, nec ementes ut a se emant; sed suo iure et industria utuntur et arte mercatoria usitata, sine dispendio, immo et aliquando cum compendio et utilitate reipublicae'.

60 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 150, nr. 52: 'Quare non est cur a Salone illo suo extremo de monopolio opusculo, Rebelle et Sala supra citatis adeo sugillentur, quia sine reipublicae dispendio, immo cum reipublicae commodo et utilitate suo iure et sua arte utuntur'.

unproblematic[61]. 'This is the reason', he explains[62], 'why it is commonly allowed for merchants to keep their goods away from the market altogether and sell them later, or hide the largest part of their goods in a storage room and offer only a small part for public sale now'.

7 *Pandopolia* and the competition of all against all

While more often than not, it is sellers who acquire that monopolistic dominant position by creating artificial scarcity, Oñate nevertheless repeats that buyers, too, can create situations that leave them in a position of excessive bargaining power. In modern economic language, this is a monospony rather than a monopoly. Oñate does not use that term. Rather, he includes situations of monopsony under the generic term monopoly, explaining that, mutatis mutandis, all four kinds of monopoly can also be committed by purchasers[63]. A concrete example concerns abusive behavior by public officials who prevent other buyers from presenting themselves at both public and private auctions – this is daily practice in Peru, Oñate oberves, where *corregidores* oblige sellers to bargain exclusively with them in order to buy cheap and set up a monopoly themselves to sell the goods at predatory prices[64]. Another way in which buyers – or rather public officials – increase their bargaining power is by prohibiting local merchants to export their goods, thus guaranteeing large supply in their own local market and lower prices. Moreover, Oñate explains, monopolistic practices are not limited to sale contracts. They also occur in other agreements, especially in money-exchange transactions and labor relations, as when constructors or workers conspire not to carry out a certain work below a certain price[65]. Of course, the afore-mentioned constitution by the Emperor Zeno, which prohibited constructors from making that kind of arrangements, provides an easy argument from authority.

61 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 150, nr. 55: 'Sed praedicta in his duabus illationibus tunc tantum vera sunt et locum habent, quando merces quas isti monopolae servant aut recondunt, multae sunt. Quando enim paucae sunt in ea comparatione, etiam detectae et propalatae pretium forense et vulgare non immutant'.

62 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 150, nr. 55: 'Atque haec causa est cur mercatoribus communiter liceat aut merces suas in aliud tempus vendendas servare aut tunc vendendas maiori ex parte in suis apothecis recondere, et minorem tantum partem palam vendendam proponere'.

63 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 5, p. 153, nr. 71.

64 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 5, p. 153, nr. 71.

65 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 5, p. 153, nr. 72.

Interestingly, Oñate introduces the new term *pandopolium*, which contains the Greek adjective for 'all' (*pan*), to describe and evaluate situations whereby both buyers and sellers try to get one-sided control of the market through monopolistic practices.[66] This is not just a matter of a metaphysical obsession with technical terms. In reality, Oñate says, this situation occurs very frequently in the Americas, especially in zones of international trade such as Panama, which, at that time, belonged to the extreme north of the Vice-Royalty of Peru. What happens in Panama, Oñate explains, is that Peruvian merchants conspire in order not to buy the merchandise shipped by Spanish merchants beyond a certain price. They create a cartel that forces the Spanish merchants arriving in Panama to sell at low prices. However, the Spanish merchants protect themselves against such behavior by conspiring amongst themselves against the Peruvians by not accepting to sell unless at certain prices. The consequence of such a *pandopolium*, in which both buyers and sells try to get full control over the market, is a stale-mate that changes the moral assessment of each of the parties' behavior, because the distribution of bargaining power has now become entirely symmetrical. Citing a well-known adage from canon law (*paria delicta mutua compensatione tollantur*)[67], Oñate is of the opinion that the vicious behavior of one party is cancelled out by that of the other, leading to a competitive price which is unproblematical[68]:

> In that case, equally bad delicts are cancelled out by mutual compensation, and one monopoly is chased by the other, just as fire is being fought with fire (*clavus clavo truditur*). From mutual bidding, a just price emerges. Since, little by litte, all local buyers are bidding against all foreign sellers and eventually agree on that price, this is not to be called a monopoly but a pandopoly. I do not see anything unjust in the common establishment of that price, since the conspiration is common to all as well, that is to both buyers and sellers. Therefore this is to be called an entirely just gathering of the entire republic.

66 On this problem, see also R. Rosolino, Countervailing powers, The political economy of market, before and after Adam Smith, Cham 2020, 49-79 (Monopoly versus monopoly).

67 X 5,16,6.

68 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 149, nr. 51: 'Tunc enim paria delicta mutua compensatione tolluntur et monopolium monopolio quasi clavus clavo truditur, vel potius iustum pretium mutua licitatione consurgit, quia cum omnes hinc ementes cum omnibus inde vendentibus sensim licitando pretium illud paciscantur non monopolium sed pandopolium dici meretur, nec in illa pretii universali constitutione aliquid video iniustum quia conspiratio illa in pretium tum universalis est omnium tum etiam ex utraque parte tam emptorum quam venditorum fit. Quare iustissima potius totius reipublicae conventio dicenda est'.

In other words, vicious behavior exercized collectively on both sides of the transaction does not compromise contractual consent, whereas monopolistic behavior by just one of the parties does vitiate the bargain's voluntary nature. Quite astutely, Oñate uses this reasoning to go on and explain that quite an important economic activity in Peru does not fall under the scope of the prohibition on monopolies: the royal exploitation of natural resources in Huancavelica, a city about 225 km southeast of Lima. A major mining settlement since the 1560s, Huancavelica provided the mercury needed for the extraction of silver in the mines of Potosí, that other famous metropolis of mining activity in the Vice-Royalty of Peru[69]. The operators of the silver mines in Potosí bought the mercury from the royal mine in Huancavelica at the natural price or market price, according to Oñate, because they would not have paid a different price for the mercury if the mines had not been occupied and owned by the royal authorities[70]. In modern terminology, one could say that Oñate considered the exploitation of the mercury mines in Huancavelica as a form of 'natural monopoly'. He did not consider these monopolies to be the outcome of fraudulent behavior or deceitful tactics, but as an extension of the King's land ownership rights. 'It is as if that merchandise was born out of the minerals belonging to his estate', he explains. Oñate nevertheless warns royal officials against abuse of power, condemning favoritism and attempts to charge predatory prices.

8 Speculation, secret information, and the Merchant of Venice

Apart from his approval of natural monopolies, Oñate is careful to exclude yet another type of market behavior from the category of forbidden dominant positions, namely speculative strategies that pertain to the art of a prudent businessman (*ars mercatoria*). In the absence of fraud and trickery, merchants are allowed to speculate on the evolution of market prices, for instance by waiting to sell their goods until prices have risen. In principle, individual

69 Lane, *Potosí* (*supra*, n. 2) (also including references to the mining activities in Huancavelica).

70 Oñate, *De contractibus*, vol. 3.1, tract. 21, disp. 67, sect. 3, p. 149, nr. 51: 'Monopolium argenti vivi quod ab ipso rege occupatum omne est in Cuancavelica in hos Peruano regno iustum censeri, quia Rex moderato pretio et eodem quod foret forense in illa republica vel naturale si a Rege omnes illius argenti vivi fodinae non fuissent occupatae, illam mercem vendit suis vassallis, quasi in quodam suo fundo in suis mineralibus enatam, et fructum eorum et iuste distribuitur inter emptores qui effodiendis metallis Potossinis argenteis operam navant'.

market participants do not gain undue influence over the overall evolution of market prices by applying those day-to-day business strategies. It does not give them the power to completely control the market. Rather, as has been pointed out before, they are simply exercising their right (*suo iure utuntur*) and deploying all their energy and insight (*industria*) to try and sell or buy at the right moment. In fact, in doing so they are contributing to the smooth functioning of the market, since they will have a pecuniary incentive to offer their goods on the market when supply is low and to withdraw the same goods when offer exceeds demand. As a result, the community can expect to be always offered sufficient goods at reasonable prices.

In adapting their business strategy to changing market circumstances, merchants constantly rely on the acquisition and processing of information, gathered through their personal observation and business network. Engaging in a kind of permanent competition – John Mair, the Scottish scholastic theologian, expressly used the term 'contest' (*certamen*) to describe merchants' interactions[71] – businessmen must try to make sure that they are the first to learn about imminent changes in supply and demand to outwit their rivals. In this regard, several scholastics discussed a case known as 'The Merchant of Venice', which is exactly about the use of privileged information – for clarity's sake, it is different from Shakespeare's play with the same name. The facts of the case are as follows. A merchant from Venice receives a letter from a friend informing him about the imminent increase in the price of spices (*aromata*). In order to make profits, he instructs his partners to buy up the entire supply – clearly pursuing a strategy that Oñate has previously qualified as *coëmptio*. However, through his own neglect, the letter gets lost and is discovered by a rival merchant from the same city. This second merchant reacts even more swiftly than the first one, outsmarts his rival and manages to get hold of the entire supply.

In the contemporary scholastic literature, the question that haunted the doctors was whether the second merchant of Venice was allowed to take advantage of the secret information at the expense of the actual addressee of the letter. They wondered if the second merchant was not obliged to make restitution to the first merchant. While opinions diverged on the matter, Oñate argues straightforwardly that the second merchant cannot be considered as guilty of harming the first one. Interestingly, he applies the logic of property law to the acquisition of information – much as we have seen before in the context of his defence of intellectual property. Having lost the letter through his own neglect and stupidity (*socordia*), the first merchant 'has only himself to blame', Oñate

71 Decock, *Le marché du mérite* (*supra*, n. 18), p. 89.

says[72]. The information which he received but then lost for lack of vigilance 'resembles vacant and abandoned goods, which the second merchant has retrieved and acquired through his hard work (*industria*)'. Once the information is lost it has to be treated, from a legal point of view, as a wild bird that regains its liberty because of the hunters' negligence. In such circumstances, the wild bird will become the property of the one who first manages to catch it. Referring to Roman law[73], Oñate conceives of this process as original acquisition of ownership through *occupatio*.

In Oñate's view, the second merchant of Venice is not under any duty to make restitution to the first merchant. He simply outsmarted him and is legally allowed to do so. Oñate disagrees with Fernão Rebello (1546-1608), a fellow Jesuit from Évora, who accused the second merchant of Venice of abuse of secret information[74]. Compared to the exposition of his older colleague, Oñate's analysis is clearly more juridical in nature. However, this is only part of the story. For even if the second merchant cannot be considered as having sinned against his competitor, Oñate goes on to question his very strategy of buying up the *entire* supply of *aromata*. In line with the general thrust of his doctrine on monopolies, Oñate is not willing to approve of such a *coëmptio*-strategy, since it distorts the market at the expense of the entire community. Incidentally, if the first merchant, too, had had the intention of buying up the entire supply, he would have sinned by availing himself of his secret information. Regulation of such market behavior is absolutely necessary, according to Oñate (*mercatores isti sint regulandi*)[75]. Whatever the price at which they sell the spices, if their dominant position is the result of *coëmptio*, merchants' behavior has to be radically reined in. They should be obliged to make restitution of their profits.

72 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 151, nr. 58: '(…) illud secretum non fuit secundo commissum a primo, sed quasi proiectum a se irrecuperabiliter et quasi bona vacantia et derelicta sua industria secundi mercatoris sibi inventa et comparata; et suae socordiae deputet primus mercator si secretum, quo ad suam magnam utilitatem uti potuit, negligenter custodivit: avolavit enim ab eo et quasi avis capta sed negligenter custodita iterum iure naturae facta est primi occupantis non prioris domini, ut constat toto tit. ff. et instit. de rerum divisione'.

73 Inst. 2,1 and D. 1,8.

74 F. Rebellus, *Opus de obligationibus iustitiae, religionis et caritatis*, Lyon, Cardon, 1608, part. 2, lib. 9, q. 7, p. 640, nr. 8.

75 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 67, sect. 3, p. 152, nr. 59: 'Sed nec rationem dubitandi habet quin mercatores isti fuerint veri monopolae huius speciei ac propterea supradictis conclusionibus sint regulandi'.

9 Speculation, private knowledge and the Merchant of Rhodes

But what if the Venice merchants had not been so overzealous as to seek total control of the spice market? What if the first nor the second businessman had engaged in *coëmptio* in the strict sense of the word but in more modest forms of speculative behavior? Asking that question brings us to another famous case debated by the scholastics, viz. the case of the 'Merchant of Rhodes'[76]. Informed about future changes in the market price, this merchant wonders whether he can still sell or buy at the current market price. For example, through his connections he learns that the royal household will move out of his city, that the supply of goods will increase because of the imminent arrival of other merchants or that the authorities will lower the statutory price of grain. Can he still charge the current, relatively higher price of his goods, even though he knows that the price will soon decrease? Debated since Antiquity, the early modern Jesuits phrase the issue in terms of the impact that private knowledge is supposed to have on the just price. Following his colleagues, Oñate reasons that it should not. The just price is determined by common estimation, which depends on information and knowledge that is publicly available. A merchant who is able to anticipate the evolution of market prices better than others should not be punished for his insight. Rather, he should be allowed to profit from his information advantage.

Spending lengthy pages on the case of the 'Merchant of Rhodes', Oñate also repeats some of the more controversial standpoints that Molina and Lessius had adopted. Contrary to Cicero and many humanist scholars of their day, Molina and Lessius stated that a merchant was not obliged to share his private information with the other party to the contract, even if asked about it explicitly. He could stay quiet, preferring his own profit over that of his neighbour. This was not even a sin against charity, since the 'order of charity' obliged one to prefer his own interest above that of someone else. 'According to the order of charity', Oñate explains[77], 'and all else being the same, I must want goods, even temporal ones, to belong to me rather than to my neighbor'. While Catholic moral rigorists such as the Jansenists may have taken offense at such statements, Oñate goes on to submit that 'the contracting party exercizes his

76 W. Decock, *Lessius and the breakdown of the Scholastic paradigm*, Journal of the History of Economic Thought, 31 (2009), p. 57-78.

77 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 66, sect. 8, p. 136, nr. 120: 'illud lucrum velle sibi potius quam alteri celando casum superventurum non est contra ordinem charitatis sed potius secundum illum quia secundum ordinem charitatis caeteris paribus magis debeo bona etiam temporalia velle mihi quam proximo, et utitur contrahens iure suo illam scientiam et notitiam celans'.

right (*iure suo utitur*) by hiding his knowledge and information'. What is more, following Lessius, who relied on the Augustinian friar Pedro de Aragon's interpretation of the doctrine of professional lies (*mendacium officiosum*), Oñate reasons that this merchant does not sin against justice or charity by blatantly lying about his private knowledge about future market conditions – although he commits a sin against the virtue of truth[78].

Oñate fully backs Aragon's and Lessius' viewpoint, further explaining that a merchant who believes the words of a competitor has only himself to blame[79]. Moreover, he explicility rules out the possibility of applying the general rule that deceit invalidates a contract. If we accepted that, then the contract would always have to be considered invalid in cases such as that of the Merchant of Rhodes. The particular nature of this case is that it starts from the assumption that the other party to the contract would not have accepted the bargain, or at least not on the same terms, had he had the same private knowledge[80]. Not everyone will be convinced by this argument. A tension arises here between Oñate's emphasis on absolute free will as the basis and fundament of contractual obligation and his inclination to stimulate prudent and clever market behavior. In his solution of the specific case of a merchant knowing in private about the royal household's plans to move away, he expressly argues that he is allowed to use that private knowledge to his own profit and hide the information to the other contracting party. 'This is a matter of businessmen's hard work and insight (*industria mercatorum*)', he reasons[81], 'they are simply exercizing their right (*iure suo utuntur*)'.

It remains to be seen, though, whether Oñate's opinions on the 'Merchant of Rhodes' are entirely coherent with his condemnation, in his discussion on monopolies, of merchants trying to obtain a dominant position through strategies of *coëmptio*. It should be recalled that Oñate condemns such practices as being 'monopolistic', in a much more straightforward way than Molina or

78 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 66, sect. 8, p. 136-137, nr. 122.

79 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 66, sect. 8, p. 137, nr. 122: 'quod enim interroget vel non non variat ius nec obligationem conscientiae: sibi enim imputet qui de scientia privata, quam manifestare non tenetur, alium interrogat et suo responso fidit'.

80 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 66, sect. 8, p. 137, nr. 122: 'Nec refert quod ea deceptio det causam contractui, necne. In toto enim hoc casu supponimus ementes et vendentes, si scirent instantem abundantiam vel penuriam non fore eos contractus inituros. Unde si illa ratio efficax esset, semper contractus esset nullus et semper decipiens ad restitutionem teneretur'.

81 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 66, sect. 8, p. 137, nr. 124: 'illa scientia ad suum commodum uti non detegendo emptori futuram curiae migrationem res est ad industriam mercatorum pertinens, qui utuntur iure suo'.

Lessius. Granted, the transaction concluded by the Merchant of Rhodes operates on a micro-level. It does not necessarily influence the overall evolution of the market price. The Merchant of Rhodes remains a price-taker, so to speak, and does not reach a position whereby he controls the market. In this regard, it is perhaps not a surprise to find that Oñate does not take into consideration the case whereby the Merchant of Rhodes adapts his strategy according to his private knowledge and tries to sell or buy many *more* goods upon learning that prices will decrease or increase because of an external event. Molina and Lessius had explicitly addressed this issue, allowing the merchant to speculate on this knowledge and make even more profits than originally intended by buying or selling more goods (*plus*).

Obviously, there is a thin line between such speculative activities as described by Molina and Lessius and the attempt to create a dominant position by virtue of *coëmptio*[82]. But Oñate simply ignores the question. Whether on purpose or not, it helps to hide the connection between the case of the Merchant of Rhodes and that of *coëmptio*-strategies resulting in a dominant position, making it easier for Oñate to simultaneously approve of the Merchant of Rhodes and condemn monopolies based on excessive *industria*. This would seem to lead to inconsistencies. In his treatment of a historical-Biblical case related to that of the Merchant of Rhodes, namely that of Joseph purchasing abundant grain supplies only to sell them dear to foreign nations when Egypt and the surrounding areas were struck by scarcity and famine (Gen. 41:49). Traditionally, the scholastics cited this case as an argument in favor of the legitimacy of the Merchant of Rhodes's exploitation of his private knowledge. But the way Oñate describes Joseph's massive grain storing efforts is reminiscent of the definition of *coëmptio*, especially because he emphasizes that Joseph bought the *entire* grain stock (*emit totum triticum*)[83]. In Oñate's defense, one could argue that Joseph acted as a political leader and in the interests of the citizens, whereas ordinary businessmen look after their own interest.

82 This might explain why Lessius accepts reasoning by analogy from one case to the other, see *De iustitia et iure*, lib. 2, cap. 21, dub. 21, Antverpiae 1621, p. 296, nr. 152. See also Decock, *Le marché du mérite* (*supra*, n. 18), p. 83-104.

83 Oñate, *De contractibus* (*supra*, n. 16), vol. 3.1, tract. 21, disp. 66, sect. 8, p. 134, nr. 112: 'Probatur haec sententia valde efficacibus rationibus. Prima ex facto Ioseph Patriarchae Gen. 41, qui sciens superventuram famem in Aegyptum et superventuram abundantiam emit tamen totum triticum pretio currenti vilissimo et postea vendebat pretio maximo, qui et vendendo et emendo gravissime peccasset, siquidem ea arte expoliavit Aegyptum, nisi nostra opinio esset verum, eum qui scit superventuram abundantiam posse vendere maioris et qui superventuram famem posse emere minoris'. The story of Joseph is also used as an argument in nr. 123 (p. 137) and nr. 129 (p. 138) of Oñate's exposition on the Merchant of Rhodes.

10 Concluding remarks

Mercatores isti regulandi – merchants that behave like monopolists must be regulated. This fragment from Oñate's analysis of the case of the Merchant of Venice, which we discussed above, neatly summarizes his opinion on the need for moral regulation of the market, especially to combat various forms of monopolistic practices. To make sure that that regulation is properly taken care of, experts in law and theology like Oñate are needed. Especially in the context of the New World, where public institutions remained weak and the opportunities for abuse rampant, *teólogos-juristas* played a major role in that normative effort[84]. A great advocate of property rights and freedom of contract, Oñate does not shy away from protecting the market against vicious practices by greedy individuals and public officials alike. Although the complex nature of his legal analysis prevents him from drawing simplistic conclusions or indulging in economic moralism, his treatise *De contractibus* nevertheless betrays a strong character, who is not afraid to condemn practices that jeopardize commercial liberty in particular and freedom of contract in general. This is a quality of Oñate's work that he shares with many other Jesuits from the early modern period. Oñate constantly enters into a dialogue with them, showing that he is fully part of a centuries-old 'conversation' among so-called scholastic authors on law, economics and theology. At the same time, he displays a remarkable originality. Apart from the sense of detail with which he treats cases, his analysis stands out by its references to local practices in Peru and the experience of the colonial economy.

84 In this sense, Oñate's *De contractibus* offers a major example of moral theological literature that contributes to our understanding of normative practices in Iberian America, see Th. Duve and O. Danwerth (eds.), *Knowledge of the Pragmatici, Legal and moral theological literature and the formation of Early Modern Ibero-America*, Leiden – Boston 2020.