Abstract

« Texts serve contexts », runs a common rule of legal practice. Taking into account this basic yet revealing insight, it will be argued in this paper that constitutionalist doctrine as it was developed by Francisco Suárez in early modern times basically is to be considered as the outcome of the power struggle between the Church, its protestant rivals and increasingly ambitious secular authorities. By stressing its natural and contractual origins, Suárez's « natural » account of political power was geared towards bringing down to earth the lofty ambitions of absolutist princes who increasingly tried to fish into the Church's ponds. From a methodological point of view, in a « humanistic » vain this paper foremostly seeks to foster a return to a close-reading of Suárez's *De legibus ac Deo legislatore* (1612) and *De defensione fidei catholicae* (1613).

Key words

Contitutionalist doctrine, Francisco Suárez, power struggle, Church, princes, political power.

Resumen

"Los textos sirven al contexto" establece una norma común de la práctica legal. Teniendo en cuenta esta idea aun básica y reveladora, se argumentará en este documento que la doctrina constitucionalista, desarrollada por Francisco Suárez en los inicios de los tiempos modernos básicamente se considera como un resultado de la lucha de poder entre la iglesia, sus rivales protestantes y las cada vez más ambiciosas, autoridades seculares. Enfatizando sus orígenes naturales y contractuales, la consideración natural de Suárez sobre el poder político se dedicó a aterrizar las altas ambiciones de los príncipes absolutistas, quienes cada vez más, trataron de pescar en los estanque de la Iglesia. Este documento, desde un punto de vista metodológico, en una vanidad "humanista", busca fortalecer un retorno a la lectura cercana de *De degibus ac Deo legislatore* (1612) y *De defensione fidei Catholicae* (1613) de Suárez.

Palabras clave

Doctrina constitucionalista, Francisco Suárez, lucha de poder, Iglesia, príncipes, poder político.

Counter-reformation diplomacy behind Francisco Suárez's constitutionalist theory

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1. Introduction

In his *Treatise on commerce and contracts*, Tomas de Mercado (ca. 1530-1579) warned merchants not to embark upon a business trip to the Americas all too frequently, certainly not from the end of October till the end of December, for hurricanes and storms would definitely punish their insatiable desire to make money all across the year and regardless of natural constraints. What is more, Mercado even wondered if risking one's life in order to go to Florida or Campeche was lawful before the court of conscience at all. He criticized the recklessness of many a merchant crossing the Ocean all too frequently in order to make more money, thereby neglecting the natural rhythm of the seasons.[1] Academics can hardly been said to be driven by an insatiable desire to make money, so we do not take Mercado's warning to apply to the European scholars who crossed the Atlantic to attend this first meeting of the *Instituto Latinoamericano de Historia del Derecho*. What it does mean to indicate, though, is how life has changed compared to almost five centuries ago, and how careful we should be as a result in interpreting the flourishing of constitutionalist and natural rights doctrines in legal and moral philosophy of the 16th century

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1 Cf. Tomas de Mercado, *Suma de tratos y contratos*, lib. 2, cap. 23, in : *idem*, edición de Nicolas Sanchez Albornoz, Madrid, 1977, vol. 1, pp. 246-247 **:** *« Es tanta la inconsideración de algunos que se ponen a él [el periculo] por levísimas causas y motivos, tanto más atrevidos y reprehensibles en su navegación que Leandro en su pasaje o Ícaro en su vuelo, según fabulan los poetas, cuanto en realidad de verdad es mayor y más peligroso el mar Océano que aparta las Indias de Europa que el estrecho del Helesponto que divide a Sestos de Abido.»* Apart from the introduction by Sanchez Albornoz to his edition, excellent reflections on Mercado's commercial treatise are offered in Andrés Botero Bernal's 'Análisis de la obra « Suma de tratos y contratos » del Dominico Tomás de Mercado', in : id., *Diagnóstico de la eficacia del derecho en Colombia y otros ensayos*, Medellín: Señal editora, 2003, pp. 128-192.

Spanish Golden Age. Even so, the natural law rhetoric being used today seems not to have lost anything of the ambivalence it possessed from its very origins. This paper will argue that constitutionalism as it was famously expounded by the Jesuit Francisco Suárez (1548-1617) fundamentally is not to be regarded as a spontaneous withdrawal from the Church out of worldly policies. On the contrary, stressing its natural and contractual origins, Suárez's secularizing account of political power was geared towards breaking the mounting ambitions of secular state power.

2. Medieval political philosophy and its recapitulation during the (Counter-) Reformation

It proves helpful in gaining a better understanding of early modern political thought to briefly point out some very basic features of the political doctrine of the early middle ages that inevitably underlie future controversies.[2] According to early medieval doctrine, life on earth and the political society was all about a preparation of life in heaven. In the Augustinian tradition, there is no separate and distinct human or political life governed by rules of its own.[3] On the contrary, the existence of a political organization and authority is explained by Augustine (354-430) in entirely religious terms. Because of the thoroughly sinful nature of man, man is constantly breaking the rules of good social behavior, creating chaos and violence, and violating the moral precepts contained in the Bible. Therefore, God has ordained wordly power with the divine task of punishing crime and making people choose the path leading to heaven. Political authority, then, is divine, as to its origins as well as to its end. An important change in this early medieval paradigm of political thought was brought about in the 13th century. After Aristotle's political and ethical works had

2 This brief summary obviously does not make any pretensions to originality nor comprehensiveness. A standard view of Medieval political thought is offered, amongst others, by J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought*, Cambridge : CUP, 1988. The classic study on early modern Reformation and Counter-Reformation political thought as well as its Medieval antecedents remains Quentin Skinner's, *The Foundations of Modern Political Thought*, Vol. 2 : *The Age of Reformation*, Cambridge : CUP, 1978. For a more recent overview, see Merio Scattola, *Teologia politica*, Lessico della politica 15, Bologna : Il Mulino, 2007, pp. 35-76. A very useful outline for present purposes of the history of the Medieval and early modern doctrines on State-Church relationships is to be found in Bart Wauters's *Recht als religie. Canonieke onderbouw van de vroegmoderne staatsvorming in de Zuidelijke Nederlanden*, Symbolae, Series B/35, Leuven : Universitaire Pers, 2005, pp. 13-136.

3 See Augustine, *De civitate Dei*, XIV, passim.

been made available to the Latin West through the translations made by Robert de Grosseteste and William of Moerbeke, Thomas Aquinas (1225-1274) attempted to reconcile Aristotelianism with Christian Revelation in his famous *Summa Theologiae*. This led to a rather secularized account of political society. Political power was now being seen as the result of a purely human and natural process, independent of any divine plan. For Aristotle had convincingly demonstrated in his *Politics* how political communities naturally come about as different families and tribes unite in order to exchange goods and services between them for the mere reason that natural needs to survive drive them to do so.[4] In addition, nature has given some people the natural gift of leading other people, whereas other people are naturally inclined to obey a ruler. In this manner, a natural hierarchy between members of the same society comes into being, which at the same time guarantees the self-sufficiency and harmony of the community. God is entirely absent in this secular version of the origins of political society, yet he remains present too in that everything on earth is also determined by a natural end to which it evolves. Nature, essence and end are all the same in the Aristotelian so-called teleologic vision of nature. Therefore, men are called to create a community of which the final task is to develop the real and distinctive features of a human being. According to Aristotle, the distinctive feature of a human being is his reason. Consequently, the final aim of a political community should be to enable its citizens to reason and debate about the way they should behave morally and socially, and to contemplate the highest and most perfect Being man can think of, which is God, of course. Needless to say, it was quite easy for Thomas to maintain that this God was the God of the Gospel, of course.

These Medieval doctrines re-emerged in slightly different forms in the political debates ensuing from the discoveries of the New World and from the rise of Protestantism in the early 16th century. By re-stating the so-called *via antiqua* doctrine of Thomas Aquinas, the Counter-Reformation intellectuals tried to uproot the heretical political doctrines of the Lutherans and some humanists. Luther (1483-1546) had revived the Augustinian concept of the divine origins and legitimation of political power.[5] Since Luther defended a very pessimistic view of the post-lapsarian nature of man, he thought God had ordained political power with the divine task of punishing man's vices and re-directing man to God. Political power had to rest on grace and God, for human reason and nature were far too corrupt to be able to construct a political society of their own. In the same vain, the humanist philosopher Juan Ginés de Sepúlveda (1490-1573) argued that true and legitimate

4 See Aristotle, *Politics*, I.

5 See, for instance, his *Von der weltlichen Obrigkeit* (1523).

political power could only rest on divine choice.[6] Therefore, the Indians could not claim to be legitimate and genuine rulers of their lands, thus Sepúlveda. For they did not know God. The Indians did not possess knowledge of the Christian Faith, and therefore could not possibly be said to have been ordained legitimate rulers of the New world. They lacked divine support. Their power was merely based on corrupt nature. Moreover, Sepúlveda thought the Indians were a shining example of Aristotle's category of people that were naturally inferior because they lacked sufficient reason. Consequently, Sepúlveda concluded that it was proper to see the Spanish conquest as an instance of a just war against illegitimate rulers.

The humanitarian disaster ensuing from Sepúlveda's reasoning, as well as its protestant touch urged the counter-reformation theologians to develop another model of political society. A model which would enable them, first to attack the claims made by heretics like Luther, and secondly, to reinforce their own power over the behaviour of the people (over Indians as well as over Spanish merchants profiting from the trade between Europe and the Indies). The « Thomists » of the second half of the 16th and the beginning of the 17th century based their political theory on the optimistic belief in the capacities of man and human nature.[7] To Jesuits like Francisco Suárez, for instance, it is obvious that man's reason is able to supply him with the moral foundations of a stable political society.[8] The point is, however, that it was the Counter-Reformation theologians who claimed to uncover and explain these moral and reasonable foundations of political life. Now let us see how so-called modern concepts like constitutionalism, social contract, and the state of nature were developed in Suárez's political doctrine in response to the heretical views of Luther, James I, Sepúlveda, and their likes.

6 See, for example, his *Democrates secundus sive de justis belli causis apud Indos* (1550).

7 An excellent outline of so-called « Thomist » political philosophy is included in Skinner, *Foundations*, vol. 2, pp. 135-173.

8 An in-depth study of early modern Jesuit political doctrine in its entirety has recently been made public by Harro Höpfl: *Jesuit Political Thought. The Society of Jesus and the State c. 1540-1630*, Ideas in Context 70, Cambridge: CUP, 2004. For a late volume on Suárez in particular with a focus on his *bellum justum* theory, see Markus Kremer, *Den Frieden Verantworten. Politische Ethik bei Francisco Suárez (1548-1617)*, Theologie und Frieden 35, Stuttgart: Kohlhammer, 2008. An anthology of Spanish political thought at the time of Suárez is provided by Ronald W. Truman: *Spanish Treatises on Government, Society and Religion in the Time of Philip II. The 'de regimine principum' and Associated Traditions*, Brill's Studies in Intellectual History 95, Leiden-Boston-Köln: Brill, 1999. Of particular interest in the latter volume (pp. 315-360) is the chapter on Juan de Mariana (1535-1624), a Jesuit writer to whom Harald Braun dedicated an entire monograph of late. See Braun, H. E., *Juan de Mariana and Early Modern Spanish Political Thought*, Aldershot : Ashgate, 2007.

3. Suárez's constitutionalist account of political power

3.1. The scope of the debate

In 1606, after a gunpowder plot set up by the catholics had almost succeeded in killing him, James I Stuart forced his subjects in Scotland and England to swear an oath of allegiance stating that both the supreme spiritual and temporal power exclusively belonged to him.[9] It is this very blasphemous event which according to Suárez himself caused him to write his *Defensio fidei catholicae* (1613), containing his theories about the natural origins of political power and his doctrine of Church-State relationships.[10] Though Suárez did approve of a so-called civil oath *(iuramentum civile)*, in which a King made his subjects swear obedience in merely worldly affairs, he berated the claim made first by Henry VIII Tudor, and later reinforced by Elisabeth I Tudor and James I Stuart that in spiritual matters, too, citizens were subject to the secular authorities. He rejected this kind of spiritual oath *(iuramentum sacrum)* mixed up with the civil oath in more or less explicit terms *(iuramentum mixtum clare et aperte seu palliatum)* as a novel duty entirely incompatible with safe and traditional catholic doctrine.[11] For it placed the secular King striving for absolute power on the same level as the Pope. The scope of Suárez's work, then, will be to deconstruct[12] this myth of the divine right of kings which challenged the power of the supreme pontiff and the Roman-Catholic Church. The final conclusion he eventually meant to arrive at is that:[13]

9 See *Triplici nodo, triplex cuneus, or an apologie for the oath of allegiance. Against the two breves of Pope Paules Quintus, and the late letter of Cardinal Bellarmine to G. Blackwel the archpriest* contained in James I, *Political Works*, Reprinted from the Edition of 1616 (ed. C. H. McIlwain), Cambridge Mass. : Harvard University Press, 1918. The clash between James I and Suárez had been anticipated, indeed, by the political theories of the Scottish jurist William Barclay (1546-1608) and the Italian Jesuit Robertus Bellarminus (1542-1621), respectively.

10 Franciscus Suárez, *De defensione fidei catholicae*, lib. 6, prooemium, num. 1, p. 660, in : *Opera Omnia*, editio nova a Carolo Berton, tom. 24, Parisiis : L. Vives, 1859. For on overview of recent publications on various aspects of Suárez's gigantic intellectual legacy, see the regularly updated « Suárez » section on Jacob Schmutz's excellent site on early modern scholasticism : Schmutz, J., *Scholasticon* (14/12/2008), URL = http://www.scholasticon.fr/Information/Suarez_fr.php.

11 Suárez, *De defensione fidei catholicae*, lib. 6, num. 5, p. 666.

12 This is the term used by Jean-François Courtine, *Nature et empire de la loi. Études suaréziennes*, Paris : Vrin, 1999, p. 22.

13 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 2, num. 10, p. 209 : *« Ex quibus tandem concluditur nullum regem vel monarcham habere vel habuisse (secundum ordinariam legem) immediate a Deo vel ex divina institutione politicum principatum, sed mediante humana voluntate et institutione. Hoc est* egregium Theologiae axioma*, sed vere, quia recte intellectum verissimum est, et ad intelligendos fines et limites civilis potestatis maxime necessarium. »*

> *No one king or monarch has ever obtained political power immediately through God or through divine institution (pursuant to an ordinary law). Rather, political power is obtained through human consent and establishment. This is a* fundamental axiom of theological wisdom*, yet at the same time absolutely true if correctly understood, and of vital importance in gaining a correct understanding of the limits and boundaries of civil power.*

3.2. A universe of laws

Theologians like Suárez elaborated on Aquinas's vision of a universe ruled by a set of various kinds of law.[14] In Suárez's view, there is the eternal law *(lex aeterna)* by which God himself acts ; there is the natural law (*lex naturalis)* which God implants in men in order that they are able to understand His plan for the world. Positive law *(lex positiva)* is distinguished into human law *(lex humana)* and divine law *(lex divina)*. The latter is revealed by God through Scripture and contains the supernatural prescripts that both complement and presuppose the natural law. Positive human law, on the other hand, is decreed by man himself by virtue of his ecclesiastical *(lex canonica)* or civil authority *(lex civilis)*. Again, Suárez points out that ecclestical legislative power has supernatural origins, whereas civil law has a merely human character as to its direct nature.[15] That does not mean that Suárez thinks or wishes canon law to rule all people on earth, for he explicitly recognizes that canon law only applies to those having entered the community of the Catholic Church through their baptism. A further distinction he makes is between civil law promulgated among the infidels *(in gentibus et in infidelibus)*, and civil law governing a community of Christian citizens *(inter fideles in Ecclesia Christi)*. The relevance of this dichotomy being that positive human law sufficiently promulgated in a Christian republic – granted that it is modelled on natural law – is considered to be binding all the Christians living in that territory before the court of conscience as a matter of natural justice. The secularization of political power is not complete, then, in Suárez's political doctrine. On the contrary, it is the explicit aim of his masterpiece on legal theory, *De legibus ac Deo legislatore* (1612) to show how every legislative power, albeit indirectly, in the end still derives its power

14 There are a lot of discrepancies, though, between Thomas's and Suárez's concept and division of law, see Courtine, *Nature et empire de la loi*, pp. 91-114 and Brieskorn, N., 'Lex Aeterna. Zu Francisco Suárez' Tractatus de legibus ac Deo legislatore', in : Grunert, F.-Seelmann, K. (eds.), *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik*, Frühe Neuzeit 68, Tübingen, 2001, pp. 49-73.

15 See Suárez, *De legibus ac Deo legislatore. Tractatus de legibus utriusque fori hominibus utilis*, lib. 3, prooemium, p. 175, in : *Opera Omnia*, editio nova a Carolo Berton, tom. 5, Parisiis : L. Vives, 1856.

from God as the ultimate Lawmaker. This constitutes the ultimate legitimation, by the way, of why a theologian should investigate positive law at all.[16] Notwithstanding the positive law's participation in a divine plan, the *Doctor eximius* still made a radical distinction on the most basic level between natural law, on the one hand, and positive law, on the other. For in great contrast to any form of positive law, natural law is an *immutable* law communicated through reason which cannot even be altered by God himself, and to which men would be subject even in the hypothesis God were not existing.[17]

3.3. A flavour of « democracy » in the state of nature

Now why do we need positive law? Why do we need political societies in which positive law is ordained by a particular civil authority if a natural law exists, after all? What can explain the necessary transition of our state of nature, governed by natural law, to our state of political society, governed by positive law as well as natural law? In response to heretics like James I, Suárez stresses that political society is an invention of man himself instead of a gift of God. All societies have been set up by their own members as a means of fulfilling purely human needs. The necessity of a political order is deduced by Francisco Suárez from an imagined *« state of nature »*.[18] In outright Aristotelian vain, and abstracting from any divine revelation, he thinks human beings will inevitably form a community given their intrinsically social and linguistic nature. Furthermore, in this state of nature a legitimate form of political power comes into existence for the mere reason that it is necessary for the preservation of the social community : mankind cannot uphold justice and peace unless it is ruled by an authority which cares for the common good by virtue of its office. Consequently, the legitimacy of political power is made dependent upon its necessity for the safeguarding of the community, even in the state of nature:[19]

16 Suárez, *De legibus ac Deo legislatore*, Prooemium, p. ix-x.

17 On the (late) scholastic origins of the famous « impious hypothesis » usually attributed to Grotius, see Dufour, A., 'Les *Magni Hispani* dans l'œuvre de Grotius', in : Grunert, F.-Seelmann, K. (eds.), *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik*, Frühe Neuzeit 68 (Tübingen, 2001), pp. 351-380.

18 The concept of a « state of nature » figures in scholastic writings prior to Suárez to reflect upon the question what man would be like were there no grace and divine revelation. Yet, as a method of considering the bases and necessity of political power, it first emerges in Suárez and Hobbes, as Höpfl rightly notes in 'Scholasticism in Quentin Skinner's Foundations', in: Brett, A.-Tully, J.-Hamilton-Bleakley, H. (eds.), *Rethinking the Foundations of Modern Political Thought* (Cambridge, CUP, 2006), pp. 127-128.

19 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 1, num. 3, p. 203 : *« (…) ratio hujus veritatis, quae ex necessitate hujus principatus et potestatis ejus, et conse-*

> *The reason behind this truth is that political power is necessary to the end of safeguarding mankind and the civil community. For mankind is by nature inclined towards forming a civil society, and it is in need of this civil society for its own self-preservation. Yet a community of people cannot survive without justice and peace. Justice and peace, for their part, do not subsist without a governing body that has the power to command and to control. Hence the necessity in a social community of a political power that looks after the community by virtue of its office.*

The main characteristics of this state of nature are the freedom, equality and independence of all human beings.[20] Everybody is free, equal, autonomous and nobody possesses any power greater than the power of anyone else. For although there naturally is a power holding together this social community, it pertains to the community taken as a whole, and not to one person in particular. What is more, since God is the ultimate Creator of nature, political power as it is conferred upon the entire community in the state of nature is divinely ordained. For everything that exists on account of natural law stems from God as the creator of nature. As a result, political power which comes into existence through a natural process, is ordained by God as the creator of nature, too.[21] Importantly, the immediately divine character of political power only pertains to the community taken as a whole and in its state of nature :[22]

> *God confers the supreme civil power in a direct way only to the community in its entirety. From an absolute point of view, the supreme civil power is given directly by God to the people gathered*

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quenter ex fine illius, qui est conservatio humanae ac civilis reipublicae, sumitur. Homo enim natura sua propensus est ad civilem societatem, eaque ad convenientem hujus vitae conservationem maxime indiget, (…) Non potest autem communitas hominum sine justitia et pace conservari ; neque justitia et pax sine gubernatore, qui potestatem praecipiendi et coercendi habeat, servari possunt ; ergo in humana civitate necessarius est princeps politicus, qui illam in officio contineat. »

20 For a discussion of 19th century adaptations of this scholastic theory, see Andrés Botero Bernal, 'Los antecedentes del primer constitucionalismo antioqueño (elementos para comprender el proceso constitucional hispanoamericano)', *Revista Electrónica de Historia Constitucional*, 7 (2006), 91-122.

21 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 1, num. 7, p. 205 : *«omnia quae sunt de jure naturae, sunt a Deo ut auctore naturae ; sed principatus politicus est de jure naturae ; ergo est a Deo ut auctore naturae. »*

22 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 1, num. 5, p. 207 : *« Suprema potestas civilis soli communitati perfectae immediate a Deo confertur. (…) Primo enim suprema potestas civilis per se spectata immediate quidem data est a Deo hominibus in civitatem seu perfectam communitatem politicam congregatis, non quidem ex peculiari et quasi positiva institutione vel donatione omnino distincta a productione talis naturae, sed per naturalem consecutionem ex vi primae creationis ejus, ideoque ex vi talis donationis non est haec potestas in una persona, neque in peculiari congregatione multarum, sed in toto perfecto populo seu corpore communitatis. »* Cf. *id.*, num. 7, p. 208.

> *as citizens in a perfect political community. This does not happen, though, through a particular and almost positive establishment or donation radically different from what nature itself brings forth, but rather through a natural sequence that starts off once the community has been created. Accordingly, by virtue of that kind of donation this power does rest neither with one particular person, nor with a particular group of persons, but rather with the entire population and the perfect body of the community.*

Suárez does not maintain, then, that a particular prince in real life societies can claim to have received his power directly from God – needless to say, such an assumption would radically run counter to his final purpose of undermining the claim made by James I to a divine right of kings…

3.4. « Constitutionalism » and « social compact »

Should we infer from this proposition that democracy is the naturally prescribed political form of government ? In any event, it would be problematical, given the state of nature, to find reason dictating another form of government as being natural. Everybody is free and equal in the state of nature, so how could it possibly be legitimate for just one person or a particular group to claim power over anyone else ? [23]

> *Monarchy and aristocracy could only have been introduced through positive divine or human constitution, since naked reason itself does not reveal any one of those forms to be necessary. Democracy, on the other hand, could exist on the basis of pure nature without needing any positive ordinance. For democracy to remain in existence it is sufficient that no other and new positive form of government is positively established, since natural reason dictates that the supreme political power naturally follows from the existence of a perfect human community and pertains to the entire community, unless it is transferred upon another body through a new ordinance.*

To explain the transition from the abstract state of nature and the natural state of democracy towards concrete and existing forms of monarchistic and oligarchic government, Suárez makes a distinction between natural law that prescribes certain behavior *(ius naturale praecipiens)*,

23 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 1, num. 8, p. 209 : *« … monarchia et aristocratia introduci non potuerunt sine positiva institutione divina vel humana, quia sola naturalis ratio nude sumpta non determinat aliquam ex dictis speciebus ut necessarium… (…) At vero democratia esse posset absque institutione positiva ex sola naturali institutione seu dimanatione cum sola negatione novae seu positivae institutionis, quia ipsa ratio naturalis dictat potestatem politicam supremam naturaliter sequi ex humana communitate perfecta et ex vi ejusdem rationis ad totam communitatem pertinere nisi per novam institutionem in alium transferatur »*. Compare *id.*, cap. 8, num. 1, p. 243.

and natural law that proposes certain forms of action *(ius naturale concedens)*. Democracy is the (only) natural form of government, to be sure, but it is perfectly lawful for human beings to establish another form of government, since democracy has been ordained by the *ius naturale concedens*, which acts like a kind of suppletory law. As such, it allows for change on the basis of human autonomy. A comparison might be drawn here with the natural state of communism as to the division of goods amongst the members of the state of nature, since originally there is no reason for anyone to have a higher right to the riches of nature than anyone else.[24] However, according to common scholastic opinion, this original state of communism could lawfully – and should preferably – be substituted through other property regimes depending on the will of the human beings.[25] Similarly, on the individual level a man can give up his original liberty, by allowing someone else to take him as a slave.

Now what drove mankind to give up his original state of liberty, equality and autonomy in a social community ruled by the law of nature ? Why do people forfeit their freedom in order to be ruled by others ? At this point in his exposition, Suárez intuitively turns back to Augustine's perception of man. Even though they would never deny that man's reason and nature are still sufficiently pure to apprehend the dictates of the law of nature, the schoolmen generally acknowledged that after the fall from paradise the natural capacities of mankind had been impaired to a certain extent. Consequently, man is inclined towards selfishness and sinful behavior which disrupt the peace and harmony of the natural community. Ordinary individuals find it difficult to understand what is necessary for the common good and hardly ever make any attempt to pursue it themselves. So what prompts people to forfeit their natural democratic liberty in favor of the bonds of positive law are calculations of self-interest. For anyone understands after a while that it is better for oneself to give up a part of one's freedom to avoid that someone else in living his freedom violates his own self-interest. Subsequent to calculations of self-interest, a public authority is created whose duty is to promote the common good. The legitimate way in which this happens, is through the establishment of a « *social*

24 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 1, num. 14, pp. 210-211.

25 This common scholastic doctrine was based on Aristotle's refutation in his *Politics* II, 5, 1-13 of Plato's arguments in his *Republic* and *Laws* in favour of a communistic property regime. Since the system op private property was based on pragmatic considerations rather than being a primary and immediate dictate of natural law, it could be absolished if as a means it did not serve the end of safeguarding the peace and justice of the society anymore. In case of distress or extreme poverty, a person was therefore allowed to claim back his original natural right to ownership of the material. resources on earth, for instance by stealing.

compact » between the ruler and the citizens.[26] Commenting on the famous Roman *« lex regia »*, [27] Suárez concludes that:[28]

> *This law is not called royal, as if it were decreed by a certain king, but because it concerns the imperial power as such, as is indicated in Dig. 1, 4, 1. This fragment also points out that royal dignity is constituted and established by the people, for it is they who transfer their power to him, as the Glosses and scholars explain. Yet this law could not have been decreed by way of a mere order, since the people would have abdicated from their supreme jurisdictional power in doing so. Consequently, it must have been constituted through a contract, in which the people transferred their power upon the prince on condition and under the obligation that he bears the responsibility for the republic and that he administers justice. Subsequently, along with the power the prince must have accepted this condition. It is this contract which has rendered the « lex regia » on royal power stable and firm. Kings, then, do not derive their power immediately from God, but from the people.*

Like Bartolus a Saxoferrato (1313-1357), Mario Salamonio (1450-1532) and Andreas Alciato (1492-1550) before him, Suárez interpreted the *« lex regia »* to mean, then, that the grant of sovereignty it embodies is to be understood in a constitutionalist sense.[29] The power of the ruler is limited and qualified by the conditions contained in the contract

26 Leonardus Lessius (1554-1623), a Jesuit from the Southern Netherlands who took colleges with Suárez at the *Collegio Romano* describes the agreement between the citizens and public authority in terms of an employment contract. See Lessius, *De iustitia et iure*, lib. 2, cap. 1, dubit. 3, num. 13, p. 11: *« Tota respublica se habet ad principem sicut particularis persona ad custodem, quem stipendio ad se tuendum et custodiendum conduxit ; et ob hanc causam maxime procuratio boni communis pertinet ad illum architektonikoos.»*

27 Dig. 1, 4, 1 and Inst. 1, 2: *«Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat. »*

28 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 1, num. 12, p. 210 : *« Illa enim lex non dicitur regia, quia ab aliquo rege lata sit, sed quia de imperio regis lata est, ut in eadem l.1 dicitur, ubi etiam significatur constitutam esse a populo creante et instituente regis dignitatem, transferendo in illum suam potestatem, ut ibi etiam Glossae et Doctores exponunt. Non potuit autem illa lex ferri per modum solius praecepti, cum per illam populus se abdicaverit a suprema juris dicendi potestate ; ergo intelligi debet constituta per modum pacti, quo populus in principem transtulit potestatem sub onere et obligatione gerendi curam reipublicae et justitiam administrandi, et princeps tam potestatem quam conditionem acceptavit ; ex quo pacto firma et stabilis permansit lex regia, seu de regali potestate ; non ergo immediate a Deo, sed a populo reges hanc habent potestatem. »*

29 See Skinner, *Foundations*, vol. 2, pp. 130-134 and Richard Tuck, *Natural Rights Theories. Their Origin and Development*, Cambridge : CUP, 1981, pp. 39-40. On the various interpretations of the « lex regia » during the *ius commune*, see Ennio

by which the people conferred their sovereignty upon him.[30] Put in less unclear terms : James I could not possibly claim to have an absolute and divine right of kingship.

4. Roman-Catholic diplomacy

4.1. Alienation of power

You can berate a powerful partner like James I Stuart, and urge him to change his views, but he is very likely to remain reluctant to accept your deal unless you give him the prospect of receiving something in exchange for it. It might have been exactly this diplomatic insight which drove Suárez to slightly modify his natural law account of the origins of political society. For Suárez's account of the contractual basis of political power certainly does not amount to a defence of « radical » constitutionalism. Contrary to Bartolus of Saxoferrato (1313-1357) or Fernando Vasquez (1512-1569), for instance, Suárez has it that the community in the state of nature does not merely delegate dominion to a public authority, but entirely *alienates* it.[31] As a consequence, the ruler does not need consent or acceptance of the people anymore for his just law to become effective once popular sovereignty has been conferred upon him.[32] It is only with regard to the origins of political authority that contractual consent is needed by the people. Consequently, even hereditary succession of royal power is perfectly legitimate, for with succession the right to govern, obtained through the contract with the people, is simply passed on to the next king.[33]

Cortese, *La norma giuridica. Spunti teorici nel diritto comune classico passim*, Ius Nostrum 6.2, Milano: Giuffrè, 1995 [1964] [see index, p. 505].

30 Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 9, num. 4, p. 202 : *« In principe supremo esse hanc potestatem eo modo et sub ea conditione sub qua data est et translata per communitatem : ratio est clara ex superius dictis : quia haec est veluti conventio quaedam inter communitatem et principem, et ideo potestas recepta non excedit modum donationis, vel conventionis.»*

31 Cf. Köck, *Der Beitrag der Schule von Salamanca*, pp. 47-48.

32 Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 19, num. 7, p. 251 : *« Post legem absolute constitutam ab habente supremam potestatem, nunquam fuit nova acceptatio necessaria, sed in sola democratia contingebat ut idem esset condens et acceptans legem, et ideo simul fiebant. »*

33 Suárez, *De defensione fidei catholicae*, lib.3, cap. 2, num. 19, p. 212. At this point, Suárez mentions yet another way to get into power without contractual consent of the people in a strict sense, that is through a quasi-contract, like a just war *(iustum bellum)* or a right punishment *(iusta punitio)*.

The idea of consent is not used to establish the legitimacy of what happens during the period of government itself :[34]

> *Once the power has been transferred to the king, the people cannot restrain it any further, nor can they abrogate the king's just laws. By the same token, once the people have been made subject, it is unlawful for them to restrain the power of the king any more than has been settled in the original contract that entailed the first transfer of power. The law of justice would not allow of that, because it teaches that legitimate contracts are to be fulfilled, and that an unconditional donation once validly made cannot be revoked in any way, certainly if it is onerous.*

In affirming the almost absolute secular power of the prince after his election, Suárez defended him against the claims made by proto-protestant thinkers like John Wycliff (1324-1384) and Jan Hus (1369-1415). On account of the idea of *« libertas christiana »*, they had advocated the right of disobedience for all true Christians towards the public authorities, certainly if they were not founded on the right faith. Suárez, for his part, set out to show that Christian liberty by no means implies any exemption from positive law.[35] Again, his natural law account of the origins of political power plays a critical role here. Since grace presupposes and fulfills the natural order, every Christian first of all naturally belongs to a purely human community in which an authority will be established that has a natural claim to be obeyed for the sake of the very self-preservation of that community, even if it is not grounded on faith.[36] Consequently, a pagan ruler would have a legitimate right to be

34 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 2, num. 4, p. 213 : *« Potestatem semel in regem translatam populus restringere nequit, neque ejus justas leges abrogare. – Atque eadem ratione non licet populo semel subjecto potestatem regis magis restringere, quam in prima translatione seu conventione restricta fuit, quia id non permittit lex illa justitiae, quae docet legitima pacta servanda esse, et donationem absolutam semel valide factam revocari non posse, neque in totum, neque ex parte, et maxime quando onerosa fuit.»*

35 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 4, num. 18, p. 223 : *«At libertas christiana non consistit in exemptione a justis legibus humanis neque in immunitate a justa coactione, aut vindicta peccatorum, quando contra pacem et justitiam committantur ; sed consistit in exemptione, vel a lege Moysi, vel a timore servili, seu (quod perinde est) consistit in libera servitute ex amore et charitate, cui humanum regimen non repugnat, sed potius illam juvat, si adsit ; si vero desit, illius defectum per coactionem supplet. »* Compare the irony in Suárez's refutation of those who consider themselves to be the most perfect and virtuous men on earth and claim to be exempt from any obligation towards the public authorities by reason of their moral excellence; *De legibus ac Deo legislatore*, lib. 3, cap. 31, num. 2-3, p. 298.

36 Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 10, num. 2, p. 208 : *«Haec potestats pertinet ad purum jus naturale : ut supra ostensum est : unde futura esset in hominibus, etiamsi crearentur in puris naturalibus sine ullo ordine ad supernaturalem finem, et fuit in gentibus ante christi adventum, et nunc est in infidelibus non*

obeyed by his Christian subjects as longs as he does not prevent them from living their beliefs, since political power does not depend upon faith, as Suárez argues in a clearly anti-Lutheran vain.[37] We should not be surprised, then, to find Suárez regularly quoting from the first letter of Peter (« Be subject to every ordinance of man for the Lord's sake: whether to the king, as supreme; or unto governors »), though it is equally significant that he leaves out the Augustinian- and Lutheran-like second part of the same sentence (« as sent by him for vengeance on evil-doers and for praise to them that do well »).[38]

It is important to stress that Suárez grants public authority an *almost* absolute power in worldly affairs. For there is a hitch : even though it is to the merit of the *doctor sublimis* to have pointed out the quintessential role of the will in the promulgation of a legitimate and binding law, he does not allow a lawmaker to indulge in pure whimsicality. A law needs to be in conformity with the dictates of natural justice before it can be deemed to constitute a true and binding law. This is not to say that citizens are allowed to disobey their ruler in the event that he lives an immoral and corrupt life as a private person – Suárez makes a clear distinction between the prince's private and professional life. One specific law he promulgated by virtue of his office and which goes manifestly against natural law cannot be a legitimate ground for disobedience either, though citizens may lawfully ignore this particular law while remaining firm in their observance of all other positive legislation. But as a general rule, positive laws must be modeled on natural law and the virtues of justice, temperance, prudence and fortitude ensuing from it. What is more, public authority itself is bound by its own laws *(legibus non solutus)*, since it falls within the scope of application of the rule-prescribing force of the law *(vis directiva)* in view of the common good :[39]

> *Even though man can enact laws autonomously, in the process of doing so he serves as a servant and steward of God. Accordingly, a*

baptizatis, praesertim in gentibus. Et ratio clara est, quia fides et reliqua dona sunt superioris ordinis : ergo non possunt jure naturae requiri ad hanc potestatem. »

37 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 3, num. 7, p. 219: *« Ut, verbi gratia, si rex gentilis justo bello civitatem christianam occuparet, tunc verum dominium acquireret, nam hoc etiam est de jure gentium a naturali derivatum, quod fides non tollit.»*

38 1 Peter 2 : 13 and 14 respectively.

39 Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 35, num. 11, p. 319 : *«(…) licet homo immediate legem ferat, in eo actu se gerit ut minister et dispensator Dei (…) ; ergo intentio et voluntas principis ferentis legem debet conformari intentioni Dei dantis potestatem : (…). Deus autem, non solum ut auctor gratiae, sed etiam ut auctor naturae, vult legislatorem humanum non habere potestatem ad ferendas leges, nisi cum universali obligatione illarum, qua totam republicam ut constantem ex corpore et capite comprehendat (…) Probatur minor ex ipsa necessitate communis boni, ad quod haec potestas ordinatur : datur enim in aedificationem, non in destructionem.»*

> *prince needs to adjust his own law-making intention and will to the intention of God who gives him this very power. Now God, not only as a matter of grace, but also as a matter of nature only wants the human legislator to have legislative power if the laws he enacts are indiscriminately applied to everybody, i.e. to the community in its entirety including both its body ánd head. Thus commands the common good, from which power derives its ultimate legitimacy. For power is given for the sake of conservation, not in view of destruction.*

It would prove to be extremely pernicious to the community, for instance, if a prince were not compelled to sell at the lawfully fixed price whereas all ordinary citizens are.[40] In practice, though, the supreme power cannot be liable to prosecution since the rule-enforcing power of the law *(vis coactiva)* cannot be exercised upon him.[41] For there is no one bigger in power than him, and as a matter of fact nobody can be coerced by himself.[42]

4.2. Positive laws binding in conscience

The second way in which Suárez tries to make his deal more attractive is by promising full cover from the Christian court of conscience to the king's legislative endeavors, provided that he takes morality and the cardinal virtues in particular as the model of his laws. If a law is truly in accordance with the principles of justice, then not obeying the ruler amounts to committing a sin against God. For eventually, any lawgiver derives his power from the first and ultimate Lawgiver and participates in a divine activity.[43] God may not be the direct cause *(causa proxima)* of earthly power, as the Creator of the universe he always remains

40 Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 35, num. 8, p. 318.

41 Cf. Thomas Aquinas, *Summa Theologiae*, IaIIae, quaest. 96, art. 5, ad 3. In *Der Beitrag der Schule von Salamanca zur Entwicklung der Lehre von den Grundrechten*, Schriften zur Rechtsgeschichte 39, Berlin : Duncker & Humblot, p. 55, note 204 Köck rightly insists on the distinction made by Thomas and Suárez between *« vis coactiva »* and *« vis directiva »* in answering the question of whether the King is bound by the laws. This distinction seems to have become somewhat blurred in Skinner, *Foundations*, vol. 2, p. 184.

42 Suárez*, De legibus ac Deo legislatore,* lib. 3, cap. 35, num. 15, p. 320 *: « Circa secundum punctum, de vi coactiva legis communis resolutio est legem non obligare principem quoad vim coactivam. (…) Ratio vero est, quia coactio ex intrinseca ratione sua postulat ut ab extrinseco proveniat, ut constat ex philosophia ; ergo princeps non potest cogere seipsum per suam legem. »*

43 Suárez, De *legibus ac Deo legislatore*, lib. 3, cap. 21, num. 6, p. 258: «Legislator civilis fert legem ut minister Dei et per potestatem ab eo acceptam.» Compare Bireley's reflections on the way in which catholic thinkers at the treshold of the 17th century in general sought to demonstrate that catholicism was the religion most fit to support the authority of the secular rulers ; *The Counter-Reformation Prince. Anti-Machiavellianism or Catholic Statecraft in Early Modern Europe*, Chapel Hill and London : University of North Carolina Press, 1990, p. 231.

the first and indirect cause *(causa prima)* of any authority necessary for mankind's self-preservation.[44] Therefore, a theologian must have a thorough understanding of positive law in the first place. If he does not know the rules by which life in society should abide, then he risks to let slip through the net of his moral vigilance a host of infringements against these very positive laws. Hence a myriad of sins against God would risk to go unpunished before the court of conscience.[45]

Now how does Suárez conceive of the relationship between positive and natural law ? Positive human law basically is the handmaiden of natural law, that is for sure, but there are two ways in which they relate to each other.[46] On the one hand, there are positive laws merely restating a natural law precept *(lex humana declarativa)* in the political society. Examples are the prohibitions on theft and murder. They are merely to be considered as restatements of the basic natural law principles as they can be found in the Decalogue. Each of these human rules ensues from natural law principles in an obvious and direct way *(per modum conclusionis)*, merely making them more explicit. On the other hand, one finds human laws adding a qualification or specification *(lex humana addens obligationem specialem)* to an abstract natural law principle through a process of determination *(per modum determinationis)*. These are the kind of laws in which human legislative power is exercised in its most proper sense, as when the general prohibition to kill is made more specific through the ban on carrying weapons at night. Given the natural and thus indirectly divine nature of legislative power, these specifications add obligations to the human conscience under penalty of sin:[47]

44 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 2, num. 1, p. 206 : *«Quia nulla est potestas quae hoc modo non sit a Deo, ut a prima causa, ac proinde immediate in illo genere; atque ita potestas etiam data immediate ab hominibus a rege vel pontifice datur etiam a Deo ut prima causa immediate influente in ullum effectum et in actu voluntatis creatae, per quam proxime donatur. At vero talis potestas non dicitur simpliciter esse immediate a Deo sed solum secundum quid ; nam proxime ab homine datur, et ab illo pendet.»*

45 Suárez, *De legibus ac Deo legislatore*, prooemium, p.x : *« Deinde theologicum est negotium conscientiis prospicere viatorum ; conscientiarum vero rectitudo stat legibus servandis, sicut et pravitas violandis, cum lex quaelibet sit regula, si ut oportet servetur, aeternae salutis assequendae ; si violetur, amittendae ; ergo et legis inspectio, quatenus est conscientiae vinculum ad theologum pertinebit.»*

46 Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 21, num. 10, p. 259-260. Compare with Thomas Aquinas, *Summa Theologiae*, IaIIae, quaest. 96, art. 4.

47 Suárez, *De legibus ac Deo legislatore*, lib. 3, cap. 24, num. 2, p. 269: *« Lex humana ex se obligat in conscientia : ergo ex se etiam inducit obligationem materiae proportionatam, si circa illam absolute feratur : ergo ex se inducere valet obligationem sub mortali. Confirmatur, quia ratio naturalis dictat talibus legibus esse obediendum sicut dictat esse obediendum parentibus, et sicut dictat promissionem Deo factam esse servandam. Ergo sicut non servare vota vel non obedire parentibus ex suo genere est peccatum mortale, ita etiam non servare leges civiles, seu (quod perinde est) non obedire principi seculari, ex suo genere est peccatum mortale : ergo leges civiles ex genere suo possunt obligare ad mortale.»*

Human law is intrinsically binding in conscience. Accordingly, it imposes an obligation in proper proportion to the seriousness of the matter if it aims at regulating this matter once and for all. Hence, human law is capable of imposing an obligation even under penalty of mortal sin. Natural reason confirms this in dictating that we must obey such laws in the same way as we must obey our parents and deliver on promises made to God. Consequently, it intrinsically is a mortal sin not to observe civil law or, which amounts to the same, not to obey secular authority. For not observing a vow and disobeying your parents intrinsically are mortal sins, too. It is possible for civil laws, then, to impose an obligation under the intrinsic penalty of mortal sin.

5. The theory of the «indirect power» of the Church in wordly affairs

Whenever princes are tempted by Lutheran or Anglican, let alone Machiavellian tendencies, they are eventually bound to give in to the Catholic Church's equally alluring counter-proposal, thus Suárez must have hoped in expounding his political doctrines. The final aim, then, of his natural law account of secular political power was correspondingly clear. Describing the relationship between Church and State in terms of the head-body metaphor, there was no doubt for him that the Church was to be regarded as the head leading the body.[48] In theory, head and body are responsible each for different functions – the Church having a monopoly in spiritual affairs, the State imposing its laws in wordly matters. Yet the uncontrolled movements of the body might need some monitoring by the head every now and then. As a result, the Church kept a right to interfere in wordly affairs as soon as spiritual demands needed it, Suárez claimed in the footsteps of his colleague Roberto Bellarmino (1542-1621).

More specifically, Suárez's doctrine of the indirect secular power of the Church implied that the Roman pontiff had the right to intervene in the legislative, jurisdictional as well as executive power of the State any time morality would demand it.[49] The reason being that :[50]

48 Suárez, *De defensione fidei catholicae*, lib. 3, *summa cum apostrophe ad regem Angliae*, num. 11, p. 350.

49 Thus a summary in slightly anachronistic terms of Suárez, *De defensione fidei catholicae*, lib. 3, cap. 22, nums. 10-14, pp. 311-313.

50 Suárez, *De defensione fidei catholicae*, lib. 3, cap. 22, num. 14, p. 313 : *« Ratio est, quia ad munus pontificis spectat [1] impedire publica peccata, eorumque occasiones morales (…) auferre ; ergo si leges vel judicia saecularia fovent peccata, aut illorum occasionem praebent, possunt per pontificem vel irrita declarari vel etiam*

> *It pertains to the pontiff's office [1] to prevent the people from sinning and to remove anything that is likely to give occasion for sinning. To that end the pontiff is allowed to declare void or even nullify himself all laws and judgments made by the secular authorities that favour sinning or enhance the chances of giving occasion for sinning. By the same token it pertains to the pontiff's office [2] to promote faith, religion and piety. As a result, he is allowed to prescribe or ordain a rule in their favour, regardless of any civil law precepts.*

In purely wordly matters, like the regulation of markets, the Church could lawfully take corrective measures for the sake of morality *(boni mores)* by imposing its own laws, or by urging the secular authorities to revoke or rectify a positive law settling an excessivelly high interest rate, for example. Additionally, laws insufficiently embodying considerations of natural equity *(aequitas naturalis)* could be emended by the Roman pontiff. The Church did not approve of the alimony regime in positive law, for instance, while it did not include a maintenance order towards children born out of wedlock. Moreover, the Roman pontiff could subrogate himself in the legislative power of the secular authorities in case the latter would fail to act as a regulator, for instance in response to new commercial techniques. On the jurisdictional level, Suárez has it that the pope is capable of reversing a judgment pronounced by a civil court, and to claim jurisdiction in a lawsuit. Last but not least, there are two cases in which the Roman pontiff is allowed to steer and direct the State on a factual level. If one State is about to abuse its power through waging an unjust war on another State or even the very Church community. Conversely, if positive action is needed in order to defend another State, the Roman pontiff can urge secular authorities to take appropriate measures of force to run to the rescue of that State.

6. Manuals on natural justice and the shaping of modern contract law

It would prove to be rather unkind, not to say inefficient, to uphold your negotiating partner a tempting political alternative, without providing him with the means of realizing it. In this respect, it will not come as a surprise that one of the most extraordinary phenomena in 17th century printing houses all over Europe is its massive production of books and treatises entitled *« On justice and right »*, *« On commerce »*, *« On contracts »*, etc.[51] Against the background of the political

irritari (…). Simili etiam modo ad pontificem spectat [2] promovere fidem, religionem et pietatem, et ideo in earum favorem potest aliquid statuere et praecipere, ut servetur, non obstante quacumque lege civili. »

51 See, for example, Joannes de Lugo's (1583-1660) *De iustitia et iure*, Petrus Gibalinus's (1592-1671), *De universa rerum humanarum negotiatione*, and Petrus de

philosophy of one of the brightest minds their order ever spawned, the Jesuits decided to tap into a market for political and economic advice to princes and private persons who for the sake of their own soul and in view of ecclesiastical backing of their power were kindly invited to align their legislative or commercial activity with natural law principles. The natural law solution to the most concrete and various problems politicians, lawyers, businessmen, clergy as well as ordinary people were confronted with were tackled in these manuals in an unprecedentedly systematic and comprehensive way.

All existing analytical tools, ranging from Aristotelian philosophy, over *ius commune*, to scholastic theology were applied to find new answers to both old and new problems. In this manner, the Jesuits successfully continued a catholic natural law tradition tracing its origins back to the Dominicans of the Convento de San Estebán in Salamanca. In reviving and recommenting the *Secunda Secundae* of the *Summa Theologiae* of their most famous predecessor, luminaries like Francisco de Vitoria (1486-1546) and Domingo de Soto (1495-1560) had already tried to give a natural law based answer to the challenges facing them given the increasingly absolutist pretentions of the Spanish emperors, the propagation of Protestantism, and the economic and anthropological turmoil following the discovery of the Americas.[52] In this way natural law served as a sophisticated weapon that allowed the Roman-Catholic Church to increase its hold over mankind in various aspects of life through the incessant consultancy in wordly affairs monitored by its religious orders.

Importantly, not only did the Jesuits contribute to an important chapter in the history of public law through formulating the distinctively « modern » and contractual accounts of political power. The very mirror-for-princes and mirror-for-businessmen, so to speak, that ensued from the Jesuits' natural law based view of society in their turn contain a host of principles now underlying the law of obligations. Early 17h century Jesuit political and legal thought urgently deserves attention, then, from both historians of public and private law.[53] Pedro de Oñate,

Oñate's (1568-1646) *De contractibus* respectively.

52 The natural law account of political authority had allowed Francisco de Vitoria to recognize that the Indians exercized a genuine form of political power. Similarly, it made it possible for Antonio de Montesinos and for Bartolomé de las Cases to maintain that the Indians naturally benefitted from natural rights *qua* human beings. Sepúlveda, though, cunningly exploited this natural law theory in stating that, if the Indians possessed natural rights, they were also expected to behave according to the duties nature imposes upon mankind. Since they clearly did not respect natural duties (e.g. human sacrifices), Spain had a legitimate cause to wage war on them. On the ambiguous use and abuse of natural law doctrine within the context of the discovery of the Americas, see Aldo Andrea Cassi, *Ultramar. L'invenzione europea del Nuovo Mondo*, Bari : Laterza, 2007, especialy pp. 159-162.

53 The importance of early modern scholasticism for the development of private law has been highlighted, amongst others, in Paolo Grossi (ed.), *La seconda scolastica*

for instance, who spent part of his life as a provincial of the Jesuit Order in Paraguay, formulated the principle of contractual freedom in a way clearer than any modern manual on contract law. He has it that :[54]

> *A vast number of irritating and useless disputes and lawsuits have been removed thanks to the conformity of natural law, canon law and Hispanic law with regard to the enforceability of naked pacts. In the most sensible way, liberty has been restored to the contracting parties, so that whenever they want to enter into whatsoever a contract in whatever way, their freely made agreement will be enforced before any court they want.*

Contractual freedom, then, was one of the cornerstones of early modern Jesuit legal doctrine. The Catholic Church's storm troops' preoccupation with contracts might be a direct consequence of their guerilla-like war against the increasingly absolutist aspirations of the secular State.[55] Through their networks and presence at the ground level of society, the Jesuits searched to mount a firm bottom-up response to the violent top-down state legislation. Did not contractual promises take the place of the law for those who had made them?[56] And was not the Church the institution which through its parish priests and religious orders in practice had a quasi-monopoly over customs and morals ruling the behavior between singular contracting parties creating these laws for themselves ? As Paolo Prodi has noted, the outcome of the power struggle between Church and State from the second half of the 17th century onwards, would be the victory of the State, yet, subse-

nella formazione del diritto privato moderno, Atti del Incontro di studio (Firenze, 16-19 ottobre 1972), Per la storia del pensiero giuridico moderno 1 (Milano, 1973) and James Gordley's *The Philosophical Origins of Modern Contract Doctrine*, Oxford: Clarendon Law Series, 1991.

54 Petrus de Oñate, *De contractibus*, Romae : 1646, tom. 1 (de contractibus in genere), 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 et quomodocumque 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.»*

55 Compare the conclusory remarks by Paolo Prodi in Quaglioni, D. –Todeschini, G.-Varanini, G.M. (eds.), *Credito e usura fra teologia, diritto e amministrazione : linguaggi a confronto, sec. XII-XVI*, Collection de l'Ecole française de Rome 346, Rome, 2005, p. 294 : *« Conflitti e collaborazioni tra i diversi fori caratterizzano quindi i secoli successivi nella tendenza della Chiesa a mantenere la sua giurisdizione sul contratto mediante la difesa della superiorità del giuramento (…) e soprattutto (…) riaffermando la superiorità del contratto, regolato dalle superiori norme elaborate dai moralisti e dai casisti, sulla legge statale. »*

56 See D. 50, 17, 23 and its reception in the Medieval *ius commune*.

quently, the State borrowed the very detailed normative regulations of the Church and presented them in a secular form.[57]

In this respect, a remarkable *inversion* of State-Church relationships seems to emerge from a comparison of the formula of contractual freedom in contemporary legal systems and the late scholastic doctrine, respectively: the French Civil Code, for instance, limits the basic positive law principle of contractual freedom by making reference to moral standards and customs, whereas early modern Jesuits like Lessius qualify their ethical principle of contractual freedom by pointing to the limits set by positive law:

> *Agreements lawfully entered into take the place of the law for those who have made them.*
>
> They may be revoked only by mutual consent, or for causes authorized by law.
>
> *They must be performed in good faith. Agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature.* [Code Civil][58]

Every agreement – albeit naked – that parties with full legal capacity have freely and spontaneously entered into, imposes a natural obligation, that is before the court of conscience. Hence it is impossible for one party to revoke the contract unless the other party gives his consent, or unless the contract is absolutely or relatively void as a matter of positive law. [Lessius][59]

7. Conclusion

In sum, Suárez wants James I to remember his status of a mere sheep belonging to Christ's massive flock, who by no means is entitled to a shepherd's position. From his natural account of the origins of political

57 Paolo Prodi**,** *Eine Geschichtе der Gerechtigkeit. Vom Recht Gottes zum modernen Rechtsstaat*, München, C.H. Beck, 2003, p. 270.

58 See the English translation of art. 1134-1135 of the Civil Code of the French Republic [upgraded until 20/02/2004] on http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#CHAPTER%20I%20-%20PRE. Obviously, moral considerations affect contractual validity in still another way through the provisions on *« causa »* in art. 1131-1133 in the same Code Civil.

59 Lessius, *De iustitia et iure*, cap. 17, dub. 4, num. 19, p. 151: *« Omnis contractus, etiam nudus, sponte libereque factus, si contrahentes sint habiles, parit obligationem naturalem seu in foro conscientiae, ita ut parte invita non possis rescindere; nisi iure positivo sit irritus vel detur irritandi potestas. »*

power it has become clear that England's ruler cannot claim a divine right of kings : the origins of secular power are purely human and natural. Only the Supreme Roman Pontiff can claim to be ordained directly by God. Moreover, a secular ruler is limited in power through conditions contained in the contract by which the power originally resting with the people was conferred upon him. If James I accepted this view, the Church would promise full backing of his legislative activities through the court of conscience, provided that he modelled his laws on the regulations as expounded in the manuals of the Catholic natural lawyers.

In short, despite superficial similarities, much of the political theory in the early modern world sharply differs from contemporary constitutionalist and democratic doctrines, at least by French post-*ancien régime* standards. The moral, not to say ecclesiastical foundations of political life were still very present. Even so, a vast arsenal of juridical concepts dealing with both private and public law issues, and now governing the entire world, were deviced for the first time as secular States began to challenge their age-old Roman-Catholic rival. Leaving Western Europe, one might even be tempted to doubt whether the victory of the temporal over the spiritual power has been as complete as it is usually thought to be by self-styled intellectuals of the Northern hemisphere. In any event, Tomas de Mercado's statement about the usefulness of trade could easily be applied to global academic exchange, too: *«Every single businessman profoundly enriches both his body and soul. Talking with different people, travelling to various places, feeling how it is to live according to different customs, seeing the variety of ways to govern and rule citizens, they emerge as seasoned and smart universal men, indeed, who never let any chance to do business slip by.»*[60] Let us never cease, then, from disobeying Mercado's rule not to cross the Atlantic all too frequently.

60 Tomas de Mercado, *Suma de tratos y contratos*, lib. 2, cap. 2, in : *idem*, edición de N. Sanchez Albornoz, Madrid, 1977, vol. 1, pp. 71-72: *« Los particulares tratantes también enriquecen entera y perfectamente en el cuerpo y en el alma, porque, conversando con muchas gentes, estando en distintos reinos, tratando con varias naciones, experimentando diferentes costumbres, considerando el diverso gobierno y policía de los pueblos, se hacen hombres universales, cursados y ladinos para cualesquiera negocios que se les ofrezcan. »*

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