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FRANCISCO SUÁREZ AS THE FORERUNNER OF MODERN RATIONALIST NATURAL LAW THEORIES?

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RESUMEN

La teoría de la ley natural de Francisco Suárez ha sido objeto de interpretaciones radicalmente divergentes. Como norma general, los comentaristas que acusan o alaban a Suárez por apartarse de Tomás de Aquino y por adoptar principios filosóficos nominalistas, generalmente lo consideran un voluntarista, mientras que los estudiosos que ven en él un innovador creativo dentro del ala tomista, se inclinan por considerarlo como una especie de racionalista que rechaza claramente el voluntarismo de Ockham y Escoto. Un tercer tipo de interpretación sugiere que Suárez se apartó de la tradición tomista de la ley natural en una dirección opuesta, de modo tal que preparó el camino para el racionalismo moderno y la teoría secularizada de la ley natural. El punto de partida de esta última lectura reside en que él "concede lo esencial" (Jean-François Courtine), o "está cerca de conceder la substancia" (Thomas Pink) de la posición intelectualista de Gabriel Vázquez, o "es llevado al umbral de" su aceptación (John Finnis). Por tanto, "fundamentalmente, la voluntad divina sigue estando también en Suárez ligada a la naturaleza racional de las cosas. [...] Al bien o mal existente en sí mismo, la voluntad de Dios solo añade la obligación especial de la ley divina" (Hans Welzel), visión que está a solo un paso de la famosa hipótesis del "etiamsi daremus" de Grocio. Este artículo intenta principalmente refutar esta línea de argumentación. Defenderé que los elementos voluntaristas de la síntesis de Suárez excluyen absolutamente tal interpretación, no solo su bien conocido concepto general de ley, sino también su habitualmente descuidada noción de 'ley eterna', a la que atribuyo un papel clave a este respecto.

Palabras clave: Francisco Suárez; voluntarismo; intelectualismo; rarrionalismo; ley natural.

ABSTRACT

Francisco Suárez' theory of natural law has always been the object of radically divergent interpretations. As a general rule, those commentators who blame or praise Suárez for departing from Aquinas and adopting nominalist philosophical principles generally regard him as a voluntarist, while scholars seeing in him a creative innovator inside the Thomist camp are inclined to consider him as a kind of rationalist who clearly rejected the voluntarism of Ockham and Scotus. A third type of interpretation suggests that Suárez deviated from the Thomistic natural law tradition in the opposite direction, so that he prepared the way for modern rationalism and secularized natural law theory. The starting point of this latter reading of Suárez is that he "concedes the essence" (Jean-François Courtine), or "comes close to conceding the substance" (Thomas Pink) of Gabriel Vázquez' intellectualist position, or „is brought to the brink of" accepting it (John Finnis). Thus, "fundamentally, the divine will remains also in Suárez bound to the rational nature of things. [...] To the self-existing good or evil God's will only appends the special obligation of divine law" (Hans Welzel), which view is only one step from Grotius' famous "etiamsi daremus" hypothesis.

This paper is mainly intended to refute this line of argumentation. I will argue that the voluntarist elements of the Suárezian synthesis absolutely preclude such an interpretation – not only his well-known general concept of law but also his often neglected notion of 'lex aeterna' to which I attribute a key role in this respect.

Keywords: Francisco Suárez; Voluntarism; Intellectualism; Rationalism; Natural Law.

1. INTRODUCTION

Francisco Suárez' theory of natural law has always been the object of radically divergent interpretations. As a general rule, those commentators who blame or praise Suárez for departing from Aquinas and adopting nominalist philosophical principles usually regard him as a voluntarist,¹ while scholars

¹ See e.g. Michel Villey, *La formation de la pensée juridique moderne: Cours d'histoire de la philosophie du droit*, 4th ed. (Paris: Montchrestien, 1975), 368-395; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), II.6 and XI.8-9; Walter Farrell, *The Natural Moral Law according to St. Thomas and Suarez* (Ditchling: St. Dominic's Press, 1930); Pauline C. Westerman,

seeing in him a creative innovator inside the Thomist camp are inclined to consider him as a kind of rationalist who clearly rejected the voluntarism of Ockham and Scotus.² A third type of interpretation suggests that Suárez deviated from the Thomistic natural law tradition in the opposite direction, so that he prepared the way for modern rationalism and secularised natural law theory.³ This paper is mainly intended to refute this latter reading of Suárez.

II. SUÁREZ'S RATIONALISM

Following Aquinas, Suárez conceives of natural law as the participation of eternal law in rational beings.⁴ Eternal law and natural law differ as *lex per essentiam* and *lex per participationem*, or as 'law as it exists in the lawgiver' and 'law as it is in the subject'.⁵ In his discussion of the general concept of law, Suárez describes 'law as in the subject' as pertaining to the intellectual nature, asserting that only rational creatures can be governed by law, whereas irrational beings, lacking reason and free will, are not capable of participating in it.⁶

The Disintegration of Natural Law Theory: Aquinas to Finnis (Leiden: Brill, 1998), ch. 3; Michel Bastit, *Naissance de la loi moderne: La pensée de la loi de Saint Thomas à Suarez* (Paris: Presses Universitaires de France, 1990), pt. 3; Philippe-Ignace André-Vincent, "La notion moderne de droit naturel et le volontarisme (de Vitoria et Suarez à Rousseau)," *Archives de philosophie du droit* 8 (1963): 237-259; Pierre-François Moreau, "Loi naturelle et ordre des choses chez Suarez," *Archives de philosophie* 42 (1979): 229-234; Joseph Thomas Delos, *La société internationale et les principes du droit public*, 2nd ed. (Paris: Pedone, 1950), ch. 6.

2 See e.g. Michael Bertram Crowe, "The 'Impious Hypothesis': A Paradox in Hugo Grotius?," *Tijdschrift voor Filosofie* 38 (1976): 379-410; Frederick Copleston, *A History of Philosophy* (London: Continuum, 2003), vol. 3, *Late Medieval and Renaissance Philosophy*, ch. 23; Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 1978), vol. 2, *The Age of Reformation*, ch. 5; Otto von Guericke, *Political Theories of the Middle Age*, trans. Frederick Maitland (Cambridge: Cambridge University Press, 1900), ch. 9; Heinrich Rommen, *Die Staatslehre des Franz Suarez S.J.* (Mönchengladbach: Volksvereins, 1926); Georges Jarlot, "Les idées politiques de Suarez et le pouvoir absolu," *Archives de philosophie* 18 (1949): 64-107; Jacques de Blic, "Le volontarisme juridique chez Suarez?," *Revue de philosophie* 30 (1930): 213-230; Émile Jombart, "Le 'volontarisme' de la loi d'après Suarez," *Nouvelle revue de théologie* 59 (1932): 34-44.

3 See Hans Welzel, *Naturrecht und Materiale Gerechtigkeit*, 4th ed. (Göttingen: Vandenhoeck & Ruprecht, 1980), 97-99; Reijo Wilenius, *The Social and Political Theory of Francisco Suárez* (Helsinki: Akateeminen Kirjakauppa, 1963), 56-63; Jean-François Courtine, "La raison et l'empire de la loi," in *Nature et empire de la loi: Études suarésiennes* (Paris: Vrin, 1999), 91-114; James Gordley, "Suárez and Natural Law," in *The Philosophy of Francisco Suárez*, ed. Benjamin Hill and Henrik Lagerlund (Oxford: Oxford University Press, 2012), 209-229. Michel Villey, John Finnis and Pauline C. Westerman accuse Suárez of voluntarist and (modern) rationalist tendencies at the same time. See Villey, *Formation*, 384-386; Finnis, *Natural Law and Natural Rights*, 45, 338 and 350; Westerman, *Disintegration*, 78, 102 and 108-110.

4 Cf. *Summa theologiae* I-II q. 91 a. 2 co.

5 *De legibus* 2, Introduction.

6 *De legibus* 1.4.2, 1.1.2, 1.3.14.

Suárez applies this principle emphatically to every kind of law. In this respect, he seems to be more consistently rationalist than Saint Thomas who willingly incorporates Ulpian's definition into his natural law theory.⁷ Likewise, he is empathic in separating natural law from human will and attaching it to right reason. Deploying the Thomist language of *dominium sui*, Suárez argues that as “the exercise of dominion and the function of ruling are characteristic of law, and in man these functions are to be attributed to right reason, ... the natural law must be constituted in the reason, as in the immediate and intrinsic rule of human actions.”⁸

Suárez further strengthens the rationalist character of Thomistic natural law theory by extending natural law to the conclusions deduced from the primary, *per se nota* principles.⁹ What is more, he elevates them to the same level of validity (and immutability) as that of the first principles.¹⁰ Suárez surpasses the rationalism of Aquinas in another aspect, too. As a consequence of the certainty and necessary truth of the conclusions derived from general principles, he does not allow the slightest change in the precepts of natural law. “The natural law cannot of itself lapse or suffer change, whether in its entirety, or in its individual precepts – he declares categorically – since it is an intrinsic property which flows of necessity from human nature as such.”¹¹ This does not mean that unlike Aquinas, he does not take at all into consideration the contingency of human affairs;¹² but he conceives of the precepts of natural law as containing in themselves (at least implicitly) the conditions in which they should be applied.¹³ That leaves, of course, a much lesser role for prudence than it has in the natural law theory of Aquinas.¹⁴ So Suárez appears to commit the “hubris” – characteristic of many later seventeenth- and eighteenth-century natural law theories – of laying down an all-encompassing, inflexible code of natural

7 See *Summa theologiae* I-II q. 94 a. 2 co., I-II q. 95 a. 4 ad 1, II-II q. 57 a. 3 co.; *In IV Sententiarum* d. 33 q. 1 a. 1 ad 4; *In V Ethicorum* l. 12 n. 4.

8 *De legibus* 2.5.12: “proprium est legis dominari et regere. Sed hoc tribuendum est rectae rationi in homine ... in ratione est lex naturalis constituenda tanquam in proxima regula intrinseca humanarum actionum.”

9 Welzel, *Naturrecht und Materiale Gerechtigkeit*, 98.

10 In doing so, Suárez manifestly contradicts the opinion of Aquinas that only the general principles of natural law are necessarily true, while the conclusions derived therefrom are variable and uncertain. Cf. *Summa theologiae* I-II q. 94 aa. 4-5.

11 *De legibus* 2.13.2: “legem naturalem per seipsam desinere non posse vel mutari, neque in universali neque in particulari ... Prout est in homine mutari non potest, quia est intrinseca proprietas necessario fluens ex tali natura, qua talis est”.

12 Westerman, *Disintegration*, 109.

13 See *De legibus* 2.13.7, 2.13.9.

14 For the causes of the considerably smaller importance of prudence in the moral philosophy of Suárez, see John L. Treloar, “Moral Virtue and the Demise of Prudence in the Thought of Francis Suárez,” *American Catholic Philosophical Quarterly* 65 (1991): 387-405.

precepts. With this thesis Suárez incurs the criticisms of Villey, Welzel and Gordley, describing him as a rigid formalist who fossilised natural law.¹⁵ Nevertheless, this interpretation is only partly true. Suárez distinguishes two fundamentally different kinds of natural law: ‘perceptive’ and ‘permissive’.¹⁶ And formalism is present only in the former type; ‘permissive’ natural law, on the other hand, defines an area of human freedom and autonomy, where Suárez does justice to the variability of human conditions.¹⁷

Suárez raises the crucial question of the *ratio formalis* (formal basis) of natural law. Is it rational nature itself to which human actions may be found to be appropriate or, on the contrary, inappropriate? Or is it rather rational nature understood as the faculty of judging such conformity or lack of conformity? For him only the second answer is acceptable. As both views might be justified on Thomistic grounds,¹⁸ this question might perhaps seem purely terminological and, to be sure, somewhat artificial at first sight, but, as Michael Bertram Crowe rightly stresses, it is much more than a *lis de verbis*, inasmuch as Suárez treats this question as constituting a part of a more general and fundamental controversy, dividing intellectualists and voluntarists, as to whether natural law should be understood as a *lex indicativa* or a *lex praeceptiva*.¹⁹

The distinction between indicative law and prescriptive law can be traced back to the fourteenth century. It was introduced by the Ockhamist-Augustinian theologian Gregory of Rimini in his *Commentary on the Sentences of Peter Lombard*.²⁰ The other authors cited by Suárez in this respect – Gabriel Biel, Jacques Almain and Antonio de Córdoba – are also fourteenth- to sixteenth-century thinkers.²¹ This is a clear sign of the fact that not only the distinction itself but also the whole intellectualist-voluntarist debate dates back only to the fourteenth century, and not before. The controversy was essentially about divine rationality and freedom, and it was the appearance of the new, voluntarist concept of law on the turn of the thirteenth and fourteenth centuries that sparked

15 Villey, *Formation*, 387-389; Welzel, *Naturrecht und Materiale Gerechtigkeit*, 98-99; Gordley, “Suárez and Natural Law,” 221-23.

16 *De legibus* 2.14.6, 2.14.14, 2.14.19, 2.18.2.

17 Westerman, *Disintegration*, 114; Wilenius, *Francisco Suárez*, 63; Brian Tierney, *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800* (Washington: Catholic University of America Press, 2014), 204-9.

18 For a good brief summary of Aquinas’s different explanations of the formal basis of natural law, see Farrell, *Natural Moral Law*, 82-91. Farrell emphasizes that Aquinas himself did not consider these different views as mutually exclusive.

19 Michael Bertram Crowe, *The Changing Profile of the Natural Law* (The Hague: Nijhoff, 1977), 216-17.

20 See *In II Sententiarum* dd. 34-37 q. 1 a. 2.

21 See *De legibus* 2.6.3.

it off. While according to Aquinas's conception of eternal law there may be order in God's mind without restraining divine freedom, the concept of law as command seemed to necessitate a firm choice between a determinist and an indeterminist view of God: God is either merely a teacher of the law of nature, Himself subject to and bound by that law, or, just the opposite, a legislator acting as an arbitrary, omnipotent sovereign.²² Suárez appears to think, quite rightly, that the question is not adequately posed in this manner, so he does not accept either of the two opinions, and seeks instead a *via media* founded on Saint Thomas's natural law theory.

III. THE CRITIQUE OF INTELLECTUALISM AND VOLUNTARISM

Suárez first sets out to refute the intellectualist position. It is important to note that practically all the above theologians enumerated by Suárez in this connection were (at least partly) Ockhamists and hence (more or less) voluntarists, who adopted certain essentialist viewpoints in order to differentiate themselves from the more robust voluntarism of Ockham, Gerson and d'Ailly.²³ Gregory of Rimini and Gabriel Biel in his wake differentiated between *lex indicativa* and *lex praeceptiva* just with the purpose of counterbalancing or reconciling the voluntarist stand that it is God's will that determines what is good and evil with the rationalist view of good and evil as grounded in the nature of things.²⁴ That is why Gregory stressed so much that sin is sin because it is against divine reason insofar as it is right, rather than insofar as it is divine; moreover, he added, "if, under the impossible hypothesis that [*per impossibile*] divine reason or God Himself did not exist, or His reason should err, still if someone were to act against angelic or human right reason, or any other possible kind of right reason, he would sin."²⁵ Thus, paradoxically enough, it was a "rationalist" or moderate voluntarist current inside the nominalist camp that led

22 Westerman, *Disintegration*, 85-86 and 92.

23 For the political and legal theory of Gerson and d'Ailly, see respectively John B. Morrall, *Gerson and the Great Schism* (Manchester: Manchester University Press, 1960); Francis Oakley, *The Political Thought of Pierre d'Ailly: The Voluntarist Tradition* (New Haven: Yale University Press, 1964).

24 Crowe, "Impious Hypothesis," 398.

25 *In II Sententiarum* dd. 34-37 q. 1 a. 2: "si per impossibile ratio divina sive deus ipse non esset aut ratio illa esset errans, adhuc, si quis ageret contra rectam rationem angelicam vel humanam aut aliam aliquam, si qua esset, peccaret." Biel reiterated almost verbatim Gregory's statement. See *In II Sententiarum* d. 35 q. 1 a. 1.

gradually to intellectualism and in the end to the “*etiamsi daremus*” hypothesis of Hugo Grotius.²⁶

Seeing that the above-mentioned authors also aim, in their own way, at a synthesis of voluntarism and rationalism, their theoretical position seems by no means so far removed from that of Suárez as it might appear from the *De Legibus*. Does this mean that Suárez is merely tilting at windmills? Not at all. It is generally true that the theologians of the Counter-Reformation, in contrast with the nominalist and voluntarist tendencies inherent in Protestant thought, were inclined towards intellectualism. Indeed, the reassertion of the predominance of reason in moral and legal philosophy was an integrant part of the sixteenth-seventeenth-century scholastic revival.²⁷ In this way, the Second Scholasticism played an important role in the revitalisation of classical Aristotelian-Thomist natural law doctrine. However, certain Thomists, in their zeal to oppose Protestant voluntarism, leaned towards extreme objectivism and rationalism in law and morals. This tendency culminated in the *oeuvre* of Suárez’s fellow Jesuit Gabriel Vázquez.²⁸ Hans Welzel points out that by incorporating the phrase “*vel non recte de rebus iudicaret*” (or if He did not judge of things correctly) into the description of the intellectualist conception of natural law, Suárez made an unequivocal allusion to his Jesuit rival,²⁹ who had affirmed in his Commentary on the *Prima Secundae* of the *Summa theologiae* that “if we should concede, which is indeed impossible, that *God did not judge as He does now*, and if there remained in us the use of reason, sin would also remain”.³⁰ The ground for this statement is that sin is evil of itself, prior to any external prohibition, even to the judgment or will of God.³¹ From this allusion it seems quite obvious that Suárez’s criticism is directed as much, if not more, against Vázquez and other contemporary exponents of extreme intellectualism than against Gregory of Rimini and Biel. It is worth mentioning here that in an earlier phase of his scientific career, Suárez too tended towards extreme essentialism.³²

26 James St. Leger, The “*Etiamsi Daremus*” of Hugo Grotius: A Study in the Origins of International Law (Rome: Herder, 1962), 124. Cf. *De iure belli ac pacis* Prolegomena n. 11.

27 St. Leger, *Etiamsi Daremus*, 93.

28 As a general rule, Jesuits were more inclined to extreme essentialism than Dominicans. Vitoria and Soto, for instance, were much more moderate in this respect.

29 Welzel, *Naturrecht und Materiale Gerechtigkeit*, 97.

30 *Commentariorum ac disputationum in primam secundae Sancti Thomae* (henceforth *Commentariorum*), d. 97 c. 1 n. 3: “si concessio impossibili intelligeremus *Deum non ita iudicare*, et manere in nobis usum rationis, maneret etiam peccatum” (emphasis added).

31 *Commentariorum* d. 97 c. 1 n. 2.

32 Pedro Suñer, “El Teocentrismo de la ley natural,” in Francisco Suárez, *De legibus*, ed. Luciano Pereña et al., 8 vols. (Madrid: Consejo Superior de Investigaciones Científicas, 1971-1981), vol. 3, *De legibus (II 1-12): De lege naturali*, xlii-xlvi. Hugo Grotius, as is well known, made an intellectual

Here we have to return for a while to the problem of the *ratio formalis* of natural law. In Suárez's age, the major proponent of the view that natural law should be identified with rational nature as such was none other than Gabriel Vázquez.³³ Vázquez located the formal basis of natural law in human rational nature itself rather than in the judgment of reason in order to eliminate all subjective elements from the concept of *ratio*.³⁴ This opinion is unacceptable for Suárez. Not that he questions the doctrine of *perseitas boni* which assumes the intrinsic goodness (or badness) of actions. Just the contrary! He willingly accepts the idea that rational nature is the foundation of the objective goodness of moral actions; but on the other hand he dismisses the view that for that reason it can be termed law. Suárez admits that human rational nature is rightly considered as a measure or standard for law but not that '*lex*' can be predicated of it. For "rational nature itself, strictly viewed in its essential aspect, neither gives commands, nor makes evident the rectitude or turpitude of anything".³⁵

In Suárez's opinion, by equating *lex naturalis* with rational nature, Vázquez defends a non-legal conception of natural law, and this holds in general for all (extreme) intellectualists. Moreover, this conception would lead to absurd conclusions. If rational nature or the judgment of right reason alone sufficed to constitute law, then God would have His own natural law, binding and obligatory on Him.³⁶

God Himself would be subject to a natural law relating to His will; since even in God, an intellectual act of judgment logically precedes an act of His will, a judgment indicating that lying is wicked, that to keep one's promises is wholly right and necessary, and so forth; and therefore, if such an act of the intellect is sufficient to constitute the essence of law, then there will be a true natural law, even with respect to God Himself. For in such a case, the fact that God has no

move in the opposite direction: he first advocated a voluntarist doctrine of natural law in the *De iure praedae*, and then opted for extreme rationalism in the *De iure belli ac pacis*.

33 See e.g. *Commentariorum* d. 150 c. 3 n. 23: "Prima igitur lex naturalis in creatura rationali est ipsamet natura, quatenus, rationalis, quia haec est prima regula boni et mali".

34 Welzel, *Naturrecht und Materiale Gerechtigkeit*, 95-96.

35 *De legibus* 2.5.6: "non omne id quod est fundamentum honestatis seu rectitudinis actus lege praecepti vel quod est fundamentum turpitudinis actus lege prohibiti, potest dici lex. Ergo licet natura rationalis sit fundamentum honestatis obiectivae actuum moralium humanorum, non ideo dici potest lex. Et eadem ratione, quamvis dicatur mensura, non ideo recte concluditur quod sit lex, quia mensura latius patet quam lex." *De legibus* 2.5.5: "natura ipsa rationalis praecise spectata, ut talis essentia est, nec praecipit, nec ostendit honestatem aut malitiam, nec dirigit aut illuminat, nec alium proprium effectum legis habet."

36 *De legibus* 2.5.7: "Praeterea possumus ab inconvenientibus argumentari. Unum est, quia sequitur non minus proprie habere Deum suam legem naturalem quae ipsum liget et obliget, quam homines."

superior, will not serve as an objection, since the natural law is not imposed by any superior.³⁷

Nevertheless, this is not the single or greatest error that intellectualism commits in connection with natural law according to Suárez. Beside the fact that the intellectualists undermine the legal character of natural law they also make it doubtful that it is truly divine law. For the intellectualist standpoint entails that

the precepts of the natural law are not from God, inasmuch as they are characterized by a necessary goodness, and inasmuch as that condition of necessary goodness, which is in rational nature (by reason of which that nature is the measure of such goodness), does not depend upon God for its rational basis, although its actual existence does depend upon Him. ... Hence, natural law is prior to the divine judgment and the divine will of God; and therefore, natural law does not have God for its author, but necessarily dwells within rational nature in that matter, in such fashion that it is inherently endowed with this essence, and no other.³⁸

This passage, I think, clearly shows that Suárez is fully aware of the possible secularist implications of a full-blown rationalist conception of natural law.³⁹ That is why he got so frightened of Vázquez's natural law doctrine.⁴⁰ This danger was already inherent in the "*etiamsi daremus*" hypothesis of Gregory of Rimini and Gabriel Biel – even though if this was very far from their original intentions. As James St. Leger rightly stresses, they considered the supposition of the non-existence of God simply as an impossible condition, a condition

37 *De legibus* 2.6.6: "etiam Deus haberet legem sibi naturalem respectu suae voluntatis, quia etiam in Deo ad voluntatem antecedit secundum rationem iudicium mentis, indicans mentiri esse malum, servare promissum esse omnino rectum et necessarium. Si ergo hoc satis est ad rationem legis, etiam in Deo erit vera lex naturalis. Quia tunc non obstat quod Deus non habeat superiorem, quia lex naturalis non imponitur ab aliquo superiore." Likewise, a rational judgment of an equal, of an inferior or of a teacher showing the nature of a given action, adds Suárez, would be 'law' in the proper sense. Such a conclusion would be manifestly absurd, too.

38 *De legibus* 2.5.8: "Deinde sequitur legem naturalem non esse legem divinam, neque esse ex Deo. Probatur sequela, quia iuxta illam sententiam praecepta huius legis non sunt ex Deo quatenus necessariam honestatem habent, et illa conditio quae est in natura rationali, ratione cuius est mensura illius honestatis, non pendet a Deo in ratione, licet pendeat in existentia. ... Ergo lex naturalis praecedit iudicium et voluntatem Dei. Ergo non habet auctorem Deum, sed per se inest tali naturae eo modo quo de se habet ut sit talis essentiae et non alterius."

39 Reijo Wilenius argues that Suárez makes natural law and the moral order "autonomous, independent of God's will." It seems to me that Wilenius is committing here the very mistake he warns against a bit later: "One is easily misled in Suárez's works by the fact that he puts forth with the utmost care, and as if they were his own, opinions which he later refutes." See Wilenius, *Francisco Suárez*, 59-60, 60 n. 3.

40 Welzel, *Naturrecht und Materiale Gerechtigkeit*, 97.

contrary to fact, and “the only purpose of this hypothesis was to bring into bold relief the rational character of natural law as opposed to the voluntarism of authors who linked the natural law exclusively to a command of the divine will.”⁴¹ *Mutatis mutandis*, this is also true of Grotius, who took over this medieval commonplace with the intention of underlining the rationality and immutability of the moral order, and not with the purpose of separating law from theology or of constructing a secularised theory of natural law.⁴²

Suárez is not less critical of the voluntarist conception of natural law. He is convinced that if intellectualism denies the prescriptive and hence the legal character of natural law, then voluntarism precludes its “naturalness”, since it bases natural law on arbitrary divine fiat. For Ockham, as Suárez not altogether correctly reads him, divine volition is the sole source of good and evil.⁴³ The *doctor eximius* dismisses this view as “false and absurd”.⁴⁴ He tackles the questions of hatred of God and adultery that after Ockham became the nerve-points of the intellectualist-voluntarist controversy, and rejects forcefully the answers given to them by the nominalist theologian. He lays down as “an axiom common to the theologians that certain evils are prohibited because they are evil.”⁴⁵ He traces this axiom back to Saint Augustine, saying (through Evodius) in the *De libero arbitrio* that adultery is not an evil because prohibited by law (*malum quia prohibitum*), but it is so prohibited because it is evil (*malum per se*).⁴⁶ Furthermore, he recalls the metaphysical principle that the nature of things, their essence is immutable. Some human acts are intrinsically, by their very nature good or bad. If this were not the case, then it would be possible even for hatred of God to become righteous and allowed by Him, which would be plain nonsense.⁴⁷

41 St. Leger, *Etiamsi Daremus*, 123.

42 Crowe, “Impious Hypothesis,” 381, 405; Anton-Hermann Chroust, “Hugo Grotius and the Scholastic Natural Law Tradition,” *The New Scholasticism* 17 (1943): 126.

43 Suárez disregards the rationalist side of Ockham’s moral philosophy. He ignores, for instance, Ockham’s claim that moral doctrine is twofold, and demonstrative, non-positive moral science directs human acts apart from any command or precept of a superior. See *Quodlibeta septem* II q. 14.

44 *De legibus* 2.15.4.

45 *De legibus* 2.6.11: “Et quoad priorem partem colligitur ex illo communi axiomatico theologorum: quaedam mala esse prohibita quia mala.”

46 See *De libero arbitrio* 1.3. In order to prove his thesis, in *De legibus* 2.6.18 Suárez invokes the authority of Aquinas as well, according to whom a sin is contrary to the natural law “precisely because it is inordinate”. See *Summa theologiae* I-II q. 71. a. 6 ad 4.

47 *De legibus* 2.6.11, 2.15.4.

IV. THE SUÁREZIAN *VIA MEDIA*

I have noticed earlier that Suárez searches for a Thomist middle course that avoids both the Scylla of (extreme) intellectualism and the Charybdis of voluntarism. We have seen above his objections to these two extremes. But what does his own solution consist in? Suárez suggests (as might have been guessed) that the natural law is a *lex indicativa* and a *lex praeceptiva* at the same time:

natural law, as it exists in man, does not merely indicate what is evil, but actually obliges us to avoid the same; ... it consequently does not merely point out the natural disharmony of a particular act or object with rational nature, but is also a manifestation of the divine will prohibiting that act or object.⁴⁸

On the one hand, the divine precept or prohibition does not constitute the whole reason of the good or evil involved in the observance or transgression of natural law. On the contrary, God's will necessarily presupposes in the object of the act concerned the existence of an intrinsic harmony or disharmony with rational nature and with its proper end (*perseitas boni et mali*).⁴⁹ Thus the natural law is indeed "natural". On the other hand, natural reason indicates not only that something is in itself good or evil, but also that it is in conformity with the divine will that the good should be done and the evil avoided.⁵⁰ The divine volition attaches to the goodness or badness inherent in the relevant acts an obligation derived from divine law:

all things which are declared evil by the natural law are forbidden by God, by a special command and by that will which binds and obliges us, through the force of His authority, to obey those natural precepts; therefore, the natural law is truly prescriptive law, that is to say, one which contains true precepts ... the natural law is truly and properly divine law, of which God is the Author.⁵¹

48 *De legibus* 2.6.13: "fit legem naturalem, prout in nobis est, non tantum esse indicantem malum, sed etiam obligantem ad cavendum illud, ... subinde non solum representare naturalem disconvenientiam talis actus vel obiecti cum rationali natura, sed etiam esse signum divinae voluntatis vetantis illud."

49 *De legibus* 2.6.11: "Haec Dei voluntas, prohibitio aut praeceptio non est tota ratio bonitatis et malitiae quae est in observatione vel transgressione legis naturalis, sed supponit in ipsis actibus necessariam quamdam honestatem vel turpitudinem".

50 *De legibus* 2.6.8: "ratio naturalis quae indicat quid sit per se malum vel bonum homini, consequenter indicat esse secundum divinam voluntatem ut unum fiat et aliud vitetur."

51 *Ibid.*: "omnia quae lex naturalis dicitur esse mala, prohibentur a Deo speciali praecepto et voluntate, qua vult nos teneri et obligari vi auctoritatis eius ad illa servanda. Ergo lex naturalis est

Suárez here has to face a problem analogous to but not identical with that of the “*etiamsi daremus*” hypothesis: if God were not to issue the prohibitions and commands of natural law, would lying nevertheless be evil and a sin and respecting one’s parents good? Suárez gives a complex answer to the question. First, disaccord with right reason is in itself, apart from its relation to law, a moral evil and a sin.⁵² Secondly, a sin forbidden by God “is also characterized by a special depravity which it would not possess if the divine prohibition had not intervened, and it is in view of this depravity that the character of sin considered theologically becomes complete”.⁵³ Thirdly, from Aquinas’s dictum that God “would deny Himself if He were to do away with the very order of His own justice”,⁵⁴ Suárez deduces the proposition that God cannot but prohibit what is evil *per se*: “whatever is contrary to right reason is displeasing to God, and the opposite is pleasing Him; for the will of God is supremely just, and therefore, that which is evil cannot fail to displease Him, nor can that which is righteous fail to please Him, inasmuch as God’s will cannot be irrational.”⁵⁵ Consequently, God cannot grant any dispensation from the precepts of natural law, comprising all the ten commandments of the Decalogue.⁵⁶

Suárez takes great care to embed his voluntarist concept of law into an objectivist, rationalist framework based on a metaphysical view of human nature.⁵⁷ He underlines that “natural law, in all its precepts, relates to the natural

proprie lex praeceptiva seu insinuativa proprii praecepti”; *De legibus* 2.6.13: “legem naturalem esse veram ac propriam legem divinam, cuius legislator est Deus.”

52 *De legibus* 2.6.17: “Respondeo igitur in actu humano esse aliquam bonitatem vel malitiam ex vi obiecti praecise spectati, ut est consonum vel dissonum rationi rectae et secundum eam posse denominari et malum et peccatum et culpabilem secundum illos respectus, seclusa habitudine ad propriam legem.”

53 *De legibus* 2.6.18: “Quae ratio potius videtur probare esse prohibitum quia malum, quam e converso. Quod verum est loquendo de malitia moralis inordinationis, tamen ratione illius addita est lex aeterna et divina prohibitio ad quam habet tale peccatum specialem repugnantiam; et consequenter inde habet specialem deordinationem quam non haberet si prohibitio divina non intervenisset, per quam deordinationem completur ratio peccati theologice sumpti”.

54 *Summa theologiae* I-II q. 100 a. 8 ad 2: “Negaret autem seipsum, si ipsum ordinem suae iustitiae auferret”. Aquinas asserts that in connection with the question whether the precepts of the Decalogue are dispensable.

55 *De legibus* 2.6.5: “Et ait Deum non posse negare seipsum, et ideo non posse ordinem suae iustitiae auferre, sentiens non posse non prohibere ea quae mala sunt et contra rationem naturalem.” *De legibus* 2.6.8: “quidquid contra rationem rectam fit, displicet Deo, et contrarium illi placet; quia cum voluntas Dei sit summe iusta, non potest illi non displicere quod turpe est, nec non placere honestum, quia voluntas Dei non potest esse irrationabilis”.

56 *De legibus* 2.15.3-12, 2.15.16, 2.15.26. Suarez emphatically discards the opinion of Ockham, d’Ailly and Gerson that God can dispense from virtually all the precepts of the Decalogue, just as the view of Scotus and Biel that only the first table of the Decalogue does not admit of dispensation.

57 Vidal Abril, “Perspectivas del iusnaturalismo suareciano,” in Suárez, *De legibus*, 3: lxxxii.

qualities of man”,⁵⁸ and follows Aquinas in linking natural law to the order of natural inclinations and the teleology of human nature:

Saint Thomas ... traces this variety in the natural precepts to the varied natural inclinations of man. For man is, as it were, an individual entity and as such has an inclination to preserve his own being, and to safeguard his own welfare; he is also a being corruptible – that is to say mortal – and as such is inclined towards the preservation of the species, and towards the actions necessary to that end; and finally, he is a rational being and as such is suited for immortality and spiritual perfection, as well as for communication with God and social intercourse with rational creatures. Hence, the natural law brings man to perfection with regard to every one of his tendencies ... all these precepts proceed, by a certain necessity, from nature, and from God as the Author of nature, and all tend to the same end, which is undoubtedly the due preservation and natural perfection or felicity of human nature.⁵⁹

V. TOWARDS SECULARISED RATIONALISM?

The above theses seem to be in perfect harmony with the spirit of Aquinas, and in direct opposition to the Ockhamist doctrine that God can command (or abstain from commanding) virtually anything. Accordingly, it would be a gross mistake to label Suárez without qualification a voluntarist, as Villey, Farrell and certain other scholars do. At first sight, the interpretation of Hans Welzel seems much better founded. He argues that after all, the Suárezian middle course is nothing but a compromise, for “fundamentally, in Suárez too [just as in Vázquez], the divine will remains bound to the rational nature of things. God must forbid what is intrinsically evil and against natural reason. To the self-existing good or evil God’s will only appends the special obligation of divine law.”⁶⁰ Similarly, Thomas Pink deems that Suárez “comes close to conceding

58 *De legibus* 2.14.8: “naturale ius quoad omnia praecepta sua pertinet ad naturales hominis proprietates”.

59 *De legibus* 2.8.4: “reducit divus Thomas ... varietatem hanc praeceptorum naturalium ad varias hominis inclinationes naturales. Est enim homo individuum quoddam ens et ut sic inclinatur ad conservandum suum esse ad suam commoditatem. Est etiam ens corruptibile seu mortale et ut sic inclinatur ad conservationem speciei et ad actiones propter illam necessarias. Tandem rationalis est et ut sic capax immortalitatis et spiritualium perfectionum et communicationis cum Deo ac societatis cum rationalibus creaturis. Lex ergo naturalis perficit hominem secundum omnem inclinationem suam”; *De legibus* 2.7.7: “haec omnia praecepta necessitate quadam prodeunt a natura et a Deo quatenus auctor est naturae, et tendunt ad eundem finem, nimirum ad debitam conservationem et naturalem perfectionem seu felicitatem humanae naturae.”

60 Welzel, *Naturrecht und Materiale Gerechtigkeit*, 97-98.

the substance” of Vázquez’s intellectualist conception of natural law as “a law without a law-maker”.⁶¹ John Finnis, albeit emphasizing the voluntarism of Suárez’s notion of obligation, also affirms that the Spanish theologian „is brought to the brink of saying that even without reference to any divine precept, acts (or their avoidance) can be obligatory”.⁶² Jean-François Courtine goes yet further, claiming that “in spite of the tirelessly reiterated criticisms against Vázquez, it is legitimate to ask whether Suárez does not concede the essence. Certainly, he does not maintain without a corrective the radical thesis that the *dictamen naturale rectae rationis* as such has the force of law; this would be to consider that man, completely rational, is a law unto himself. However, the correction made here by Suárez, i.e. the necessity of the supplement that consists in the imperative as a sign of the will, does not modify in substance the underlying thesis of autonomy.”⁶³ Courtine’s final conclusion is that in the wake of Vázquez, Suárez made an important contribution to the rationalisation and secularisation of natural law.⁶⁴

Would the decree of God’s will really be solely a supplement to the judgment of right reason in Suárez’s natural law theory? This would imply a determinist view of God that would entirely destroy God’s freedom and consequently Suárez’s conception of *lex aeterna* based on it. And it would contradict his deep conviction that law is an act of free will and a command of a superior⁶⁵ (not to mention the title of his book: *On Laws and God the Lawgiver*). So either Suárez contradicts himself or Courtine’s suggestion is wrong. Everything seems to turn on what Suárez exactly means by saying that “God cannot fail to prohibit that which is intrinsically evil and inordinate in rational nature”.⁶⁶ And this in turn depends on the stance he takes in the old dispute over the absolute and ordained power of God. To be sure, Suárez disapproves

61 Thomas Pink, “Action and Freedom in Suárez’s Ethics,” in *Interpreting Suárez: Critical Essays*, ed. Daniel Schwarz (Cambridge: Cambridge University Press, 2012), 134-135.

62 Finnis, *Natural Law and Natural Rights*, 350.

63 Courtine, “Empire de la loi,” 113. Courtine supports his claim with the following quotation, taken from *De legibus* 2.5.10: “such dictates have the force of law over man, even though they may not be externally clothed in the form of written law. Therefore, these dictates constitute natural law; and accordingly, the man who is guided by them is said to be a law unto himself, since he bears law written within himself through the medium of the dictates of natural reason” [consequenter ostendit dictamen illud habere vim legis in homine, etiamsi scriptam exterius legem non habeat. Hoc ergo dictamen est lex naturalis et ratione illius dicitur homo qui illo ducitur esse sibi lex, quia in se habet scriptam legem medio dictamine naturalis rationis].

64 Courtine, “Empire de la loi,” 114.

65 See e.g. *De legibus* 1.5.24: “law ... is the act of a just and upright will, the act whereby a superior wills to bind an inferior to the performance of a particular deed” [legem ... esse actus voluntatis iustae et rectae, quo superior vult inferiorem obligare ad hoc vel illud faciendum].

66 *De legibus* 2.6.21: “non potest Deus non prohibere id quod est intrinsece malum et inordinatum in natura rationali”.

Ockham's voluntarist view that God can, by virtue of His absolute power, abstain from laying down such a prohibition,⁶⁷ and he affirms that the divine will necessarily presupposes a dictate of the divine reason declaring that a given act is righteous or evil.⁶⁸ But on the other hand he repeatedly and vigorously denies that either human rational nature or the judgment of divine reason constitutes a law binding God's will. God is entirely free from law, thus what He wills is always just and fitting.⁶⁹

Hence, notwithstanding any law whatsoever made by Himself for the government of Creation, God may disregard that law, making use of His absolute power, as in the distribution of rewards or punishments, and so forth; because He is not bound to the observance of law. For He is sovereign Lord and not confined within any order.⁷⁰

So it is evident that by saying that God has to prohibit what is evil *per se*, Suárez by no means suggests that God is legally obliged to do so or that he issues that prohibition mechanically, without deliberation. Yet He cannot but prohibit evil, but for rather different reasons (which have to be quoted at full length here):

although the divine will is absolutely free in its external actions, nevertheless, if it be assumed that this will elicits one free act, then it may be necessarily bound, in consequence, to the performance of another action. For example, if through the divine will an unconditional promise is made, that will is obliged to fulfil the promise In like manner, if it is the divine will to create the world, and to preserve the same in such a way as to fulfil a certain end, then there cannot fail to exist a providential care over that world Accordingly, assuming the existence of the will to create rational nature with sufficient knowledge for the doing of good and evil, and with sufficient divine co-operation for the performance of both, God could not have refrained from

67 *De legibus* 2.6.20: "In quo duo possunt cogitari modi dicendi. Primus est Deum quidem posse de potentia absoluta non facere talem prohibitionem, quia non apparet implicatio contradictionis, ut videntur probare omnia quae Ockham, Gerson et alii pro sua sententia congerunt; nihilominus tamen id fieri non posse secundum legem ordinariam divinae providentiae rerum naturis consentaneam. Nam hoc ad minus probant rationes in contrarium factae pro nostra sententia et multum favent testimonia Scripturae et Patrum."

68 *De legibus* 2.6.13: "Unde probandum non est quod doctores posteriori loco allegati dicunt voluntatem divinam, qua lex naturalis sancitur, non supponere dictamen divinae rationis dictantis hoc esse honestum vel turpe".

69 *De legibus* 2.2.5: "Anselmus dicens Deum esse omnino liberum a lege et ideo quod vult, iustum et conveniens esse".

70 *De legibus* 2.2.6: "Unde non obstante quacumque lege a se posita circa rerum gubernationem, potest illam non servare, sua potentia absoluta utendo, ut circa praemia vel poenam retribuendam et similia, quia non obligatur ad servandam legem, quia est supremus Dominus et extra omnem ordinem".

willing to forbid that a creature so endowed should commit acts intrinsically evil, nor could He have willed not to prescribe the necessary righteous acts. For just as God cannot lie, neither can He govern unwisely or unjustly; ... absolutely speaking, God could have refrained from laying down any command or prohibition; yet, assuming that He has willed to have subjects endowed with the use of reason, He could not have failed to be their lawgiver – in those matters, at least, which are necessary to natural moral rectitude.⁷¹

This solution is slightly reminiscent of Ockham's conception of conditional natural law,⁷² insofar as the core of Suárez's argument is as follows: *supposing* that God has decided to create man as a rational, free being, then he could not have abstained from commanding/forbidding him what is according/contrary to his nature and hence shown by right reason to be in itself good/evil. But this is, I think, not more than a formal resemblance. Substantially, Suárez's argument is much closer to the Thomist view that while theoretically it is conceivable that by his absolute power God could act independently of the created order, in effect, God's will always coincides with the order which He has established.⁷³ Following his theory of ordered causes, Aquinas states that if we consider the order of nature established by God depending on the first cause, i.e. Himself,

God cannot do anything against this order; for, if He did so, He would act against His foreknowledge, or His will, or His goodness. But if we consider the order of things depending on any secondary cause, thus God can do something outside such order; for He is not subject to the order of secondary causes; but, on the contrary, this order is subject to Him, as proceeding from

71 *De legibus* 2.6.23: "Dico igitur ex Caietano divinam voluntatem, licet simpliciter libera sit ad extra, tamen ex suppositione unius actus liberi posse necessitari ad alium ut, si vult promittere absolute, necessitatur ad implendum promissum. ... Et cum eadem proportione, si vult creare mundum et illum conservare in ordine ad talem finem, non potest non habere providentiam illius ... Ideoque supposita voluntate creandi naturam rationalem cum sufficienti cognitione ad operandum bonum et malum et cum sufficienti concursu ex parte Dei ad utrumque, non potuisse Deum non velle prohibere tali creaturae actus intrinsece malos vel nolle praecipere honestos necessarios. Quia sicut non potest Deus mentiri, ita non potest insipienter vel iniuste gubernare ... absolute posset Deus nihil praecipere vel prohibere. Tamen ex suppositione quod voluit habere subditos ratione utentes, non potuit non esse legislator eorum saltem in his quae ad honestatem naturalem morum necessaria sunt."

72 Ockham differentiates between three usages of the term *ius naturale*. The third meaning what he calls '*ius naturale ex suppositione*' contains rational answers to contingent conditions. See *Dialogus* 3.2.3.6.

73 Mary Anne Pernoud, "The Theory of the *Potentia Dei* according to Aquinas, Scotus and Ockham," *Antonianum* 47 (1972): 83. Cf. *Summa theologiae* I q. 25 a. 5 ad 1.

Him, not by a natural necessity, but by the choice of His own will; for He could have created another order of things.⁷⁴

Although for the things already made no other order would be fitting and good, God could do other things, and impose upon them another order, as He is bound to nobody but Himself. This means, on the other hand, that He can do nothing but what is befitting to Himself and just.⁷⁵

Thus Suárez agrees with Saint Thomas (and partly with Ockham) that God could have created another moral order. The act of creation is a completely free act; the divine will can freely choose between several rational plans. And after decreeing absolutely that something is to be done or to be avoided, “God is unable to act in opposition to His own decree not on account of any prohibition which the decree carries with it, but on account of the repugnant nature of that act itself”.⁷⁶ God could in principle rightfully do so, but this would be against His very nature. And obviously God cannot deny Himself and cannot abolish the order of His own justice:

granted that it implies not a physical contradiction (so to speak), but solely a moral one, for God to change His decree, and further, granted that once He has made a decree, it is contrary to due order that He should act in opposition thereto, nevertheless, these facts result not from any prohibition but from the intrinsic nature and essence of God For just as it is unfitting that divinity should deceive, even so it is unfitting that divinity should be inconstant.⁷⁷

74 *Summa theologiae* I q. 105 a. 6 co.: “Si ergo ordo rerum consideretur prout dependet a prima causa, sic contra rerum ordinem Deus facere non potest, sic enim si faceret, faceret contra suam praesentiam aut voluntatem aut bonitatem. Si vero consideretur rerum ordo prout dependet a qualibet secundarum causarum, sic Deus potest facere praeter ordinem rerum. Quia ordini secundarum causarum ipse non est subiectus, sed talis ordo ei subiicitur, quasi ab eo procedens non per necessitatem naturae, sed per arbitrium voluntatis, potuisset enim et alium ordinem rerum instituere.”

75 *Summa theologiae* I q. 25 a. 5 ad 3: “licet istis rebus quae nunc sunt, nullus alius cursus esset bonus et conveniens, tamen Deus posset alias res facere, et alium eis imponere ordinem”. *Summa theologiae* I q. 25 a. 5 ad 2: “Deus non debet aliquid alicui nisi sibi. Unde, cum dicitur quod Deus non potest facere nisi quod debet nihil aliud significatur nisi quod Deus non potest facere nisi quod ei est conveniens et iustum”.

76 *De legibus* 2.2.7: “Dices: si Deus, postquam decrevit absolute aliquid non facere, id ageret, inordinate faceret, et ideo id facere non potest. Ergo liberum decretum Dei habet vim positivae legis respectu voluntatis eius, ut non possit honeste facere quod per se ac remoto illo decreto libere facere potuisset. Responde Deum non posse facere contra suum decretum, non propter prohibitionem quam decretum inducat sed propter repugnantiam ipsius rei”.

77 *Ibid.*: “esto non implicaret contradictionem physicam (ut sic dicam) mutare Deum decretum suum, sed tantum morale ac subinde posito uno decreto esse inordinatum agere contra illud. Nihilominus id non oriri ex prohibitione, sed ex intrinseca natura et essentia Dei Quia sicut non decet divinitatem fallere, ita nec inconstantem esse.”

The fact that Suárez formulates the above opinion in his discussion of eternal law can be a perfect illustration why he holds to this traditional idea, which he conceives, in contrast with its traditional scholastic meaning, not as a norm above the divine volition but as a free expression of God's will.⁷⁸ Eternal law and creation are absolutely free acts of God, whereas all His subsequent acts – including the precepts of natural law – are only relatively free, being bound in consequence of them.

VI. CONCLUSION

Francisco Suárez faced the intriguing but difficult challenge of accommodating the late medieval voluntarist concept of law, together with all the problems it entails, into his predominantly Thomist and rationalist legal philosophy. As it seems to me, he succeeded in elaborating an equilibrated and viable synthesis of essentialism and voluntarism. While on the one hand he restored the “naturalness” and rationality of natural law on the basis of the teleology and *perseitas moralis* of human acts, on the other hand the voluntarist elements of the Suárezian synthesis, above all his conception of ‘*lex aeterna*’, did not leave space for any kind of secularised rationalism. This way he was able to avoid the trap of both voluntarism and extreme rationalism, into which most of modern natural law theorists later fell.

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⁷⁸ See *De legibus* 2.2.9, 2.3.4, 2.3.6.

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