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CREATING JUSTICE IN AN EMERGING WORLD

THE NATURAL LAW BASIS OF FRANCISCO DE VITORIA'S POLITICAL AND INTERNATIONAL THOUGHT

LA CREACIÓN DE LA JUSTICIA EN UN MUNDO NACIENTE

EL FUNDAMENTO IUSNATURALISTA DEL PENSAMIENTO POLÍTICO E INTERNACIONAL DE FRANCISCO DE VITORIA

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ABSTRACT

This article outlines Francisco de Vitoria's conception of natural law and natural right in an effort to amend a number of interpretations in the academic literature on his political and international thought that misapprehend Vitoria's iusnaturalism. In this view, his use of the Thomist doctrine of natural law and justice lays the foundation for his works on politics, society and international relations since the doctrine itself espouses equality and justice both within the domestic realm and between discrete communities. In an implicit appeal to the link between ethics and politics, his doctrine of natural law, moreover, fulfills a critical and constitutional role by designating justice and the common good as a pattern of order to which power and authority must conform in order to be legitimate.

Keywords: F. de Vitoria, international relations, justice, natural right, power.

RESUMEN

Se esboza la concepción de ley natural y derecho natural de Francisco de Vitoria con el fin de corregir varias de las interpretaciones de su pensamiento político e internacional que se encuentran en la literatura académica y que malentienden el iusnaturalismo de Vitoria. Se argumenta que la utilización que hace Vitoria de la doctrina tomista de ley y derecho natural constituye el fundamento de sus obras sobre política, sociedad y relaciones internacionales ya que dicha doctrina propugna la igualdad y la justicia tanto en el ámbito interno como entre comunidades distintas. Su doctrina sobre la ley natural apela implícitamente al vínculo entre ética y política y desempeña un papel crítico y constitucional al concebir la justicia y el bien común como un patrón de orden al que se deben conformar el poder y la autoridad para obtener legitimidad.

Palabras clave: F. de Vitoria, relaciones internacionales, justicia, derecho natural, poder.

Introductory Remarks

One of the most striking characteristics of some of the current literature that either directly addresses or touches upon the body of thought associated with Francisco de Vitoria and the *School of Salamanca* is the difficulty of fully comprehending its philosophical basis, the Thomistic conception of natural law as understood and applied by the Spanish theologians of the sixteenth century. Much has been written on Francisco de Vitoria's seminal work, *Relectio de Indis* (1539), and on how this contributed, by way of his influence on Hugo Grotius,[1] to the development of modern international law. It is also true that his work has been seen as justifying the aims and methods of the Spanish conquest in the Indies or, as in his political theory, as justifying monarchy as the only form of legitimate government. However, a careful examination of Vitoria's natural law ethics, which expresses a conception of justice, of law, and of political community, as well as a universalist conception of international relations, makes the latter suggestion untenable.

A principal concern of this article is that of offering an exposition of the basic tenets of Thomist natural law in accordance with the perspective of early sixteenth century Spanish scholastic thought. Thomist *iusnaturalism* lies at the very foundation of Vitoria's and his disciples' political and legal thinking. Yet, a significant portion of the contemporary literature addressing Spanish political thought during this period, with a few exceptions, glosses over or furnishes scant analysis of the meaning of this concept despite its being central to Vitoria's thought. Even contemporary studies focusing principally on the natural law tradition (including those addressing the Thomist variant) eschew any systematic discussion of the contribution of Spanish scholastic thought to the development of the natural law tradition itself.[2] In many such enquiries, Vitoria and his contemporaries are, at most, mentioned only in passing, despite their rich contribution to the literature on natural law ethics. By comparison, let us consider the assertions of a scholar who pondered the significance of Spanish moral philosophy three hundred years ago. Hermann Conring, a seventeenth century jurist and Professor at the University of Helmstaedt, devotes a chapter to Spain in his *Examen rerum publicarum potiorum totius orbis* (*An Examination of the Most Important Public Affairs of the World*), and offers the following assessment of Vitoria's *Relectiones Theologicae* and the development of moral philosophy in Spain:

1 Spanish scholarship is generally more favorable to this assertion. See, for example, García Arias (1947), de Hinojosa (1919), Leger (1962), and Puig Peña (1934).

2 See Porter and Wolterstorff (2000), and McLean (2000).

> There is a work of his entitled *Relectiones*, which may be extraordinarily useful, not only for theologians, but also for jurisconsults, because it discusses moral topics with the greatest care and subtlety, wherefore I always read it with admiration […] Often I am surprised that Hugo Grotius was able to make progress in this kind of work so much greater than that ordinarily made by other authors. But his genius was curious. However, if he excelled in philosophy and produced the incomparable book, *De jure belli ac pacis*, he owed it to his reading of the Spanish jurisconsults, Ferdinand Vázquez and Diego Covarruvias, who in their turn made use of the work of their master, Franciscus de Victoria. He cites them frequently. Spanish legal science differed much from French legal science. In France we can praise only Cujas, Hotman, Bauduin, and others who have given their works a literary finish, but in Spain natural law is much better cultivated; there is indeed no other place where it is so happily taught. And all this Spain owes to Franciscus de Victoria. The same consideration applies to philosophy; it is moral philosophy that is most studied in that country. Let him who aspires to the most exact knowledge of moral philosophy procure Spanish authors. Compared with the Spanish, the Germans and French are naught. It is for the reason pointed out by us that the Spanish have been so successful in the cultivation of metaphysics [...]. (qtd. in Nys 1917 98-99)

According to a scholar who wrote over seventy-five years ago, the scarce in-depth knowledge of Spanish thought in the areas of law, politics, and ethics can be explained by a "historical and systematic" prejudice that can be found, for example, in Julius Stahl's work on the history of legal philosophy. Stahl systematically banished from the center of his attention thinkers whose works incorporated theology and included only those thinkers whose point of departure had been a philosophy of law understood as a science independent of theology and morality (*cf.* Riaza 1925 324-325).[3] Historically, this partiality has also entailed, as Riaza says, an attempt to define legal philosophy as something that began with Hugo Grotius's treatise of 1625, *De iure belli ac pacis*.

Although this matter is not the focus of this article, a few brief remarks are warranted. In addition to the problem of shirking the Spanish contribution to the development of natural law, there is the common positivist denial of human law as having some (divine) ethical basis from which legislation may be directed or guided. Urdánoz has seen this as an outcome of the intellectual ruminations of Protestant

3 Riaza further remarks, however, that the works of the Spanish theologians do not forge a new legal science, but rather allow both theologian and lawyer to participate in the study of questions associated with legislation.

theology and Enlightenment philosophy during the course of the sixteenth and seventeenth centuries, whose advance is attributable to the pre-rationalism of Grotius, Thomasius, and Pufendorf (*cf.* Urdánoz 1947 238). Grotius himself had initiated this departure from Scholastic natural law by drawing upon the voluntarist nominalism of Gabriel Biel (†1495) outlined a century earlier. Thus, based on an entirely empirical criterion, natural law became the product of human natural reason in the absence of a metaphysical foundation. The articulation of law itself had become severed from religious influence and authority. Here, natural reason alone would be sufficient for establishing an autonomous conception of natural law (*ibd.*). Thus, from this approximate point in time, the development of natural law doctrines continued along the lines of a secularized variant, leaving the previous heritage, especially the so-called "Spanish School of Natural Law", in a state of relative obscurity.

The Concept of Natural Law in Aquinas and Vitoria

The concept of natural law in Aquinas is but one component of a hierarchical order of laws: the eternal law (*lex aeterna*), the natural law (*lex naturalis*) and its constituent part, natural right (*ius naturale*). Finally, below this hierarchy are the Divine and human laws (*lex divina et positiva*). Generally speaking, the Thomist conception of law is so well known, particularly among theologians and legal philosophers, that one might question the need of setting forth its central tenets once again. However, the literature on Vitoria, as I have already suggested, exhibits significant oversights when attempting to explicate Vitoria's natural law doctrine, if it ventures to do so at all. Serious interpretive problems also ensue when a number of scholars offer assessments of Vitoria's university lectures, and, from my point of view, such difficulties arise from not fully addressing the concept of natural law and discussing its connotations. Hence, the connection between 'natural law' and 'natural right' (and how these provide a basis upon which to establish a just political and legal order); the relationship between these two concepts and the Thomist conception of humans, their capacity to reason and to discern the principles of natural law; and the character of the law of nations (*ius gentium*) often remain obscured.

The following section is thus devoted to outlining two underlying themes present in Thomist natural law: man and political society. First is the question of the *rational nature* of humans as the basis of the political order. Unlike its Hobbesian counterpart, human beings are conceived in an optimistic sense (*i.e.* as rational creatures naturally inclined toward discovering the universal principles of morality). This involves a sanguine epistemological assessment of their psychology. Thomism affirms

the operation of practical reason in humans as the primary mechanism for acquiring knowledge of good and the common good.

Second, such a moral characterization of humans has implications for the political order. Essentially this means that their ethical and rational nature is asserted as the source of a system of laws whose fundamental purpose is the achievement of the common good. The common good, in turn, is seen, from the perspective of law, as a function of the articulation of the principles of justice by natural reason. The epistemological process describing the manner in which human beings acquire knowledge of moral principles is resolved into an assertion of their ability to discover the principles of justice that must, in this view, govern the political order through the legislation of just laws. The ontology of man thus involves the parallel theme of the nature of the state. Only a *just* state is a legitimate state. Hence, my overview will also address the concept of natural right, positive right, and justice.

The third section will discuss the general implications of this doctrine for the character of domestic and international society, inasmuch as justice is seen as the ordering principle of both realms. Specifically, I wish to underscore the critical and constitutional function of Thomist natural law in Vitoria, in the sense that its appeal to justice places ethical limits on the exercise of political power in domestic and international politics.

The Order of Reason in Man and the Basis of Political Society

The Thomist concept of natural law is thoroughly embedded in a broad conceptualization of a *universal order*. The idea is Augustinian in origin and emphasizes the existence of a universal order governed by a divine reason and will (*ratio divina vel voluntas Dei*) (*cf.* Truyol y Serra 1989 264). Thus, St. Augustine incorporated Stoic metaphysical beliefs that asserted the existence of a divinity that had created all things according to their nature and to their corresponding ends. This teleological conception of nature further argues that the participation of humans in this divine *logos* defines their essential equality. No man is a slave by nature but rather by convention (*cf. id*. 179). Stoicism had provided a philosophical view of nature that, as Truyol has noted, allowed medieval theology to develop the Christian theory of eternal and natural laws. What St. Augustine had managed to forge, in this manner, was a theocentric conception of natural law that replaced the cosmological and pantheistic conception developed previously by the ancient Stoics (*cf. id*. 264). For St. Augustine, the eternal law is divine reason and will, and requires that human beings respect the natural order of things. In human conscience, this eternal law operates as

natural law, one which humans freely follow as rational beings able, as they are, to distinguish between good and evil, between the just and the unjust (*cf. id*. 264-265). These are a few of the background ideas that infused Thomist theology with the raw material necessary for the development of its own theological system and for the development of political and legal theory in later centuries.

Aquinas absorbed and further developed this notion of a universe directed and guided by the highest form of reason, that of the "first mover", God. In his *Summa Theologiae*, eternal law is conceived as God's wisdom directing all movement and action in creation; all creation is governed by this divine reason and destined to an end. In individuals, reason and will also have a purpose and an end but, unlike things belonging to external nature, men act freely as masters of their own conduct. Inasmuch as humans are endowed with reason, the definition of natural law as "nothing else than the rational creature's participation in eternal law" (Fox 1910) underscores not only the essential dignity of humans, their ethical nature, but also the prescriptions they must follow in the ordering of social life, especially in the creation of law, seen as the rational (and ethical) consequence of human intellect. Specifically, participation in eternal law designates, as a Spanish theologian has noted, a reflection, albeit imperfect, of that divine reason in human beings (*cf.* Urdánoz 237). Therein lies his essential dignity and equality. The development of man's ethical virtues remains in a state of potency, and it is intellect that which will allow him to unveil and discover the proper moral ordering of life. As a legal scholar has observed, that same reason inherent in man thus designates a "natural sphere of rational and ethical values" which finds expression in the notion of natural law and forms the basis for the realization and maintenance of the social and political order (*cf.* d'Entrèves 1939 21).

From the point of view of the individual, natural law is but a "rule of conduct which is prescribed to us by the Creator in the constitution of the nature with which He has endowed us" (Fox 1910). And this conduct may be said to be 'natural' in the sense that it is conceived as residing in the very nature of humans, who can discover it through reason (*cf. ibd*.). From the perspective of the social and political order, which Aquinas, following Aristotle, also considers natural, social and political institutions are seen as grounded in that very conception of the nature of man (*cf.* d'Entrèves 22).

In this respect, Paul Sigmund's general assessment of Aquinas' political and legal theory is correct in maintaining that Aquinas reasserts the value of politics because he sees politics and political life "as morally positive activities that are in accordance with the intention of God for man" (Sigmund 1993 217). A.P. d'Entrèves arrives at a virtually identical conclusion

when he emphasizes that the central concern of Aquinas' political thought is that of "the nature and value of political experience" (d'Entrèvez 20). The structure of that concern, one must bear in mind, has as its point of departure a definite (optimistic) conception of humans owing to their innate capacity to reason which, among other things, allows their intellect to distinguish between right and wrong, between that which is just and that which is unjust (*cf.* Urdánoz 251). This ability to reason, Thomism maintains, underscores the dignity and exceptional character of humans above and beyond all other things in nature, and affirms their social and political character. The ethical ordering of that society and the nature and ends of its institutions are then deduced from the relationship among like men in political society. In sum, the ethical ordering and inclination of man's rational nature (*naturalis ratio*) necessarily leads to the notion of a natural and ethical ordering of political society.

From this at least two questions follow. What principles characterize natural law and how may humans know them? What is the purpose and function of natural law for both society as a whole and for the individual? In this teleological conception of man and society, what are the ends that must be sought in the ordering of social and political life? In what follows, it should be noted that my purpose is not to establish whether the Thomist conception of natural law is acceptable or correct for modern scholars, nor to enter into a debate centering on the problems associated with the epistemology of Aquinas' metaphysics, but merely to describe its principal tenets as a means of grasping the meaning and implications of Vitoria's political writings.

Thomist Natural Law, its Principles and Cognoscibility: Practical Reason and Man's Natural Inclination Towards the Good

One of the hallmarks of the Thomist conception of natural law is the existence of a set of self-evident principles discoverable by humans, and from which are derived their moral duties and obligations. Coleman's explication of the cognoscibility of these self-evident principles argues that

> [Such principles] arise in us through the way we experience and think about the world. Hence, our logical ways of arguing and our ways of knowing what there is, rest on what is called metaphysical realism, a set of first principles, the truth of which humans cannot logically prove but which they accept as the starting point of whatever else they can logically prove. Indemonstrable propositions or first principles express the most basic, metaphysically immediate facts about reality for all humans. Because they are not specific to cultures, humans everywhere cannot fail to see their necessity and they are graspable by everyone. (2000 85)

Sigmund has shown, furthermore, that the self-evident quality of such principles is based on an optimistic assumption regarding the natural inclinations of the human intellect, viz. its propensity for rationally discovering the principles of morality and goals that are perceived by reason as good (*cf.* Sigmund 223). Fox has similarly summarized the essence of these principles in the following manner:

> Starting from the premise that good is what primarily falls under the apprehension of the practical reason –that is of reason acting as the dictator of conduct– and that, consequently, the supreme principle of moral action must have good as its central idea, [Aquinas] holds that the supreme principle, from which all the other principles and precepts are derived, is that good is to be done, and evil avoided. (STQ44 A2)

The previous statement contains a number of conceptual elements that may remain obscure to the inexperienced reader of Aquinas and require a degree of qualification and exegesis. Some of the contemporary literature focusing on the Thomist conception of natural law, as utilized in the writings of the sixteenth century Spanish theologians, argues that from the "supreme principle" described above, Thomists deduced the primary principles of natural law; that, through a cognitive process known as "synderesis", human laws could be ultimately generated and codified; and that such laws also served to maintain an ethnocentric status quo harmful to indigenous society in the Indies.[4] Such summations of natural law, however, remain generally unclear as to the nature of the process by which such cognitive deductions that ultimately lead to the promulgation of law are possible (*i.e.* the nature of practical and speculative reason in man and how human reason itself may envision and, indeed, establish a "just" social order). This point is decisive because man's rational capacity for the Thomists had ethical implications for the unfolding of individual and social pursuits. In other words, what remains substantially obscure in a number of discussions on natural law is the significance assigned to human reason in the ordering of political and social life, particularly as it pertains to the function and purpose of political authority in shaping the common good, when taken to the level of law and politics. A few remarks addressing the Thomist metaphysical conception of reason in man, particularly in its relation to the supreme principle of pursuing good and shunning evil, are thus warranted.

What is, then, the relationship between the conception of humans as rational creatures and their participation in the supreme principle of natural law, *to do good and avoid evil*? What are the implications of

4 See, for example, Pagden and Lawrence (1991 XIV-XV), and Pagden (1994 159-160).

this doctrine from the point of view of the ethical ordering of society? Indeed, how does the ontology of man necessarily lead to a particular view of the social order? Aquinas, in a fashion wholly reminiscent of the Aristotelian characterization of the *logos* (or rational principle) as divided into two parts, speaks of speculative and practical reason. In ST I Q79 A12 of the *Summa Theologicae* man's general capacity to reason is described as:

> […] a kind of movement which begins with the understanding of certain things that are naturally known as immutable principles without investigation. It ends in the intellectual activity by which we make judgments on the basis of those principles that are naturally known in themselves concerning what has been discovered by reasoning.

Speculative and practical reason operate on the basis of principles that are particular to each. Speculative reason, Aquinas tells us in reference to Aristotle's *Ethics*, is based on a disposition called *habitus* or "the understanding of principles" (Aquinas 1988 35). Practical reason, likewise, is not predicated upon a special power but by virtue of a natural disposition called *synderesis*, or a capacity to apprehend general principles of morality (*cf. id*. 35-36). Aquinas asserts that, in matters concerning practical reason, the first thing that is grasped by humans in an absolute sense is the idea of their existence or *being* which establishes itself as a self-evident truth (ST I-IIQ94 A2); but this ontological truth, for Aquinas, is necessarily followed by a parallel notion of *being* in relation to its moral end, which is *good*.

Just as being is the first thing that is apprehended absolutely, good is the first thing apprehended by practical reason which is directed towards action, since everything that acts does so for an end which possesses the quality of goodness. Therefore, the first principle of practical reason is based on the nature of good, *i.e.* "Good is that which all things seek." Hence, the first precept of law is that good is to be done and pursued, and evil is to be avoided. All the other precepts of the law of nature are based on this, so that all the things that are to be done or evils to be avoided belong to the precepts of the natural law which the practical reason naturally apprehends as human goods (*cf.* Aquinas 1988 49).

Thus, the order or sequence of the precepts of natural law closely follows the order of man's natural inclinations or affinities. As Aquinas observes, there exists in human beings a natural inclination to good that they naturally share with "all substances, since every substance seeks to preserve itself according to its own nature" (1988 49). From this it follows that natural law embraces things that correspond to the preservation of human life (as opposed to those that foster its destruction). There also exists in humans an inclination, directed at more particular

ends, that they share with other beings, such as the union of male and female and the education of their progeny. In similar fashion, man is also inclined toward the "good of the rational creature which is his alone", and by which he is naturally inclined to learn about God and to live in society (*id*. 49-50).

This last point is of particular interest for it directs attention to Aquinas' conviction, in following the pattern set by Aristotle, that man is meant for life among his fellow humans. Indeed, he received the Aristotelian notion of man as a political animal and transformed it into the idea of man as a *political and social animal* (*cf.* Ullmann 1988 116), thereby deploying his theory of natural law within the context of society and politics. As Davis contends in his account of Thomist doctrine, God has created each species with internal properties natural to its kind. But for humans this means that their nature is not only physical but also rational and *social*, "and it is this that Thomas captures in the first principle of the natural law" when he argues that good should be pursued and evil avoided (*cf.* Davis 1997 489). It is, hence, not a moral principle as such, but a *criterion* for rational (human) action (*cf. id*. 479).[5] What becomes discernible, in any case, is the second element present in the Thomist and Vitoria's conception of the *lex naturalis*. This refers to human beings' inherent inclination toward *good*, especially as it pertains to their life within social order. The *lex naturalis* is, if one follows Davis's terminology, a *theory of rational action* inasmuch as it conceives humans as endowed not only with *reason* and *freedom* according to a divine plan, as well as with an innate *potentiality* to recognize and pursue certain ends in conformity with their nature, but also with the capacity to know, judge and achieve good both for themselves and for others, that is, as *social beings*.

Hence, the rational process by which the principles of natural law are apprehended is one that presupposes a natural and ethical inclination inherent in the very fabric of the human personality. The general tendency of intellection in humans, according to this doctrine, is conceived as being directed essentially toward a recognition and apprehension of good, not merely in reference to oneself but, equally, in reference to society (and to the common good thereof), inasmuch as they are cognizant of their ethical inclinations in relation to others within the context of a naturally existing social order.

5 Davis further concludes: "The natural law is not a code of conduct so much as those judgments about what is and ought to be done as would be made by a person of practical reason who finds himself with the best available understanding of the way the world really is" (482).

The first set of self-evident principles, which are the product of speculative reason and grounded in the metaphysical concept of "being" (*cf.* Truyol y Serra 1989 367-368), represents those that spring so directly from the supreme principle that they are deemed to possess universal validity because of their formal and general character (*cf.* id. 368). These include propositions such as "Do unto others as you would have others do unto you", "Honor your parents", or "Do not steal" (*cf.* Fox xv), and are judged to be necessary for a minimum moral order and are equally considered as possessing universal value (*cf.* Fox; Truyol y Serra 1989 367). The secondary principles (which are the outcome of practical reason), those that refer to the public and private good and which possess varying degrees of uncertainty,[6] are seen as derived from a more difficult process of inference (*cf.* Fox). It is this difficulty, both Fox and Truyol agree, that requires that natural law be duly supplemented by human law (*cf.* Truyol y Serra 1989 368; Fox). Specifically, at the level of the actual social order, society itself cannot function on the basis of formal or abstract principles but must, instead, externalize such principles in a more definite and authoritative manner that takes into account the particular circumstances that characterize a particular cultural context. This is the role of law in society.

Moreover, the universal and immutable character of natural law refers to its first principles and is anchored in an optimistic (and universal) assumption regarding the nature of man as an ethical being whose inclination is toward the achievement of good. The assumption of *universality* is predicated on the assertion that its fundamental, as opposed to its secondary, principles are inherent in the entire human species. These fundamental principles oblige humans to live according to their nature, guided by their rational character. The immutability of natural law is, likewise, predicated upon the notion of the nature of human beings, inasmuch as they are destined to an end in accordance with the precepts of the eternal law. It assumes the permanence of human nature, its continued existence, and thus commands and prohibits human action with the same force everywhere and throughout time (*cf.* Fox). Natural law is, in this view, mutable only in its secondary principles by way of either substraction or addition. In the former sense, this occurs only in special circumstances, when the matter to which those principles are applied has changed or ceased to be relevant, and only when the truthfulness or righteousness of what natural law prescribes

6 Truyol thus notes that conclusions drawn from the sphere of speculative reason are of greater certainty than those conclusions arrived at in the sphere of practical reason. This is so, he argues, because practical reason is exercised in the domain of contingency characteristic of human action. Here, general principles become ever more uncertain inasmuch as they increasingly refer to the particular. See Truyol y Serra (368).

has not been altered (*cf.* Truyol y Serra 1989 368). More commonly, the natural law may change by way of addition given that, in time, new historical circumstances may require the generation and application of new secondary principles (*cf.* Sigmund 225-226). This is typically a function associated with the creation of positive laws.

Thomist Natural Law and Positive Human Law: Good as the Purpose of Law

According to Thomist doctrine, positive laws (*ius civile*) are seen as being grounded in the principles of natural law and only those laws that adhere to its tenets are considered valid and binding. Because human law is predicated upon the precepts of natural law, its articulation is primarily aimed at the achievement and maintenance of the common good (*cf.* Truyol y Serra 1989 369).[7] Since it is concerned with the common good, human law is more restrictive in its range of application (as compared to the *lex naturalis*) because it is concerned only with those acts whose effects are socially far-reaching and directly shape the common good. And inasmuch as the "virtue of justice", in the Aristotelian sense, is directly concerned with the common good, positive laws are seen as dealing primarily with justice (*cf.* Truyol y Serra 1989 369). In this view, law is the object of justice.[8] This is substantially Vitoria's (and Aquinas') view of the function of law.[9] Vitoria's discussion of Aquinas' arguments in 'On the Effects of Law' (STI-II Q92) includes an assertion to the effect that "the intention of the king is without doubt to make men good absolutely speaking and to direct them to virtue" (Padgen and Lawrence 166). Vitoria adds, "[t]he proof is, as Aquinas said and proved earlier (I-II Q90 A2), that the final purpose of law is the common good" (*ibd.*). The argument rests on the bases by which laws may be said to be legitimate. Following Aquinas, Vitoria thus argues:

> That law is ordained to the common good may be understood in two ways: first *de iure*, because it should be so; and second *de facto*, not only because it should be so, but because if it were not so it would cease to be

7 This assertion may be found in Aquinas' Summary of Theology concerning the essence of law (Q90 A2) and in Vitoria's commentaries on Aquinas. For Vitoria's observations on this question, see Padgen and Lawrence (157-158).

8 Vitoria is clear on this point when discussing the essence of natural right (or *ius naturale*) and its relation to the Thomist notion of justice. I will outline the Thomist concept of justice below.

9 See Vitoria's view on the nature of justice in his commentaries on Aquinas' Summary of Theology, (see the section dealing with the II-II Q57-61, *De Iustitia*) in the Latin version: de Vitoria (1932). This edition covers all of Vitoria's commentaries on Aquinas. Alternatively, one may refer to a Spanish language edition exclusively devoted to his commentaries on Aquinas' conception of justice. See de Vitoria (2001).

> law. In the same way we speak of some things being necessary by prescription, and others as being necessary in fact.
>
> This being the case, we may reply that law is ordained for the common good in both senses. A prince may not invent a law which has no regard for the common good, since otherwise the law will be tyrannical, not just. The prince fulfills a public role which is itself ordained for the public good, and he is a servant of the commonwealth. A prince may of course look out for his own private good, but not through the law.
>
> Second, I assert that a law cannot be against the common good, not only *de iure*, but also *de facto*, because in that case the law would be no law. If it were established that a law in no way concerned the common good, that law should not be obeyed. (*id*. 157)

The general emphasis that Thomist thought places on the common good as the end of the laws reveals once again the natural law basis of human social institutions. The legitimacy of laws and of institutional arrangements (including public authority) becomes a function of the extent to which they are predicated upon rational, ethical principles as expressed by the precepts of natural law. If the ontology of man implies a natural and essential inclination toward good within the context of the social order, such legal and political arrangements as are constructed must attempt to follow, and indeed foster, the same natural inclinations.

From this it follows that this conception of law also holds that, by virtue of its concern for the common good, such laws as are legislated must have a general character and proceed from a competent public authority whose concern is the articulation of the common good itself. But how are the laws to be derived, and by what means? Besides the general assertion that laws must pursue the common good, what is the specific *theory* of law on the basis of which positive laws operate? To properly answer these questions, one must take into consideration and submit to analysis the Thomist assertion expressed above, viz. that law is the object of justice.

Natural Law and its Social Component: Ius Naturale *and the Order of Justice*

Natural law (*lex naturalis*) includes a narrower concept (*ius naturale* or natural right), which refers exclusively to those principles that apply to man in the social order, to humans in their relationship with other men in an established commonwealth. Natural right, for the Thomists, is that *part* of the *lex naturalis* which regulates social life in its ordering toward the common good (*cf*. Urdánoz 237; Truyol y Serra 1989 370). It is for this reason that Aquinas addresses natural right in his treatment of justice. The Thomist theory of law, which one may also

refer to, perhaps more appropriately, as a theory of *right*, establishes the existence of juridical norms (innate to man and thus considered universal) that inform natural reason. The task of the legislator, in this view, is to conform to such norms or principles when generating positive human laws (*cf.* Estébanez 459). In other words, legitimate positive laws are considered to be grounded in "right", or the natural principles of justice knowable to the lawgiver.

Both Aquinas and Vitoria (again in his commentaries on Aquinas) address the concept of justice by first distinguishing the latter from the other Aristotelian virtues. The principal difference lies in two fundamental characteristics. The first is that the virtue of justice, unlike other virtues, which are oriented toward oneself, is always directed at someone other than the agent of justice. This quality (*alterity*), the reference to the other, stems from its second characteristic, equality (drawn from the Aristotelian concept of *epieikeia*). Vitoria explained this by emphasizing that when we articulate justice, or "the just", we are not acquiring something for ourselves but rather giving someone else his due. "The just", he explained, is the same as "equal", and the "equal" is in respect of someone else, or in relation to someone else. One never says, he added, that something is equal to itself but rather equal to something else. Therefore, justice is necessarily in relation to someone else.[10] This notion of equality thus implied the corresponding notion of debit or the idea of giving to each his due.

Vitoria drew upon Roman legal texts to illustrate this point. Ulpian (†228), he noted, referred to the concept of justice as the firm and constant determination to confer to each his due (*firma et constans voluntas jus suum uni cuique trubuens*) and noted that Franciscus Accursius (†1263) had restated Ulpian's definition (*cf.* Vitoria 2001 9). This conceptualization of justice follows Aristotle's notion of "particular" justice, which, as Barker has shown, "is concerned with the specific form of goodness which consists in behaving 'fairly' […] or 'equally', to other men" (Aristotle 1946 362).[11] The conception of the common good thus implies a conception of justice (or *right*), which, in turn, involves the articulation of the idea of equality, inasmuch as it is developed and expressed in a juridical sense, among members of society. "Justice in general, then, is concerned," as Coleman notes,

> with the due measure of right external acts, giving what is due to another […] Given that one's own good must take place within common fulfillment, the *civitas* as the perfect community is the setting in which

10 See q57 a1 in Vitoria (2001 5).

11 As in Aristotle, the notion also includes the idea of distributive and commutative justice. Here, I will focus only on the former.

> one comes to have an interest in good of others of the species for their own sake and *as* members of the species (97).

Justice is, in sum, a *social* concept; and society, in this view, must embody in its actual ethical development the principles emanating from justice itself.

Natural and Positive Right: The "Just" by Nature and by Determination

This theory of "right" is conceptually divided into two distinct but complementary parts. The first, "natural right", refers to that which is just by virtue of the *nature* of the "object" in question (and this may refer to a broad range of human relationships). The second element, "positive right", refers to that which is just by virtue of a public or private compact, as in the enactment of a law or the signing of a contract between private parties. In the first sense, the "just" is realized by the very nature of the phenomenon; in the second sense, by human volition (*cf.* Truyol y Serra 1989 370). Vitoria illustrated the concepts of natural and positive right by stating, first, that in the former sense, "the just" is that which by its very nature is marked by equality. If I receive a deposit of one hundred ducats, he argued, I am obliged to return the same deposit to its rightful owner (*cf.* Vitoria 2001 14). This is by its very nature just and equal and suited to the other. In this fashion, it is also just that a father should rear his son and that the son should obey his father. "May this be the first conclusion: in this sense that which is just by its very nature is called natural right" (Vitoria 2001 14). Alternatively, that which is "just" is the result of a determination made by either law or private covenant and not by its nature. What one must pay for a horse or a house, he argued, or the wages one receives for a day's work is something not determined by its nature but by agreement. He thus arrived at his second conclusion, viz. that "the just" in this second sense is called "positive or human right" (*ibd.*). This, he concluded, is called law.

At this point, it is essential to say something about the cognitive process by which the "just" is apprehended and laws generated. As I have noted above, natural right describes the juridical principles that inform human reason (*cf.* Estébanez 463).[12] From this it follows that human reason must exercise a method by which said principles (of the "just") are understood and then translated into effective legal commands or edicts. The derivation of laws, according to this view, may

12 Here I closely follow the line of reasoning offered by Father Estébanez in his introduction to the Spanish-language edition of Aquinas' Summary of Theology, especially questions 57 to 60 as they refer to the notion of justice.

take place through two methods. The first allows the agent (*e.g.* the legislator) to locate and identify natural principles of justice through the exercise of natural reason (here, we move within the realm of "natural right"), while the second allows the translation of such principles into law (here, we reach the realm of "positive right").

This first method is *logical derivation*. By this method, the "just" may be determined in a twofold fashion. First, *absolutely*, that is by logically deducing conclusions from principles. For example, the proposition that "one must not harm anyone" is derived from a prior principle, considered to be absolute and self-evident in this view: "one must not kill" (*cf.* Estébanez 460-463). Second, logical derivation may be exercised not only "absolutely" but also by referring or *comparing* "the just" to the consequences arising from its concrete application. As Estébanez maintains, Aquinas includes in the concept of natural right both the identification of its principles as well as the conclusions logically stemming from those very same principles.[13] For example, while Aquinas did not believe that men are by nature, or in essence, slaves it may nonetheless be that under certain circumstances such servitude may be beneficial to a number of men because they simply are better suited for certain tasks than for others (*e.g.* manual labor rather than governance). It then might be just for *certain* men to engage in slavery if, through such a condition, greater evils or harm are avoided (*cf.* Estébanez 464). Secondly, the resulting derivation of laws takes place by *determination* (*cf.* Estébanez 465). This basically involves selecting from a range of possibilities and, in accordance with the needs of a historically particular social context, a future legal command through which a particular principle of "the just" is concretely applied. Estébanez, in illustrating this principle, notes that the natural precept which commands that a criminal should be punished may be realized through a variety of legal commands: death penalty, imprisonment, fines, and so on. Human law, however, must *determine* which specific sanction is appropriate (*cf.* Estébanez 465-467).

Positive human laws, in this light, are not their own autonomous source of law but rather "only the application or practical synthesis of natural right" (Estébanez 460).[14] Neither is positive right in contradiction with natural right; instead, they form a single, ethical conception of law based on principles of justice. And it is for this reason that Aquinas (STII-II Q57 A1) and Vitoria stress the notion that law is the object of justice (*cf.* Estébanez 459; Vitoria 2001 9). It is important to note that in

13 Vitoria explains this in a virtually identical fashion in his discussion of "degrees" of natural right. See Vitoria (2001 17-19).

14 The translation is mine.

this Thomist understanding of human law, law itself is *not* the same as "right" although it is closely related to it. Actual law is understood as the rule and measure, and rational *external expression*, of "right" (*cf.* Vitoria 2001 9).[15] Donnelly thus rightly observes that for Aquinas "law is the written expression of right […]" (Donnelly 529). The arena of "right" is merely the intellectual framework from which actual laws emerge. Here, the legislator's rational operation of cognition allows him to apprehend "the just" in its first self-evident, and absolute, principles –to grasp what is "naturally" right– as well as to assign to those principles the logical *conclusions* which ought to thereby take the form of a positive right that is in harmony with its corresponding natural principles. Estébanez has further observed that the *ius naturale*, from its primary principles down to its logically derived conclusions, is abstract, formal, inoperative, and requires institutional objectification whereby it may become *posited* as a concrete legal command (*cf.* 465).

Moreover, one may further describe another aspect inherent in the derivation of law from the *ius naturale*: that such legislation as is enacted may also be a function of consensus. Given the fact that a social group must observe the legislation, the process of *determination* presupposes the consent of all interested parties (as when we speak of states agreeing upon particular laws regulating inter-state activities) (*cf.* Estébanez 466). It is this consensus that marks the essential difference between natural and positive right (*cf. ibd.*). It is necessary to add, however, that it is *not* this consensus *per se* which makes positive legal commands just. What is agreed, legally expressed and posited at any given moment of promulgation is but one of a number of possible legal commands whose source, when just, is traceable to the *ius naturale* (*cf. ibd.*). The act of legislating, of determining legal sanctions, is not conceived as an arbitrary act; it, too, must abide by the dictates of natural reason (*cf. ibd.*). The *naturalis ratio* of the legislator must be enriched by historical experience, and by the political prudence and maturity acquired through personal experience itself (*cf.* Urdánoz 270).

Skinner has made an important observation on the relevance of consensus in his discussion centering on the Spanish Thomists. Such a notion reflected the theologians' concern for the legitimacy of government inasmuch as said *legitimacy* found its source in a correspondence between positive law and natural right. "[The Thomists] all assume", Skinner observes, "that the question of whether an established system of government is juridically valid is not a question about consent, but simply a question about whether the government's enactments are

15 In his commentaries on Aquinas' treatise on law (I-II Q90 A1) Vitoria emphasizes again that "law is a function of reason". See Pagden and Lawrence (155).

congruent with the laws of nature" (Skinner 162-163). Hence the corresponding Thomist assertion that only just laws are truly laws. Only a just political society can be a legitimate one. In such a view, one shared by Vitoria and his fellow theologians of the School of Salamanca, state and society are seen as a collection of individuals brought into unity by law; but the essence of the state, and its legitimacy, are to be found in the articulation of justice itself (*cf.* Naszalyi 45).

Thomist Natural Law and its Implications

The path I have pursued in this account of the Thomist doctrine of natural law is one that highlights a number of theological concepts associated with the notion of a rational and just social and political order. Many of these fundamental ideas, as old as they are, are often not properly interpreted or fully addressed when analyzing the theological and juristic discourse set forth in Vitoria's political writings. This summary of the Thomist concept of natural law has sought to provide the reader with an explanation of the latter, in order to avoid the conceptual pitfalls characteristic of some of the critical literature on Vitoria.

Justice as the Ordering Principle of Domestic and International Societies

A central theme always present in Vitoria's thought and in the Thomist mind when discussing the order of society, and which is equally deployed when discussing state governance and international relations, is the concept of justice (*iustitia*). The idea of justice, in this perspective, is developed in connection with the notion of the character of man. Indeed, the fundamental building block of the social order is man himself, or more specifically, the rational nature of man inclined as it is, by virtue of this assumption, toward good. From this proposition, it was possible to construct an entire legal and political philosophy devoted to outlining the ethical basis of a community's social and political institutions. For Aquinas and his Spanish followers, the rational character of humans, which separates them from other forms of organic life, is expressed in the enactment of laws (especially just laws) that are the product not so much of human will as they are of human reason (*cf.* d'Entrèves 22). This point is pivotal, because, on the one hand, the acceptance of this doctrine, as d'Entrèves has observed, has expressed ever since then the fundamental tension between the "intellectualistic" and "voluntarist" theory of law (*cf. ibd.*). D'Entrèves further notes:

> But above all, it explains [Aquinas'] attitude toward the problem of political obligation, and his acceptance of a theory, like that of Aristotle, which involved a rational explanation of the state and attributed a positive

> value to social and political institutions, as being grounded in the very nature of man. (22)

Earlier in this discussion I posed a question concerning the implications of the doctrine of the law of nature for the conception of man and for the relationship between man and society. The answer, I believe, is that the pursuit of the "good" of the individual, and of the "common good" and the establishment of justice in the social order, are ideals that unite the individual and society, the state and the surrounding civility, in a single fabric of moral life. Such unity implies an optimistic conception of man and of human rationality in the order of creation. And it must equally assume, as an ideal, that the interests of the state and of the individual are in harmony. This is a trait that separates Vitoria's political thought from, for example, Thomas Hobbes' conception of the social order and of political power. Hobbes' Leviathan, freed from the ethical restraints of universal principles, becomes the sole bearer of power and the sole source of law. This philosophy, made possible by the philosophic ruminations on a "state of nature" in which men are in a constant state of war against one another, and which hence required the emergence of an awe-inspiring power whose task was the maintenance of a troubled peace in a passion-filled order, parted company with previous universalist, both Catholic and pagan, philosophies and metaphysics. Man and society, in order to survive, only required a robust and over-powering authority in a world marked by moral poverty.

As opposed to such natural law theories that define man in pessimistic terms, the optimistic conception of man embodied in Vitoria's Thomist *iusnaturalism* and the teleological dimension connected to man's ontological status is posed as a point of departure for understanding the ends of society and the function and purpose of political authority. The human ability to reason is the primary indication of man's status in society. It implies the essential equality and dignity of all humans and, in doing so, defines the limits of political power in the relationship between political authority and the individual. In that relationship, the role of the state is to foster human flourishing individually and collectively. Men, indeed, must obey the state and its laws but those laws cannot be set against the individual; they cannot be rational if they are oriented toward his injury. The integration of individuals into a wider community, moreover, does not imply the annihilation of their individuality; the value of the whole does not diminish the value of its parts. This is necessarily the case because, in this view, the ends of the individual and of the state are substantially the same. "The integration of the individual in the whole," d'Entrèves holds, "must be conceived of as an enlargement and an enrichment of the human personality, not as

a degradation of the individual to the mere function of a part with no value of its own" (*cf.* 28). The state serves rather as a means for the achievement of a higher end (*cf.* d'Entrèves 29). The role of the state, in this view, is closely linked to the idea of the common good and individual human flourishing; and the common good itself, from the perspective of civil society, is substantially linked to the maintenance of justice. The state may not thus legitimately enact laws that foster the destruction or degradation of human life, nor may it exempt itself from following the laws of nature and the principles of justice that are inherent in it.

However, when this is the case, when justice as a pattern for the ordering of political and social life is abandoned, natural law may assume a *critical* function. Neumann summarizes this aspect of natural law in the following manner:

> If every doctrine of Natural Law is based upon man as an individual, either autonomous or subject to the lawfulness of external nature, then man must be considered as a rational individual. That in turn implies the recognition of the essential equality of human beings. And this again leads to the universality of the Natural Law doctrine which is the central view common to all doctrines. It also follows that no theory of Natural Law can accept facts as they are and because they are. Natural law is thus fundamentally opposed to traditionalism and historicism. Each human institution is open to critical reason, none is exempt from it. (Neumann 80)

While indeed it is generally agreed that Thomist natural law is an essentially conservative doctrine, "a kind of codification of the feudal order" that does not assume revolutionary overtones, as Neumann and others have held, this assertion focuses on merely one facet of the doctrine. Following Gierke on this matter, Neumann further maintains:

> To see Thomism as a kind of ideology intended to cover feudal exploitation with the cloak of an eternally valid law is to present but one aspect of the system […] The recognition of man as a rational creature means that "every individual is by virtue of his eternal destination at the core wholly indestructible even in relation to the Highest Power." (Neumann 82)

Thus, despite the apparently conservative character of Thomism generally speaking, it is nonetheless true (and herein lay the value of Vitoria and the School of Salamanca) that its tenets well served the intentions of the Spanish theologians when attempting to find a more secular basis for defining the nature of international community, especially when considering the status of non-Christian peoples. The intellectual resources necessary for this task where already present in Aquinas. According to Aquinas' restatement of Aristotelian philosophy, if the state and its social and political institutions are derived from

the very nature of man, if indeed they are part of a natural morality because all men can know the operations of natural law, then these very institutions could also be justified as existing on a purely human plane, "independently of religious values, which do not alter the natural order of which the state is a necessary expression" (d'Entrèvez 23-24). "This implies," d'Entrèves further notes, "that even a non-Christian or pagan state is endowed with a positive value, as against St. Augustine's conception of the pagan state as the embodiment of the *civitas terrena*, and the work of sin" (*ibd*.).

What Aquinas and Vitoria achieved was a clear distinction between the spiritual and temporal orders. This view of public (and private) authority as having a natural law basis, if extended to the realm of inter-state relations, meant that the principles of the just war doctrine pertaining to conflicts between Christian states could be equally applied to the relations between Christian and non-Christians (*cf.* Truyol y Serra 1993 22). This decisive view made possible the conception of a universal international juridical order valid for all human societies, and became the framework from which Vitoria outlined his internationalist outlook.

The Constitutional Function of Natural Right

That very internationalist view meant that the prior medieval notion of an *orbis christianus* had been wholly supplanted by a *communitas orbis* predicated upon the principles of natural right (*cf.* Belda Plans 44). Hence the *ius gentium*, which Vitoria understood, in sum, as both the Roman concept of a law *among* nations as well as a law *between* discrete political communities (*ius inter gentes*), was not merely of natural right but also required, by way of international agreement or compact, the articulation of just positive laws to which all communities are bound (*cf.* Fernández-Santamaría 1977 98-100; Truyol y Serra 1993 24). This "natural" conception of a world community stemming from the same Thomist natural law theory of political society provided Vitoria with the elements necessary not only to establish an early structure of a fully secular international law more systematically developed by later thinkers (*e.g.* Gentili and Grotius), but also to deploy the notion of natural right as a critical tool limiting the exercise of Spanish power in the New World.

Here again the entire basis of such assertions is the natural law view of the rational character of man. If men are essentially equal by virtue of their capacity of reason, and if they can create societies that rationally enact just laws, then their societies, in their mutual relations and bound by the principles of natural and positive justice, are juridically equal as well (*cf.* Truyol y Sierra 1993 24). This notion of equality and justice based on a prior notion of man allowed Vitoria to maintain that neither Imperial nor Papal authority could exercise jurisdiction over the

Indies nor could these communities be deprived of their resources or goods, for the latter by natural right, Vitoria had argued, exercised true dominion over their communities. It was only on grounds of violations of justice that *limited* intervention could be exercised.[16] His lecture *De Indis* (1539) established that dominion is a function of reason, that only rational creatures may possess dominion and, having noted the social ordering of indigenous communities as being governed by the exercise of reason, he concluded that before the arrival of the Spaniards "the barbarians undoubtedly possessed true dominion, both public and private, as any Christians" (Pagden and Lawrence 247-251). Thus, what began as an ostensibly conservative medieval doctrine was transformed by Vitoria into a critical tool with a *constitutional function* that defined and limited the exercise of power in accordance with the Thomist conception of justice and natural right. Truyol has similarly argued,

> When his nation reached the peak of its power, Vitoria sought to confound the temptations of power thus proclaiming its subservience to moral law […] His was a vision that sought to guide power rather than follow in its footsteps; and to direct power toward the fulfillment of its natural ends rather than toward a justification of its illicit aims. (Truyol y Sierra 1946 20)[17]

In the arena of international politics, this meant developing a robust system of authoritative ethical and legal constraints to which states could theoretically be subjected. In this sense, perhaps his most noteworthy achievement, in an age in which Italian princes had begun to glorify the idea of *ragione di stato* thus instating the tradition of modern *realpolitik*, was that of rigorously formulating the principles of justice upon which international relations could be predicated in times of conflict (*cf.* De Hinojosa 1946 33). That his attempts to provide an ethical conception of international order met with failure in practice does not destroy the merits of his thought, but rather merely demonstrates that the struggle for such ideals as peace and justice in international affairs has been an unrelenting effort. That his concerns in this regard are very similar to those shared by many today reveals the continued relevance and vitality of his thought. This forces us to link contemporary political and ethical speculation in matters of justice to its fathers in the world of the European Renaissance.

16 For an account of this, see Valenzuela-Vermehren (2013).

17 The translation is mine.

Summary

The fundamental building block of Thomist natural law in Vitoria is the conception of the rational character of man. His rationality not only points to his essential dignity above and beyond all other things of external nature but also designates his capacity to apprehend the fundamental principles of morality and justice that form the basis of society and its political institutions. This brand of natural law establishes that by their very rational nature, as Aquinas had argued, all men are born free and are equal in essence. Such equality, when taken onto the plane of domestic society, holds that *justice* is the foundation of the political order, for only through a just, and therefore legitimate, order may the common good, the aim of law, be achieved.

This notion is extended by Vitoria to the realm of international relations in his conception of the *ius gentium*. What natural reason has established among and between all peoples is the primary definition of the law of nations offered by him. But the latter also finds positive, binding external expression in custom and pacts. Again, the principle underlying this conception is the concept of justice, which, in asserting the essential equality of all men, equally asserts the equal juridical standing *between* political communities in international relations.

Finally, Vitoria's conception of natural law, both in the domestic and international spheres, assumes a critical and constitutional function by establishing justice as a pattern of order by which political power and authority must abide if it is to be legitimate. Vitoria's vision of political life, in this manner, maintains an essential link between ethics and politics inasmuch as justice is the fundamental source of human flourishing within and between political communities.

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