THE CONCEPT OF *IUS GENTIUM* IN SUÁREZ'S *DE LEGIBUS*

EL CONCEPTO DE *IUS GENTIUM* EN *DE LEGIBUS* DE SUÁREZ

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Abstract

This article introduces the concept of *ius gentium* as it was conceived by Francisco Suárez in *De Legibus*. Throughout this work, Suárez analyzes and criticizes previous ideas on the *ius gentium* reaching a more complete examination of the concept. Thus, Suárez concludes with a new conception of the *ius gentium* that is compatible with the modern conception of international law and is not deducible from natural law alone.

Keywords: Ius gentium, law of nations, de legibus, international law, inter gentes.

Resumen

Este artículo introduce el concepto de *ius gentium* tal como fue concebido por Francisco Suárez en *De Legibus*. A lo largo de este trabajo, Suárez analiza y critica ideas previas sobre el *ius gentium* llegando a un examen más completo del concepto. Así, Suárez concluye con una nueva concepción del *ius gentium* que es compatible con la concepción moderna del derecho internacional y no es deducible del derecho natural por sí mismo.

Palabras claves: Ius gentium, ley de las naciones, de legibus, derecho internacional, inter gentes.

Introduction

The aim of this article is to offer an introduction to the idea of *ius gentium*, or law of nations, as it was conceived by the Spanish philosopher, theologian, and jurist Francisco Suárez (1548-1617) in his *Tractatus de legibus ac Deo Legislatore* (1612) (Suárez, 1973). Within this treatise, the *ius gentium* is specifically treated in Book II, Sections XVII-XX, after an exhaustive analysis, classification, and critique of the idea of law since its philosophical and jurisprudential elucidations by Greek philosophers, Roman jurists, and Medieval theologians[1].

Suárez's notion of *ius gentium* constitutes an illustrious and classical account of the philosophical underpinning of international law. His ideas can still be of capital importance for our understanding of the moral and political philosophy that grounds current international law, even though Suárez´s thoughts on this matter were developed in the late phase of scholasticism.

One of Suárez's outstanding contributions to international law is to have clearly distinguished and separated the notion of *ius gentium* from that of natural law. Before him, both concepts were commonly confused and somewhat identified. By the same fact, another relevant contribution made by Suárez was to have emphasized the

[1] Of course, these categories often overlap. Among many others, the main authors and works that stand in the background of Suárez' treatment of the *ius gentium* are Aristotle's *Ethics*, Cicero's *On Laws*, Ulpian's *Libri ad edictum*, Justinian's *Digest* and *Institutes*, Gratian's *Decretum,* Saint Isidore's *Etymologies,* Saint Thomas Aquinas' *Summa Theologiae* (particularly I-II and II-II), Francisco de Vitoria's *De Indiis*, Domingo Soto's *De Justitia et Jure,* and Gabriel Vásquez's *Commentarium ac Disputationum,* just to mention a few.

specific human nature of the *ius gentium*, a character especially dear to modern conceptions of international law.

Suárez starts his treatment on the *ius gentium* in section XVII of *De Legibus* under the heading question: "is the natural law distinguished from the law of nations inasmuch as the latter only refers to men while the former is also common to brute animals?" (Suárez, 1973, p. 99). Here Suárez attempts to clarify -and eventually refute- the opinion that human beings and animals can be regarded under the concept of natural law, while the law of nations only regards human beings. Thus, for Suárez 'it is worth to distinguish the law of nations from the natural law, for both are so similar that many confuse them, or regard the law of nations as a part of the natural law' (Suárez, 1973, pp. 100-101). Suárez is quite aware of the proximity of the law of nations to the natural law, while positing the former as a sort of bridge between the natural law and positive human law (Suárez, 1973, p. 100).

On the ambiguity of 'law'

One of Suárez's main enterprises at this stage is 'to make some necessary distinctions regarding the term 'law' (*ius*), due to its ambiguity'[2]. "Indeed, law

[2] A preliminary treatment of the term 'law' (*lex*) and 'right' (*ius*) is offered in chapters 1 and 2 of Book I "On the Nature of Law" in *De Legibus*. In the very first article of chapter 1, Suárez criticizes Saint Thomas Aquinas's conception of law as being "too broad and general". Indeed, Aquinas's notion of law as "a certain rule and measure according to which someone is induced to acting or is restrained from acting" (*Summa Theologiae* I-II, q. 90, art. 1) is not proper to Suárez's purposes "[f]or in this way [according to that definition] law not only is found in men or rational creatures but in other creatures as well" ((Doyle, 2005, p. 120); Suárez, 1973). For Suárez, "the true and absolute designation of law is that which pertains to

sometimes signifies the moral faculty [a right or license[3]] to do something". Other times, Suárez notices, '*ius* means *lex*, which is a rule of acting with probity'. According to Suárez, law as a moral faculty can be called 'useful or real right', while law as *lex* is to be considered as a 'rule to be obeyed' or a 'legal right', properly speaking (Suárez, 1973, p. 101). Both laws can be divided into three categories, namely, natural, of nations, and civil.

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morals. [...] St. Thomas's description must, therefore, be restricted to that, namely, that law is certain measure of moral acts..." (Doyle, 2005, p. 123), (Suárez, 1973, I, 1, 5). Further, "plainly and properly speaking, only that which is simply a measure of rectitude, and consequently only that which is a right and honest rule can be called a law". "Moreover, (Cicero also in Book 2 of his work, *On Laws*) has said that law must be established for the purpose of a just, peaceful and happy life..." (Suárez, 1973, I, 1, 6).

In chapter 2, Suárez attempts to clarify "what right (*ius*) means and how it is related to law (*lex*)" (Doyle, 2005, p. 127; Suárez, 1973, I, 2, heading). Thus, after exploring some etymologies, Suárez asserts that the meaning of right (*ius*) "is customarily and properly called a certain moral faculty, which each one has with respect to his own possession or to something which is owed to him" (Doyle, 2005, p. 127; Suárez, 1973, I, 2, 5), while law, which Suárez conceives as being written and non-written, can be considered at times as synonym with right (Doyle, 2005, p. 173; (Suárez, 1973, I, 2, 7). For Suárez, law (*lex*) is essentially defined in the following 'convenient and succinct' formula: "law is a common precept, just and stable, and sufficient promulgated" (*praeceptum, iustum ac stabile, sufficienter promulgatum*)" (Suárez, 1973, 1, 12, 4; Doyle, 2005, p. 246).

Besides, in relation to the nature of human law, it is worth to mention here that Suárez stands in a conciliatory position regarding the disputes "whether law is an act of the intellect or of the will" (Suárez, 1973, I, 5). Suárez position is that "both an act of the intellect and act of the will are necessary for law... law is composed and comes together from acts of both potencies. For in moral matters it is not necessary to seek perfect and absolute unity, but a thing which is morally one can consist of many things physically distinct and mutually helping one another. Thus, therefore, law requires two things: motion and direction, goodness (so to speak) and truth, that is, a right judgment about what should be done and an efficacious will moving to do that. And therefore it can exist from an act of will and an act of intellect" (Doyle, 2005, p. 172); (Suárez, 1973, 1, 5, 20). On this, Suárez further indicates that here we are not dealing with natural or eternal law, but with "law which is established by the will of some superior. About this it is certain either that it consists of acts of both the reason and the will or that it certainly does not exist without both acts, in such way that if it is one of these only it, nevertheless, intrinsically depends upon the other" (Doyle, 2005, p. 173); (Suárez, 1973 I, 1, 22).

[3] According to Prof. Doyle's translation in (Doyle, 2005, p. 367).

1. Law (*ius*) as a moral faculty: useful or real right (*ius utile sive reale*)	a. *Ius (utile) natural* b. *Ius (utile) gentium* c. *Ius(utile) civile*
2. Law (as *lex*): rule or legal right (*ius honestum sive legale*)	a. *Ius(legale) natural* ***b. Ius (legale) gentium*** c. *Ius (legale) civile*

Fig. 1. Distinctions between ´law´ as moral faculty and as a rule (legal right), according to Suárez

On these divisions and subdivisions of law, Suárez is specifically concerned with the second (2), the *ius legale* in his second (b) consideration, the *ius (legale) gentium*. 'What we now have to explain is the second term [b], for its understanding depends on its relationships with the natural law" (Ibid.). To explain the second term, Suárez firstly takes into consideration the opinion of the jurists. "For the jurists in general, the difference between the natural law and the law of nations consists in that the natural law is also common to animals, while the law of nations only corresponds to men" (Suárez, 1973, p. 102). The union of male and female, procreation and education of the offspring are given as examples that are common to human beings and animals (Ibid.). On the other hand, 'religion, slavery, wars, the foundations of kingdoms, the distinction of properties, commerce, contracts, 'and other institutions' are examples that only pertain to men, so they belong, properly speaking, to the *ius gentium*.

Natural law and ius gentium

According to Suárez, natural law has its proper basis on the rational, not the sensitive nature of human beings (Suárez, 1973, p. 106). In this regard, when natural law prescribes something, 'it always implies a nuance of rationality' (*semper involvit modum rationalem*) (Ibid.). This would mean for Suárez that, using the examples given above, the union between man and woman, procreation and the education of offspring are distinctively different from their counterparts in non-rational animals (Ibid.). Accordingly, natural law is properly applied only to human beings, not to animals.

A specific characteristic of the *ius gentium* in distinction to natural law is that its precepts or commands endorse things that are not necessary for right conduct. In the same manner, sometimes, it does not prescribe or prohibit acts that are inherently wrong. Thus, "…[t]he law of nations does not command anything as of itself necessary for goodness nor does it prohibit anything which is essentially and intrinsically bad… this belongs to natural law" (Suárez, 1973, pp.110-111). In this regard, F. Copleston clarifies that "Suárez means that the natural law prohibits what is intrinsically evil whereas the *ius gentium* considered precisely as such does not prohibit intrinsically evil acts (for these are already forbidden by natural law) …" (Copleston, 1953, p. 391).

Another important difference of the law of nations in distinction to natural law is that its commands and prohibitions are not *necessary* consequences from the principles of natural law. This is because the *ius gentium*, in conjunction with the principles of natural law, depend on the mediation of human free will, which brings about states of affairs that are contingent, not necessary (Suárez, 1973). An immediate

corollary of this is that the precepts and proscriptions of the *ius gentium* are not immutable, as those of natural law.

In section XVIII, Suárez goes on to explore "whether the law of nations prescribes and prohibits, or whether it only concedes or permits". Here Suárez battles against the opinion that tries to distinguish the *ius gentium* from the natural law 'inasmuch as one is only concessive while the other is prescriptive'. This opinion is held on the conclusion of the previous chapter, which makes the *ius gentium* free from the necessity proper to the principles of natural law. In accordance with it, the *ius gentium* does not contain proper precepts and proscriptions, but only concessions or permissions. These permissions are given to men 'as good (*honesta*) but not as necessary for goodness (*honestatem*) and, so they are not as given as commands'. "For if these permissions were made commandments, they will either belong to natural law, when they are commanded by virtue of [natural] reason, or to civil law, when they are commanded by a human will having power [a prince or legislator] [...] Therefore, in order for the law of nations to be a distinct law [from natural law], it must be concessive, not prescriptive" (Suárez, 1973, p. 114)[4].

Curiously, Suárez indicates that he 'does not understand very well' the above-mentioned opinion, for he is not sure whether it is meaning "ius" as a moral faculty, or as law (lex) (Suárez, 1973, p. 115). For Suárez the first meaning is irrelevant in this discussion while the second can easily be refuted. Accordingly, "there is no greater

[4] This is the opinion presented by Gabriel Vázquez in his Commentariorum ac *Disputationeum in Primam Secundae Sancti Thomae* (Compluti, 1605, disp. 157, cap. 3, n. 18, pp. 73-74).

reason to distinguish a concessive rather than a prescriptive law of nations from the natural law. For in natural law there are many things, which are not commanded and whose opposites are not prohibited, which that can be done rightly in virtue of natural law" (Ibid.). Thus, there can be concessions in natural law. An example of this is the right to take a wife, which is something morally good by natural law but is not commanded by it.

For Suárez, when it is asserted that the law of nations gives a faculty to do something in the right manner (*honeste*), the important question is 'whether that faculty comes from natural reason itself (*ratione naturali praecise spectata*), or from the will of men'. If the first is asserted, then that law should be placed under natural law (for it would be equivalent to natural law). However, if it is said that this faculty comes from the will of men, then the law of nations would not seem to differ from civil law. Suárez's answer to this problem is that the law of nations comes from natural reason but it is not applied to men in an absolute manner, but just insofar as men constitute a specific form of human organization (Suárez, 1973, p. 116; Doyle, 2005, p. 383).

On the other hand, Suárez thinks that it does not make sense to separate concessive laws from prescribing or prohibiting ones. For all concession necessarily implies a prescription or prohibition. This is most easily seen in the case of privilege, "[f]or by the fact that it is conceded [by the law of nations] to one person, it [then] is prescribed for others not to impede its exercise" (Suárez, 1973, p. 117; Doyle, 2005, p. 393). This reasoning can be applied to every concessive law, either in natural law or law of nations, Suárez asserts. One example is the occupation of dwelling places. "For

this is so much permitted to everyone by the law of nations or by the natural law, that no one can justly impede another who has occupied a dwelling place which was not previously occupied. Therefore, that concession has this command joined to it" (Suárez, 1973, p. 118; Doyle, 2005, p. 383).

In section XIX, Suárez goes on to explore 'whether the law of nations is distinguished from the natural law as a simply positive law'(Suárez, 1973, p. 124); Doyle, 2005, p. 307). In this regard, Suárez is aware that "[f]rom what has been said so far, "it seems that the law of nations is not comprehended under natural law, but essentially differs from it. For although it agrees with it in many things, nevertheless, by proper and customary differences they are distinguished" (Ibid.). Here Suárez points out a first commonality – out of three – between the law of nations and natural law: they both agree in being common to all men, 'so they can be called *ius gentium*, if it is a matter of mere names' (Ibid). "This property is clear in natural law and because of it in the law *Omnes populi* (*Digest, De iustitia et iure* [Dig. 1, 1, 9]) the natural law itself appears to be called the law of nations (which can be noticed in many laws). More properly, however, that name is given to the law which has been introduced by the practice of nations (Cf. in §2 *Institutes*, *De iure naturali*, etc.)" (Doyle, 2005, pp. 387-388). The second commonality between the natural law and the *ius gentium* is that 'they both can be applied to men partially or totally'. Thus, "many of the examples which have been placed by the jurists under the law of nations... are properly said to belong only in name to the law of nations" (Suárez, 1973, p. 125). Finally, the third commonality between the law of nations and natural law is that 'as it was observed in section XVIII, both have prohibitions and concessions or permissions' (Ibid.).

Despite these three commonalities there can be mentioned three important differences between the law of nations and the natural law. The first indicates that obligation under the law of nations, insofar as we are dealing with affirmative precepts, "does not entail the obligation (*necessitas*) of the thing prescribed simply from the nature of the thing through an evident inference from natural principles… such obligation must arise from elsewhere" (Doyle, 2005, p. 388). Likewise, as we have also seen, "negatives precepts of the law of nations 'do not prohibit something because it is essentially evil but, by prohibiting it, the law of nations makes something evil' (Suárez, 1973, p.126).

The second difference between the *ius gentium* and natural law, as it has also been regarded so far, is that "the law of nations cannot be as immutable as the natural law, since immutability is rooted in necessity" (Doyle, 2005, p. 389). A third difference is that the law of nations is not always common to all nations 'but common generally and almost for all'. "Therefore, what some peoples regard as *ius gentium* can cease to be observed in some parts without error" (Suárez, 1973, p.126). Contrariwise, Suárez notes, natural law is always common to all and only ceased to be observed by error.

On the other hand, based on a text by Aquinas, Suárez remarks that we might think that the law of nations is *simply* human and positive (Suárez, 1973). In this case, we may identify it with civil law[5]. Nevertheless, an outstanding difference between the

[5] A preliminary attempt to distinguish the law of nations from civil law is presented (and rejected) in (Suárez, 1973, XIX, 5). "You will say they differ because civil law is the law of one state or kingdom while the law of nations is common to all peoples. But against this, first, is the fact that this difference seems only one of degree and one which is very much accidental. Second, and more serious is the fact that it

law of nations and civil law is that "*the precepts of the law of nations differ from the precepts of civil law in that they are not established in writing but by the customs, not of one or another state or province, but of all or almost all nations*" (Suárez, 1973)[6]. As an unwritten law based on the customs of all or almost all nations, the *ius gentium* can be understood in two ways: (1) as a law between peoples and nations and (2) laws of individual states within themselves. The first is said to be *ius gentium inter gentes*; the second one is denominated *intra gentes* (Suárez, 1973)[7].

Following Justinian's and especially St. Isidore's thoughts on the *customary* nature of the *ius gentium*, Suárez goes to present two main instances to prove this point: (1) the admission of ambassadors; (2) commercial agreements and contracts. On the first example, Suárez notes that 'the custom of admitting ambassadors with immunity rights and diplomatic securities, if considered in an absolute manner, is not necessarily of natural law'. Regarding the second example, Suárez points out that 'it is necessary to distinguish three elements in these contracts and agreements':

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seems impossible that the law of nations be common to all peoples and be introduced [only] by human will and opinion. For in things which depend on the opinion and choice of men all nations do not as a rule agree…" (Doyle, 2005, p. 394).

[6] The translation and italics used here are Doyle's in (Doyle, 2005, p. 394).

[7] As Copleston succinctly states in the following. "A particular matter can pertain to the *ius gentium* either because it is a law which the various people and nations ought to observe in their relations with each other [*ius inter gentes*] or because it is a set of laws which individual States observe within their own borders and which are similar and so commonly accepted [*ius gentium intra gentes*]" (Copleston, 1953, p. 391). The same observation and a further specification regarding the *inter* and *intra* distinction in Suárez is given by H. Rommen. "He [Suárez] further insists that one must distinguish two juridical matters which have been entangled within the term *jus gentium*: (1) those rules by which all nations are bound in their mutual relations as members of the community of nations (*jus inter gentes*); and (2) such legal institutions as are found in the internal legal order of all nations (*jus quod regna* intra *se observant*) – namely, the law of contract, the positive legal order of property, and so on. The *jus gentium* in the proper sense (*propiisime dictum*, Suárez calls it) is the public law of nations regulating the relations of the states among themselves as members of the community of nations; it is the constitutive law of this community, together with the natural law. The *states* are the subjects of this law, not so much the *individuals*" (Rommen, 1948, pp. 458-459).

> One is the particular way of contracting, which ordinarily pertains to civil law and often can be accomplished by the will of those contracting... Second is the observance of the contract after it has been made, which clearly pertains to natural law. Third is the freedom[8] to enter into commercial contracts... And this pertains to the law of nations, since the natural law does not directly require this (Doyle, 2005, p. 396).

This last point is of special importance, 'for the natural law does not impose this sort of obligation in absolute'. "A State [by natural law] could [decide to] live in isolation and without willing to commerce with other States... By *ius gentium*... it has been established that that trade be free, thus it would be a violation of the *ius gentium* to prohibit it without a sufficient justification" (Suárez, 1973, pp. 133-134).

Regarding the distinction between *ius gentium inter et intra*, Suárez considers that the *ius gentium inter se* is the modality that most properly constitute the *ius gentium*. "And to this [law of nations so understood] belong the examples... about ambassadors and commercial practices" (Suárez, 1973; Doyle, 2005, p. 396). Suárez also thinks that war should be included under the *ius gentium inter se*, "insofar as it is based upon the authority [*potestas*] which one republic... has to punish... for injury done to it by another..." (Ibid). Along with war, Suárez includes slavery too, "for peoples and nations observe that law among themselves and it was not necessary from natural reason alone" (Doyle, 2005, p. 397). As well, Suárez includes peace treaties and truces, "not insofar as they must be observed... [for this a matter of natural law,

[8] Regarding the contractual or voluntaristic character of the *ius gentium*, Rommen points out that "it would seem that this is the great merit of Suarez: that he stressed the positive character of the ius gentium in the strict sense, its 'contractual' character. By taking this position, ascribing the rules of warfare... to this man-made law, he prepared the development, not only of more humane methods of warfare but of all the methods of peaceful settlement of international disputes" (Rommen, 1948, p. 460).

Suárez notices] but insofar as they should be granted and not denied when they are requested reasonably and in a proper way" (Ibid).

In a very important passage, Suárez exposes the essential foundation of the *ius gentium* in the fact that

> The human race, although divided in peoples and kingdoms indeed, keeps a certain unity at all times, not only one which is specific to the human race, but one which is quasi political and moral, as it is indicated by the natural precept of solidarity and support that it is extended to all, including foreigners and any nation.
>
> Therefore, even though a State – monarchy or republic – is naturally self-governed and endowed with constitutive elements of its own [...], it is also – in a certain sense and in relation to the human race– a member of this universal community. For the States, individually considered, never enjoy an autonomy so absolute that does not require some help, association and common trade –sometimes for their better well-being, progress and development, and other times even on account of their moral need and lack of resources – as experience itself shows.
>
> For this reason, States have the need of a system of laws by means of which they may be directed and properly oriented in this kind of trades and mutual association. And although, at a great extent this is done by mean of natural reason, natural reason cannot do this directly and sufficiently regarding all matters and circumstances (Suárez, 1973, II, XIX, 9, pp. 135-136).

This text is especially relevant[9]. In it, Suárez indicates a series of fundamental assertions: (1) the existence of a universal community that somehow unifies the

[9] A summary and some important observation on this passage are given by Copleston. Let us be reminded that the idea of a universal community originally comes from Vitoria. "The rational basis of the *ius gentium* is, according to Suarez, the fact that the human race preserves a certain unity in spite of the division of mankind into separate nations and States. Suarez did not consider a world-state to be practicable or desirable; but at the same time he saw that individual States are not self-sufficing in a complete sense. They need some system of law to regulate their relation to each other. Natural law does not provide sufficiently for this. But the custom of nations has introduced certain customs or laws which are in accord with the natural law, even though they are not strictly deducible from it. And these customs or laws form the *ius gentium*".

It has been said [by J.B. Scott in *The Catholic Conception of International Law*, Ch. XIII, as indicated by Copleston in a footnote] that Vitoria's idea of all nations as forming in some sense a world-community and of the *ius gentium* as law established by the whole world looked forward to the possible creation of a world-government, whereas Suarez idea of the *ius gentium* looked forward rather to establishment of an international tribunal which would interpret international law and give concrete decisions without being itself a world-government, which Suarez did not regard as practicable" (Copleston, 1953, pp. 351-352).

plurality of different nations; (2) the unity posited by this universal community is specifically of a 'quasi political and moral kind', not a natural one (although natural law endorses it); (3) All States are members of this universal community, despite their autonomy or independence, for (4) States need other, because of 'natural and moral reasons' and for their own well-being and progress', which cannot be guaranteed sufficiently by natural law. The well-being and progress of nations is ultimately achieved by the law of nations.

In contrast, the *ius gentium intra se* 'comprehends precepts and forms of life that are not related to all men in intrinsic and direct way, nor have as an immediate goal a progressive association and international collaboration' (Suárez, 1973). Thus, by the *ius gentium intra se* each State defines these precepts within its own limits, according to its own constitutional and jurisdictional processes' (Ibid). However – Suárez notes – these precepts and forms of life are of such a kind that they coincide with those practiced by almost all other nations, 'reaching something a certain parallelism in the global order' (Ibid.)[10]. Examples of *ius gentium intra se* are the *particular* ways nations have constituted religion. *In general*, the establishment of a religion would belong to the natural law, but the particular mode it adopts in each case belongs to the *ius gentium intra se* (Ibid.). According to Suárez, the same can be said of St. Isidore's examples, namely, 'the occupation of territories, the construction of buildings, fortifications, and the use of money'. As well, Suárez includes 'many

[10] It is importance to notice here that this *ius gentium intra se*, as defined and used by Suárez, correspond to what contemporary jurists denominate as "comparative law".

particular contracts of buying and selling, which individual nations occupy in within themselves'. The prohibition of inter-religious marriage presents an interesting case for Suárez, who considers it as belonging to *ius gentium intra se* just under a very improbable condition, for that prohibition is usually a matter of civil law[11].

Four differences between ius gentium and natural law according to Suárez

In Section XX of *De Legibus*, Suárez presents the conclusions that derive from the former considerations, which separate the *ius gentium* from the natural law. These conclusions have to do mainly with the just and mutable nature of the *ius gentium*. They are essentially four conclusions: (1) the *ius gentium* is common to all nations without being natural; (2) the norms of the *ius gentium*, that is, its precepts and prohibitions, are not necessary or absolute conclusions from the natural law; (3) the norms of the *ius gentium* have to comply with demands of justice and equity; (4) the *ius gentium* is mutable, for it depends on the human will. In the following, I will present Suárez' final considerations on each one of these conclusions.

The first one of Suárez' conclusions refer to the *ius gentium* in its proper sense, that is, as *ius gentium inter se*. In this modality, we have already seen that it is an unwritten law that is common to all nations but is not natural. According to Suárez, it is not difficult to see that the law of nations in its *inter se* sense could have been

[11] "…I assert the same about the prohibition of marriage with those of another religion [that it belongs to civil law]. For in actual fact, where there is such a prohibition, it does not regard the general communication and society of the human race, but the proper welfare of that community in which such a prohibition is legislated. Furthermore, *if* in this prohibition *there is great similarity among nations (which to me is rather uncertain) for that reason it could be referred to the law of nations*. (Suárez, 1973, II XIX, 9), (Doyle, 2005, p. 399). The italics are mine.

propagated throughout the world by means of a gradual, continuous, expansive, and imitative process of practices and traditions among nations (Suárez, 1973). The *ius gentium inter se* 'is a law so closely related to and useful for human nature that it indeed expanded itself in a quasi-natural mode along with the human race itself'. "Therefore, it was not written, since it was not dictated by any legislator, but it grew strong from practice" (Suárez, 1973; Doyle, 2005, p. 401). The same can be applied to *the ius gentium intra se*, Suárez thinks.

The second conclusion states that "the precepts of the law of nations are conclusions from principles of natural law and differ from civil law inasmuch as civil laws are not conclusions but determinations of natural law" (Suárez, 1973; Doyle, 2005, p. 401). This offers a sound interpretation of Aquinas, according to Suárez, being especially true 'with respect to the *ius gentium inter se*'. Here Suárez interprets Aquinas', following 'Soto and others' by stating that "precepts of the law of nations are called conclusions of natural law not absolutely by a necessary inference, but in comparison to the determinations of civil and private right" (Doyle, 2005, pp. 402-403).

The third conclusion indicates that the law of nations has to comply with demands of justice and equity, 'for this is the essence of every law which is a true law'. Nevertheless, Suárez is aware of the special difference between the *ius gentium* and natural law on those demands, for the natural law 'prohibits all bad things in such a way that it permits none of them'. As we have already seen, this is not the case for the law of nations, since – at times – it allows certain evils. For Suárez, this is especially true "in that law of nations which in reality is civil law but which from likeness and agreement of nations is called the law of nations. For just as in civil law

some evils are tolerated, so also, they can be tolerated by the law of nations" (Doyle, 2005, p. 403). Here Suárez follows a long tradition among Scholastics, who have been tolerant in allowing certain evils to have some sort of legality. "For that toleration can be so necessary, because of the weakness and the condition of men and their affairs that nearly all nations agree in observing it. The toleration of prostitutes seems to be of this kind, as does also the allowance of a small deception in a contract (Ibid.), and similar things (Ibid.).

The fourth conclusion has to do with the mutable nature of the law of nations, 'inasmuch as it depends upon a human consensus'. The mutability that Suárez confers to the *ius gentium* is very restricted and is based on several reasons. One of them is that its mutability has to do with precepts and prohibitions. Other reason for the mutability of the *ius gentium* 'that things prohibited by it are not essentially evil'. Another one is that the precepts of the *ius gentium* "are not inferred by a necessary and evident inference from natural principles". A further reason is that "the obligation of the law of nations does not arise from natural reason alone without some manner of human obliging, introduced at least by general custom" (Suárez, 1973; Doyle, 2005, p. 407).

Conclusions

Regarding the former considerations, Suárez indicates that mutations in the law of nations can occur in two ways. The first occurs within the *ius gentium intra se*, while the second, with the *inter se*. In the first law of nations, laws can be changed by an individual kingdom or states within their own territories, for in this respect they

are merely civil law, but are also called *ius gentium* "only by relation to and concomitance with [the laws] of other [states], or because it is so near to natural law that is universality from all or almost all nations stems from that" (Suárez, 1973; Doyle, 2005, p. 407). In the *ius gentium inter se*, mutability is greatly difficult, though. "For it respects a law common to all nations and which seems to have been introduced by the authority of all, and which therefore can be abrogated only with the consent of all" (Suárez, 1973; Doyle, 2005, p. 407). Changes here are also difficult on account of the closeness of the *ius gentium* to natural law, which is immutable. Nevertheless, there can be mutability in the *ius gentium* if all nations agree, although this does not seem to be likely for Suárez[12].

At the end of section XX, Suárez thinks that all difficulties found in laws and authors regarding the *ius gentium* have been sufficiently explained (Suárez, 1973). According to Suárez, these difficulties 'seem to be based on ways of speaking'. Nevertheless, despite his fairly exhaustive treatment, Suárez finishes pointing out that "emphasis should not be placed on this, both because [those laws and authors] could have used their words in a different sense, and also because the law of nations is a kind of mean between the natural law and the civil law… [t]herefore, sometimes some natural precepts… have been called matters of the law of nations" (Doyle, 2005, p.

[12] An interesting note by Suárez is given in the *additiones suarecii* in (Suárez, 1973). The translation is mine. "…even though admitting the possible derogation of a part of the law of nations by means of custom, nevertheless, it is morally impossible that this law comes to disappear as a whole. It would be necessary that all nations coincide in a custom that is contrary to the law of nations. This is morally impossible. First, because there can scarcely be uniformity in any matter. Above all, for the norms of the law of nations are in close harmony to nature and, because of that, there are only a very few cases that go against it". (Suárez, 1973, §11, p. 164).

409). Nevertheless, Suárez feels confident that "when we speak with rigor and properly distinguish the natures of the two laws, their examples and precepts must also be distinguished" (Ibid).

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