Notre Dame Law Review

Volume 24 | Issue 1 Article 4

10-1-1948

De Legibus of Francisco Suarez

Heinrich A. Rommen

THE *DE LEGIBUS* OF FRANCISCO SUAREZ, S.J.

The citizens of the Republic of the Scholars commemorate this year the Fourth Centenary of Francisco Suarez (1548-1617), the Doctor Eximius. The son of a lawyer, Suarez first studied law; but coming under the influence of Father Ramirez, one of the first disciples of Ignatius of Loyola, he entered the Society of Jesus and was assigned first as teacher of philosophy, then of theology to various colleges and universities. Finally, he was appointed to the highest chair of theology at the University Coimbra, at that time the most famous university of the Iberian Peninsula.

Though Suarez began to write and publish at the comparatively late age of about 45, his *opera omnia* (not taking into consideration his many as yet unpublished memoranda) extend to twenty-six volumes and have been issued in many editions, the latest of which is the Paris edition of 1856 by Berton.

Suarez is considered by many to be the greatest theologian of the second flowering of Scholasticism in Spain's Golden Age. Even in modern theological treatises it is often to be noted that he is quoted more frequently than any other theologian with the exception of St. Thomas and St. Augustine. He and his contemporary and fellow Jesuit, Molina, are the originators of that doctrine in the Theology of Grace which is known under the name Congruism, or Molinism, and which is still a kind of official doctrine of the Jesuit theologians. Of his *Disputationes Metaphysicae* Grabmann says: "It is the most comprehensive systematic representation of Metaphysics that we have . . . a monumental work of the scholastic way of philosophical speculation." [1] In recent times the interest in—and the influence of—Suarez, the theologian and philosopher, is clearly illustrated by the

[1] Martin Grabmann: *Die Disputationes Metaphysicae des Franz Suarez*, etc., in SIX FRANZ SUAREZ, 16 and 44 (Innsbruck, 1917).

lengthy bibliography contained in *Pensamiento,* the philosophical quarterly of the Jesuits in Madrid, covering pages 610-637 of its special volume published in commemoration of the Fourth Centenary of Suarez.

Yet all of this would not be enough to justify an article on Suarez in a law review. But Suarez is no less famous for his legal and political philosophy than for his theological and philosophical works. His fame in the former fields and his importance for the student of law are founded on his two volume work, *De Legibus et de Deo Legislatore,* which has gone through many editions in Spain, Germany, France, Italy and England,[2] and on the famous *Defense of the Faith against the Errors of the Anglican Sect* which contains a devastating criticism of the Divine Right of Kings theory as well as an excellent defense of the English martyrs under Elizabeth and James I. This work, too, has been published in many editions, the latest at Barcelona in 1882. Both works aroused the ire of absolutist monarchs, and copies of them were burned by the hangman in formal ceremonies in France and in England.

It is these two works, but especially the two volumes of *De Legibus,* which give Suarez his eminent place in the field of legal and political philosophy and, consequently, might be of some interest to the student of these disciplines and of law. Numerous scholars have testified to that thesis. Hugo Grotius makes frequent acknowledgment of his debt to Suarez.[3] The *De Legibus,* together with the *Metaphysics,* was used and consulted at even the protestant universities in Germany. Among modern scholars, the famous French jurist, Maurice Hauriou, blaming those who made no use of the immense treasure of legal and political reflections to be found in such works as the *De Legibus,* confesses that he

2 First editions: Coimbra (1612), Lyon and Antwerp (1613); last editions: Paris (1856) and Naples (1872).

3 Cp. the remarks in his letter to John Cordesius (EPIST. CL IV) about the influence of Suarez on Grotius; cp. J. Larequi, S.J., in RAZON Y FE, Madrid, III, 226 (1929).

himself got his best inspirations from them and was saved from falling into grievous errors by studying them.[4] The Italian, G. de Vecchio, in his *Lectures on the Philosophy of Law,* says that Suarez' *De Legibus* is one of the most complete systematic treatises of legal and political philosophy. The German scholar, K. Jodl, says that the *De Legibus* of Suarez is the most eminent work of Late-Scholasticism in legal philosophy compared with which Melanchthon's *Epitome philosophiae moralis* and the works of other protestant authors before Grotius make a rather poor impression. J. Kohler, law professor at the University of Berlin, contends that if the theory of the Natural Law should be revived—a step he considers necessary for the better foundation of International Law—then this revival must be based on the works of the great Spaniards, especially those of Suarez, and not on Grotius.[5] In the United States, James Scott Brown has written an enthusiastic appreciation of Suarez' legal philosophy in its influence on the Law of Nations. Finally, to close these testimonials with a quite recent one by an indubitably high authority, Pius XII, speaking of the doctrine of the Natural Law in the *philosophia perennis,* says that this doctrine has reached its highest form in the works of a St. Thomas Aquinas and a Suarez.[6] Hence the students of legal and political philosophy and the jurists with equal right commemorate this year the Fourth Centenary of Suarez as do the theologians and the philosophers. And for the same reason a short essay on *De Legibus,* the principal work of Suarez, might justly interest the jurists and the readers of this review.

---

4 De Vecchio: LECON DE PHILOSOPHIE DU DROIT (Paris, 1936, 157 [translated from the Italian]).

5 Jodl: GESCHICHTE DER ETHIK, I, 612 (1906). J. Kohler: ARCHIV FUR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE Vol. X, 235 (1917).

6 ACTA APOST. Ved., 345 v. 39, (1947).

II.

Suarez was the first scholastic philosopher to desist from the customary method of merely commenting on the *Metaphysics* of Aristotle. Instead, he wrote an original work on Metaphysics although he adhered, of course, mostly to the fundamentals of Aristotelian-Thomistic philosophy. He follows a similar method in his *De Legibus et de Deo Legislatore* in relation to the *Summa Theologica* which Ignatius of Loyola had made "the" rule of theological teaching in the Jesuit order; he does not compose a commentary on the famous *Quaestiones* 90-109 of the I, II ae of the *Summa* as many earlier theologians, such as Cajetanus and Antonine of Florence, had done. He treats the same subject matter as do the above-mentioned *Quaestiones* of the *Summa*, but he treats them according to his own plan and following an elaborated system, going into the old problems in an exhaustive way, presenting all sides of a problem as they had been discussed by previous writers, correcting misinterpretations which nominalist writers had introduced and, finally, approaching and handling the many new problems which had arisen with the Reformation, the writings of a Macchiavelli, the conquest of the Americas, the appearance of the modern nation-state and the much-posited theory of divine right of monarchical absolutism. He knows the writings of the Church Fathers, those of the great Schoolmen, the works of the great masters of the Civil Law at the University of Bologna, the immense literature of the Canonists. In questions which, one might think, had been exhaustively answered by St. Thomas, he often finds new aspects; he catalogues all the objections that have been opposed to a certain doctrine through the centuries, and then he tries meticulously to answer them. One need but read a few of the more than 124 chapters of the first volume of *De Legibus*, especially of the Second and Third Books, to be impressed by the immense learning displayed and by the superior handling of source material—may that be the law of Spain, of Por-

tugal, of France, the statutes of Italian City-Republics, the Civil Law and its commentaries, or the whole ecclesiastical law collected in the *Corpus Juris Canonici* since about 1582—by the penetrating analysis of all the sides of a question and the careful and prudent weighing of the pros and cons of a problem. That, together with a clear and lucid style written in the Latin of the humanist school, will always captivate the mind of a true jurist. Suarez is always cautious in his judgment, never apodictic or self-sure; how often, for example, does he say that a certain solution appears to him "more pleasing" or "more probable." Many scholars give special stress to the objectivity and the extreme care Suarez takes in representing the theories and opinions of his opponents; it can, therefore, be said that the *De Legibus* is truly "encyclopedic" and at the same time profound.

If one were to ask why a scholar who is primarily a theologian should go so intimately into legal and political theory, the natural and the human law, Suarez himself offers the answer: God is the Legislator Universal, the ultimate source of all laws and of all powers and, thus, the theologian must be concerned with the laws. Furthermore, the theologian's responsibility is also to advise the consciences, the rectitude of which consists in obedience to just and right laws. We should remember that at the time of Suarez the "Education of the Prince" was still considered to be a theological and moral task. Thus, for instance, he dedicates his *Defense of the Catholic Faith* against James I of England to the "Kings and Princes of the Christian World." Again, as is well known, Suarez died after successfully settling a conflict between the

---

[7] Vittoria, the originator of the second flowering of Scholasticism, is directly called on by the Spanish kings to counsel them on the moral and juridical problems of the Conquista. Mariana, a contemporary of Suarez, wrote his famous work, *De Rege et de Regis Institutione,* as a book of good counsel to rulers and dedicated it to his pupil, Phillip III—and could do so in spite of his invectives against tyranny, in spite of his thesis that the people are greater than the prince—warning his pupil against the Macchiavellians (though, again, *The Prince* of Macchiavelli is on its side a textbook of politics for the Prince, although a pragmatist and rather amoral one).

secular government and the ecclesiastical authorities of Lisbon.[7] A further explanation and justification of this interest in the laws lies in the fact that the theologian must be a philosopher; the Roman jurists and the Greek philosophers from Plato on knew that the *Law* must be based on the true philosophy, as Ulpianus says: *"Veram philosophiam non simulatam affectamus."* [8] And, finally, all laws are rules for human acts performed under their consciences and have, therefore, a bearing on salvation and the life beyond.[9] It is, therefore, just and appropriate, concludes Suarez, for the theologian to concern himself with the general nature of the law, its various kinds and its causes and effects.

III.

A short and—by the nature of this essay—rather sketchy description of the content of *De Legibus* and a "case study" of one of its more than 240 chapters will best serve us as an illustration of Suarez' argument.

He divides the treatise on the Laws into ten books, each containing between twenty and forty chapters (with the exception of Book Ten, which contains only eight). The ten books treat their subject matter under the following titles:

Book 1—On the Law in general, its causes and effects;

Book 2—On the Eternal Law, the Natural Law and the Law of Nations (*Jus gentium*);

Book 3—On the positive, man-made law, or the Civil Law (i.e., secular as opposed to ecclesiastical law);

---

8 C,1,S 1 D I,1: cp. also Inst. 1 I,I,1: *Juris prudentia est divinarum atque humanarum verum notitia . . .*

9 This rather elaborated discussion in the preface to *De Legibus* was provoked by a heated controversy current at that time. Banez, O.P., held that the theory of Law was of no concern to the theologian, whereas Cano, Molina, Suarez and many others insisted that a comprehensive knowledge of the Law and of the concrete circumstances of social life were indispensable to a mastery of Moral Theology. Fr. Pelster, in SCHOLASTIK XVII, 410 (1942), remarks in discussing this controversy that Banez was less true to the principles of the Thomist School at Salamanca than were his opponents.

Book 4—On the positive ecclesiastical (or Canon) law;

Book 5—On the variety of human law, especially on penal (criminal) and onerous (i.e., tax) laws;

Book 6—On the interpretation, the changing and the cessation of positive human laws;

Book 7—On the unwritten law, which is also called customary law;

Book 8—On Privileges;

Book 9—On the Divine Law of the Old Testament; and

Book 10—On the New Divine Law (i.e., that of the New Testament).

Let us now make a brief survey of the content of one of these books as it is presented in the titles of its chapters; for example, the content of Book Three on the positive human, or civil, law in general and especially—as Suarez significantly points out—on the national laws,[10] the laws of Spain, let us say, or France. The first question is: Do men by nature possess a power to legislate; or is this power theirs only by accident (i.e., not required by the very nature of man); or is this power a consequence of original sin and, therefore, as some protestant sects, the Anabaptists for instance, contended, not necessary for the elect? The answer given is that the power to legislate follows, first from the social and political nature of man by force of which he lives in communities, one of which is the state, the perfect society in which that social nature finds its comparative perfection; and, it follows further, that in any community, especially

10 The *Jus civile* was throughout the Middle Ages the Roman civil law; but with the development of the nation-state it slowly acquired a second meaning, that of national law. While during the Middle Ages the Glossatores and the Post-glossatores contended that the Civil Law—and the laws of the Roman Empire—continued to be valid for the new Christian Empire, Vittoria, Suarez and his contemporaries contend that the Roman civil law, as such, is not valid and was never valid, not even during the Middle Ages all over the "Christian world," that neither the Emperor nor the Pope ever had the power to promulgate civil (i.e., secular or temporal) laws for all Christendom as, for instance, Bartolus taught for the Emperor and Augustinus Triumphus for the Pope.

in the perfect community, there must be a directive and—in order to realize the common good by achieving unity and order in the coordinated acts of all its members—coercive authority to legislate. Since men are *naturaliter* not governed by angels nor immediately by God, it follows that they must be governed by men. The second chapter, therefore, asks: In which men resides, by nature, this power to legislate or to rule? Some canonists answered that it resided in Adam, as Lord Filmer also held in his paternal theory of monarchy, and that Adam then transferred it to his successors, i.e., the princes. But that answer is wholly unacceptable. For by nature this power could not reside in any particular person, but only in the community itself. All men are born free, and none has any political jurisdiction or dominion over the others; consequently, this power must reside originally with the community itself. The third chapter asks the question if, since all power is derived from God, this power to legislate is immediately given by God as the Creator of human nature. The answer is that God is, of course, the ultimate source of all power, but that He gives this power to legislate, not by a particular and special act distinct from the act of creating human nature, but as a necessary consequence of that nature according to the principle that he who gives the form gives also all that which by nature belongs to the form. As man, because he is created as a rational being, has the power over himself, his faculties and his limbs as respects their use, and is *naturaliter* free and *sui juris,* so the body politic, as soon as it is born by a kind of social compact, has this power of self-rule. Yet this does not mean that the people, i.e., the political community in its original democratic form, could not transfer or, as for instance on account of an unjust war, lose this power. By consent this power may be transferred with certain conditions or without conditions upon one man or a group of men. In the fourth chapter, the *Corollaria* are presented, of which the most important is that all forms of

government are of merely positive man-made law and that, therefore, the Divine Right Theory is utterly untenable; for every ruler in monarchical governments and every group of persons in aristocratic governments holds the power to legislate by transfer, has it immediately from the people. To the body politic itself, to the people ruling themselves in original direct democracy, belongs the constituent power. Another interesting point is made—and extensively discussed in Chapters Six and Seven—namely, that the division of the world into a plurality of independent and free, i.e., sovereign, states is quite natural. Never was the Roman Emperor the ruler of the world, not even of the Christian world; the Civil Law of the Roman Emperors is not binding on the inhabitants of Portugal, nor was it ever received by custom in Spain in such a way that where the positive law of Spain is silent, the Civil Law should be observed. Spain is ruled by its national (*propria*) law and when this law is silent, the judge should apply the rule of reason, should decide *ex aequo et bono* and neither apply the Canon Law nor the (Roman) Civil Law in a civil matter. As limited as is the emperor in the power to legislate for the universe in temporal (civil) matters, so also is the Pope denied the prerogative for the universe *in temporalibus*; there does not exist such direct power of the Pope *in temporalibus* over the world. One sees here that the medieval concept of a world-monarchy resting on an identity of Church, resp. Christianity, and Imperium has faded away as unreal and somewhat fantastic. Meanwhile the pagan states of the Americas had been discovered, and the narrow world of the Middle Ages expanded quickly. The *conquistadores* used the arguments stemming from the concept of Pope or Emperor as Lord of the World to justify their conquests. The theologians from Vittoria on reject and ridicule these arguments, whether they have as their source Aristotle's defense of slavery (some men are by nature free; some, by nature slave) or the pamphlets of the Legists and the Curialists of the Middle Ages who defended the theses

explicitly—the former that the Emperor, and the latter that the Pope was the Lord of the World and could, consequently, transfer the rule over the newly discovered territories to Christian Princes. This point is again discussed in Chapters Ten and Eleven. Thus we see the abandonment of the medieval political ideologies according to which the empire was considered to be an historical continuation of the Roman Empire of antiquity and identical with Christendom, i.e., the "World," and according to which the Christian Faith was considered the basis of political unity and of citizenship with the consequence of an almost inseparable intertwining of secular civil law and ecclesiastical law. These ideologies of the Legist and the Curialist are seen as merely historical justifications of an historical ideal, not of an ever-valid political ideal. Instead, the state is firmly and exclusively based on the Natural Law. Its limitations as against the Church—the Church is universal; of states there are, quite naturally, many—and as against the realm of the person are firmly established. I am of the opinion that what Suarez has to say in these chapters will offer the best foundation for a satisfactory solution of the modern problem of the relations between the Church and the modern democratic and religiously neutral (not indifferent) State.[11] Suarez' efforts to delineate on the basis of the Natural Law by stressing the rights of the person, the right of self-determination of the body politic, the definite circumscription of the term *bonum commune politicum* furnished in his excellent theory that the *bonum commune* arises out of and regularly coincides with the *bonum* of the persons that form the community are, similarly, a most fruitful theory upon which a right balance between individual rights and liberties and social interests and responsibilities may be based. Suarez' passages on liberty of the person, his accentuation of *Jus* as meaning "rights" and not only the objective *Justum* are signs of a

11 The author has tried to do this in Ch. 25 and 26 of his book, THE STATE IN CATHOLIC THOUGHT, Herder Book Co., St. Louis, Mo., 2nd ed., 1947.

humanist and Christian Personalism to which our time should be especially receptive as an alternative to the threatening all-provident state, which in the name of a tremendously enlarged concept of the common good forgets the primary principle of social philosophy, namely that of Subsidiarity.[12] It is neither the duty nor the right of the state to make everybody happy in his private life. The state produces only those conditions in his legal and social order in which the individual person perfects his own individual happiness.

The next chapters of Book Three of *De Legibus* deal with the Macchiavellian theories according to which the ruler of the state or republic acting in its interests (such interests identified with the common good) is not bound by law and morals. Against such doctrines of the *"politici"*—as Suarez somewhat contemptuously calls the Macchiavellian writers—the point is made that the moral law and the moral value are themselves part and parcel of the common good so that, therefore, their violation can never be justified under any appeal to the realization of the common good.

Two other problems are treated consequently, the first raising the question whether the state can command and punish an internal act. Suarez answers with a clear, "No." As an example he distinguishes between the internal intention to commit murder and the attempt to execute that intention by appropriate external acts. By its very nature the inner sphere of the person is closed to the state which must and can be satisfied with the conformity of the external acts to its laws concerning the external peace and honesty

12 In Book 2, Chapter 14 of *De Legibus,* Suarez asserts that Liberty, i.e. the *dominium suae libertatis* is of positive natural law. Nature makes men free, *positive* (*ut sic dicum*) with the intrinsic Right of liberty; and only the Body Politic may take away a man's liberty *ex justa causa*—as, for instance, in punishment for crimes, just as it may, in capital punishment, take away a man's life. But no man and no prince may under claim of an absolute power *(potentia absoluta)* take away a man's liberty or property which action would be *absurdissima,* against peace and justice, and against the right given to everybody by nature (nr. 13-19 of the above-given chapter.)

of the human community.[13] In Chapter Fourteen the problem of the *ex post facto* law, as we would say today, is discussed in the form of the question: Can an *actus practeritus* be the matter of human law, i.e., can an act that was not punishable when it was committed or performed be made punishable retroactively? The answer, again, is a clear, "No," with the one exception that if the act were a grave violation of first and generally known principles of Natural Law, a later human law would have full effect (since it is merely declaring an act to be a crime which would be recognized as a crime even without the specific declaration by the human law). The Nurenberg trials are a case in this respect. Nevertheless, the strict rule is that no *ex post facto* law is within the competence of the human law, for by its very nature it is a precept and thus concerned only with future acts.

These few examples of the wealth of learning and thought to be found in these few chapters of but one of the ten books of *De Legibus* will, I hope, show that the testimonials given at the beginning of this short sketch of Suarez' thought are more than justified. It was a hard choice for me to make as to which book to discuss; for it would have been just as interesting—or even more so—to have given a representation of the doctrine of Natural Law or of the clarification of the concept of the *Jus Gentium* for which Suarez is rightly famous and which he treats extensively in the twenty chapters of Book Two of *De Legibus*. It is hoped, in conclusion, that the preceding lines may resuscitate the interest of jurists and students of jurisprudence in this great work of Suarez "from which all can profit greatly."[14]

Heinrich A. Rommen, LL.D.

---

13 Under certain circumstances the internal act is indirectly under the power of the State: a soldier ordered to guard the entrance to a fortress must not only be present and awake; he must also watch attentively and conscientiously, for without these internal acts the external act of watching is incomplete. C. 13, nr. 11.

14 DeLagarde in *Neuvelle Revue Historique de Droit Francais et Etranger* (Feb. 1929) in his review of *Die Staatslehre des Franz Suarez.*