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Facing the ambiguities of Aquinas. The 16th century debate on the genesis of *ius gentium*.

1. *Ius gentium*: a juridical concept in a philosophical context

The concept of *ius gentium* is a complex notion originated in a juridical context, which Thomas Aquinas includes in both his explanation on the nature of the law and of justice. The notion presents a certain degree of ambiguity, as this *ius* is not established by the laws of the republic but by human consensus. This fact raises the issue of the genesis of such *ius*. Dealing with this problem in the *Summa Theologiae*, Thomas Aquinas offers a somewhat ambiguous solution. This study analyses the positions expressed by Aquinas and shows how these ambiguities gave rise to a heated debate which can be found in the commentaries on the *Summa* which result from the teaching of theology in 16-century Iberian universities.[1]

In the *Summa Theologiae*, Aquinas discusses the concept of *ius gentium* first while analysing the concept of law in I-IIae, qq. 90-97 and then while discussing the

[1] The choice of the 16th-century works to be analyzed here was guided by the following criteria: i) representativeness (The First School of Salamanca: Francisco de Vitoria and Domingo Soto); ii) criticism of Soto's position and the consolidation of doctrines (The Second School of Salamanca: Luís de León and Domingo Bañez); iii) the continuity of the debate in Portuguese universities (Antonius a S. Dominicus and Ferdinandus Perez).

concept of justice in II-IIae, q. 57. An important element in Aquinas's argument is the fact that he imported this notion from its original juridical realm into the area of moral philosophy. This brings complexity to the concept, forcing its interpretation within the domain of both philosophy and moral theology.

The notion of *ius gentium* originates in the realm of law and, particularly, Roman law. Dealing with the term in the context of moral philosophy is, therefore, intrinsically problematic. Thomas Aquinas analyses the concept without presenting any specific definition of this notion, but adopting the definition of Isidore of Seville as it appears in the *Decretum Gratiani*. However, Isidore's statements are neither analytical nor conceptual, as they refer to a juridical and normative context. In fact, Aquinas does not justify the importation of a concept from the juridical realm into his discussion about law and justice, possibly because he found it natural to do so. This fact raises two questions; one about the definition of *ius gentium* and the second about the appropriateness of studying this type of *ius* within the areas of philosophy and moral theology.

Offering a general definition of *ius gentium* would require a historical review of the concept which, in fact, would generate numerous difficulties. For example, Cicero linked the notion of *ius gentium* to an eternal law that could be discovered by human reason. So, he considered *ius gentium* as a *ius* which governs all humans in accordance with their nature and reason. Centuries later, the jurist Gaius, follows Cicero in linking *ius gentium* to the *naturalis ratio* common to all humans. Vlpianus later expanded this concept of *natura*, pointing out that *ius gentium* leads to principles rational beings have in common with irrational beings, and stressing the absolutely primary and elementary character of some principles of human actions, such as the enunciations of practical reason "it is fair to give to each his own".[2]

Aquinas's arguments about law and justice in the *Summa Theologiae* cannot ignore the canonical works, namely the *Decretum Gratiani*. Analysing the concept of

[2] For a treatment of the concept from the perspective of the history of law, see M. Kaser, *Ius Gentium* (Trad. F.J. Andrés), Comares, Granada, 2004, 6-12; 19-29; 68-86; Merio Scatolla, "Models in History of Natural Law" in *Ius commune. Zeitschrift für Europäische Rechtsgeschichte*, XXVIII (2001), Frankfurt am Main, Vittorio Klostermann, 92-93. Rafael Domingo, *The New Global Law*, Cambridge, Cambridge University Press, 2010, 1-11.

ius gentium, it is precisely the work of Isidore of Seville as transposed by Gratian that will be considered here.[3] In the case of the commentaries of the 16th-century theologians, the references to jurists and their *auctoritates* – Cicero, Gaius, Vlpianus and the Justininan Institutions – are even more frequent. Whether in Aquinas or in the 16th-century scholars, the debate about the nature of *ius gentium* concerns the relationship that this *ius* establishes with natural law. The central question debated is whether the division of law proposed by Isidore is the correct one. Does human law (and by extension *ius gentium*) depend on natural law? Or is it the mere result of circumstantial determinations resulting from a temporal agreement and consensus amongst a certain set of people? And is this separation exclusive or does it admit some causal link between nature and consensus?

In the *Summa Theologiae* I-IIae, qq. 90-97, Thomas Aquinas places *ius gentium* within a four-part division of the law: eternal, natural, positive and civil, so that this *ius* would not be left out. In fact, as Isidore affirms that *ius* is either natural, or civil or *gentium*, it appears that *ius gentium* is as a distinct *ius* from those four divisions, and Aquinas redirects it towards one of them. Doing so, in some texts he seems to place it within natural law while in others it appears within civil law. This fact causes perplexity and gives rise to an intense debate among 16th-century commentators on Aquinas.

An initial justification for the emergence of this ambiguity can be found taking into account the different views Aquinas adopts in his analysis of *ius gentium*. In his explanation of the nature of law, he focuses on the principle that lends it force of law, that is, so long as it is a *ius* common to all people and adopted by all nations. However, when he analyses this *ius* from the viewpoint of the nature of justice, he takes into account the content of *ius gentium*. In fact, as pointed out above, *ius gentium* is basically defined based on its content and that is how Isidore presents it, describing it as a set of rules. Therefore, if we admit that, in his explanation of the law, Aquinas analyses this *ius* abstractly, that is, while it is linked to the law as principles regulating

[3] Kenneth Pennington has pointed out the progressive increase of legal terminology in 13th century theology. He focuses his analysis on the way Aquinas deals with juridical texts in the Summa Theologiae and mainly with the Decretum Gratiani, and emphasizes that Aquinas adopts the terms *lex naturale* and *ius naturale* but remains faithful to his philosophical and theological point of view and does not adopt their juridical interpretation. Cfr. K. PENNINGTON, "Lex naturalis and ius natural", in SPENCER E. YOUNG (ed.), Crossing Boundaries at Medieval Universities, Brill, Leinden-Boston, 2011, pp. 239-244. Regarding the canonistic language of rights, see B. Tierney, The Idea of Natural Rights, William B. Eerdmans, Michigan/Cambridge, 2001, 2nd ed., p. 58-69.

human acts, it is possible to understand that Aquinas is defining *ius gentium* according to an epistemological model, in other words, according to the manner in which its principles are rationally deduced from the law. In this case, Aquinas argues that the principles of *ius gentium* derived as necessary conclusion from *prima facie* principles of practical reasoning. However, when this *ius* is to be applied to the virtue of justice according to the equity that defines it, Aquinas has to consider its content, which includes principles such as the division of property and slavery, and whose necessary derivation from *prima facie* principles is neither evident nor necessary. Thus, in II-IIae, q. 57, a.3, Aquinas has to revise his statement about the origin of the concept, stating that the deduction of its principles does not depend on a reasoning deriving from principles *per se notae*, but on a complex reasoning. The knowledge in which *ius gentium* is based depends on a reasoning *supposito aliquid*, which considers a particular feature of the good concerned and which evaluates it in its relation to its ends and the common good.

Given the nature of *ius gentium*, its foundation is difficult to determine, as Aquinas' texts show. The research I will accomplish here, which is based on the debate identified in some commentaries on the Summa Theologiae produced in the 16th century Iberian universities – could be formulated as follows: what is the origin of a *ius* common to all peoples? Formulated in these terms, the question diverts from the domains of the history of civilization and the history of law to the realm of moral philosophy, which, in the case of the texts and authors analysed here, supposes an ontological and even a theological statement. In fact, the specific nature of *ius gentium* renders this concept particularly problematic. It is a form of *ius* that links people to rights and duties, whose principle of efficacy is the common agreement among people, but without the need for promulgation. Its norms express basic human needs, which denote a common nature. These characteristics demonstrate the level of complexity of the research on the origin of *ius gentium* when carried from the aforementioned philosophical foundations. In the commentaries of the 16th-century theologians, this concept takes centre stage, since facing the reality of human communities inhabiting the "New World", it is the basis for the elaboration of doctrines regarding the possible establishment of an international law and of the distinction between objective and subjective rights. However, in these texts, the doctrines on the constitution of this *ius* are not always linked to the debate on the origin of *ius gentium* but rather to the

exhaustive discussion of its contents: relations of domination, slavery, property, just war or freedom of religion. In fact, the debate about the norms and rules which had always integrated *ius gentium*, isolating them in order to analyse their complexity as part of human condition, acquires a central role if compared to the importance given to the origin of that right[4]. Nevertheless, the definition of the natural or positive origin, of *ius gentium* is not completely left aside in those debates and the differences between the answers given by the theologians to the question of the origin of *ius gentium*, as well as the perplexities derived from those answers, reveal the connection between the domain of theoretical and practical solutions.[5] In the specific case of the texts and authors examined here, this complexity is expressed in the differences and indecisions verified in the arguments on the place of *ius gentium* within the law and, consequently, on the norms it includes. These difficulties appertain to a particular historical context characterized by the shock of fundamental beliefs: those of a society which for many centuries had based itself on the *tempora christiana*, the crisis of conviction reflected in the reform movement, and the excessive novelty about human nature brought by the discovery of the New World.

Focussing on the question whether *ius gentium* is a natural or a positive law, we first analyse Aquinas' doctrines exposed on Summa Theologiae. Then, we verify their reception in some 16th century's commentators on Aquinas' Summa Theologiae, whose

[4] See, for example, the short, 19-page addition to the treatise by Vitoria *De iustitia et iure*, in the edition by (F. de Vitoria, *Comentarios a la Secunda secundae de Santo Tomas* [1534], Vicente Beltrán de Heredia (ed.), Tomo III, Salamanca, 1934, pp. 1-19). The work of Domingo de Soto, the 1553 edition, reproduced by Carro that we have used, is also brief, 9 pages (Domingo de Soto, De iustitia et iure libri decem V. Carro and M. González (eds), Madrid, Instituto de Estudios Politicos, Vol. II, Facsimile of the 1556 edition, Salmanticae, Andreas a Portonarijs with Spanish translation, Madrid, 1968, pp. 193-2002). The same limited scope is found in the work of Luís de León and that of Bañez, as well as in the manuscripts produced in the Portuguese universities.

[5] The Cordovez Fernando Perez (Cordova, 1530-Coimbra,1595) explicitly argues that this debate, together with the current controversy found in *De domínio et servitute*, serves as the foundation for his treatise *De restitutione*: "Ad utilissimam restitutionis materiae, quoad possim, breviter et accurate illustrandam, oportet prius, veluti totius tractationis fundamenta ante oculos ponere duas alias praevias perutilisque materias: alteram de iustitia et iure (…) alteram quae nunc maxime controvertitur de dominio et servitute". FERDINANDUS PEREZ, Prolegomena ad materiam de restitutione [1588] (Lisboa, BNp, Cod. 2623, f. 1r). However, *De iustitia et iure* makes up the first 4 folios of the codex, while *De domínio et possessione* occupies ff. 4v-35r and *De restitutione* folls ff. 40-282.

name is linked to the Foundation of the School of Salamanca, briefly referring to some marks of the disseminations of these doctrines in the 16th-century Portuguese Universities of Coimbra and Évora.

2. Thomas of Aquinas: the natural or positive origin of the *ius gentium*.

In his explanation on the nature of the law, Aquinas refers its ultimate foundation, as well as of all *lex* or *ius*[6], to a ontological realm of extreme radicalness: the eternal law containing the ordination of all things according to a divine and creative *ratio*. Regarding natural law, this basis guarantees, above all, its objectivity and stability. Natural law is that which arises from the nature of things and therefore has the same stability they have. Human law, on the other hand, derives from natural law. This derivation grants its conformity, even if a derived one, with the ontological structure established by the creator. From an epistemological point of view, this derivation is based on the model of *veritas adaequatio*, while from a logical point of view, its foundation is to by find in the syllogistic framework of the derivations of conclusions from axioms.

Analysing the nature of *ius gentium* in the context of the law Aquinas introduces a set of distinctions in order to apply this model, simultaneously theological, ontological and epistemological, to that kind of *ius*. As all human law, *ius gentium* depends on natural law, insofar as human beings are part of nature and tend to the good. However, the complexity of human nature makes humans participation in nature according to the different ways of being nature has. Thus, human beings participate in the various precepts of natural law: those corresponding to the natural tendency common to all substances, those corresponding to the natural tendency of all animals and, finally, those concerning which is good according to the nature of reason, which is the human specific characteristic[7].

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[6] See K. Pennington, *Op. cit*, p. 240-241; 241, n.26 regarding the interchangeable use of the terms *lex* and *ius* by Aquinas. Thomas's use of the concepts is also discussed in J. T. ERBEL, "Necessity of lex aeterna in Aquinas's Account os lex naturalis", in A. FIDORA, M. LUTZ-BACHMANN, A. WAGNER (eds.), *Lex und Ius. Beiträge sur Begründung des Rechts in der Philosophie des Mittelalters und der Frühen Neuzeit*, Vol. 1, Frommann-holzboog, Stuttgart-Bad Cannstatt, 2010, pp. 148-153.

[7] Cf. S. Th. I-IIae, q. 94, a.2, resp.

To explain how human law derives from reason, Aquinas affirms that something originates from natural reason *dupliciter*: 1. *sicut conclusiones ex principiis*. 2. *sicut determinationes quaedam aliquorum communium*[8]. In the first case, human law results from an inference which derives necessarily from natural axioms, such as, "do not kill". This conclusion results from the general principle of the right to life, which for living beings is a basic right. This is a necessary conclusion, to such an extent that, if reason denies it, it incurs in contradiction. In the second case, human law results from a determination derived from those primary conclusions, for example, when determines the specific punishment for murderers. In the first case, the force of the law derives from a natural need. In the second case, it derives from the consideration of the suitability between ends and means. Both conclusions are formulations of human laws. But the first approach, since it results from a prima facies principle, it derives directly from the perception of the nature of things, while the second derives from the statements that human reason produces about the nature of things. This is a distinction of the utmost importance, since it allows one to distinguish, in human law, principles which derive necessarily *ex natura rei* from norms deriving from a rational determination which depends either on the context or on secondary characteristics of things. In Summa Theologiae, I-IIae, q. 95, a.4, *respondeo*, Aquinas argues that *ius gentium* is in the first case, while *ius civile* is in the second one[9]. In this article Aquinas indeed asks whether the division of the law made by Isidore is suitable. However, Isidore places *ius gentium* within the realm of positive law, which has these three characteristics: i) it considers the suitableness and proportionality of the ends of things concerned; ii) it is public in nature; and iii) it tends to the common good. These characteristics are shared, however, by both *ius gentium* and *ius civile*. Therefore, the

[8] S. Th. I-IIae, q. 95, a.2, resp.: "Sed sciendum est quod a lege natural dupliciter potest aliquid derivari: uno modo sicut conclusiones ex principiis: alio modo, sicut determinationes quaedam aliquorum communium. Primus quidem modus est similis ei quo in scientiis ex principiis conslusiones demonstrativae producuntur. Secundo vero modo simile est quod in artibus formae communes determinantur ad aliquid speciale (…)".

[9] S. Th. I – IIae, q. 95, a.4: "(…) Est enim primo de ratione legis humanae quod sit derivata a lege naturae, ut ex dictis patet. (...) Nam ad ius gentium pertinent ea quae derivantur ex lege naturae sicut conclusiones ex principiis, ut iustae emptiones, venditiones, et alia huiusmodi, sine quibus homines ad invicem convivere non possent; (...) Quae vero derivantur a lege naturae per modum particularis determinationis, pertinent ad ius civile, secundum quod quaelibet civitas aliquid sibi accommodum determinat."

specific nature of *ius gentium* cannot be in the fact that it is a positive *ius.* Instead, it is to be found in the way in which that *ius* derives from natural law. Aquinas posits that the former derives from the latter immediately, as in a theoretical syllogism necessary conclusions derive from principles and axioms. Conversely, civil law derives from *ius naturale* as its specific determination. Thus, although stating that *ius gentium* is a positive law and accepting the division of the law established by Isidore, Aquinas states that *ius gentium* is a law formed by norms which are conclusions necessarily derived from *prima facie* principles[10].

This deduction is totally consistent with Aquinas's explanation of the nature of law. Nevertheless, to a certain extent it contradicts his statements about *ius gentium* in Summa Theologiae II-IIae q. 57. Aquinas begins by ascertaining that equity is the correct domain of *ius*[11]. Thus, in the context of the explanation of the nature of justice, *ius* is understood as the result of a relationship of equality between two similar human beings, and this is the intrinsic foundation of the virtue of justice. Thus, if the foundation of law derives from the nature of things and from the rightness of the derivation of the norm from the knowledge of the nature of things, then the derivation of the law presupposes nothing more than a formally correct reasoning. However, what specifically belongs to justice is the consideration of the nature of things regarding the practice of equity, that is, concerning the relation between humans who have the same nature. In the context of the horizontal relationships between humans, there are things which nature is *indifferent*, that means, things that does not have any ontological characteristic which might determine their attribution to one person more than to another. In this case, what criterion ought to be used to evaluate their fair distribution or possession? Aquinas states that this evaluation does not depend on an analysis of things

[10] M. Lutz-Bachmann analyses Aquinas's concept of *ius gentium* from the same perspective, but only in I-IIae, pointing out the function attributed to synderis in the deduction of the conclusions based on the principles. Cfr. M. Lutz-Bachmann, "Die Normativität des Völkerrechts: Zum Begriff des ius gentium bei Francisco Suárez im Vergleich mit Thomas von Aquin", in A. FIDORA, M. LUTZ-BACHMANN, A. WAGNER (eds.), *Lex und Ius*…., pp. 476-481.

[11] S. Th. II-IIae q. 57, a. 1, resp.: " iustitiae proprium est inter alias virtutes ut ordinet hominem in his quae sunt ad alterum. (…) Importat autem aequalitatem quaedam, ut ipsum nomen demonstrat (…) Aquealitatem autem as alterum est. (…) illud enim in opera nostro dicitur esse iustum quod responde secundum aliquam aequalitatem alteri, puta recompensatio mercedis debitae pro servitio impenso."

simpliciter, but on some of their characteristics, that means, of a specific aspect or determination of them.

In the explanation on justice, the law cannot be seen merely as rational rule, since justice consists of the application of principles, so that the rule appears qualified by an adjective – fair or unfair – as a function of the elements contained within the precepts of the law itself. Thus, in the context of justice, the deduction of what is just cannot be made only according to a formal deductive model following from self-evident principles, since other elements must also be considered, as is the case of the ends of the goods concerned, and of the means to reach them. Thus, concerning *ius gentium* and in order to evaluate the equity of this *ius*, its material content must be take into account. In coherence with his objective notion of the law, Aquinas aproximates *ius gentium* to the nature of things. However, he cannot affirm that *ius gentium* is absolute et per se close to nature, due to the similar nature that of all human beings have and the indifferent nature of some goods. Thus, apart from nature, there must be another criteria to establish a fair relation of possession between human beings equal in dignity and goods that have no objective characteristic based on which their fair possession could be decided. To solve this issue, Aquinas introduces a distinction between a *ius naturale per se* and a *ius naturale secundum quid*, and ascertains that the latter incorporates the former. He also states that only the wise man has the capacity to discern which *ius* presides over which goods, thus guaranteeing that the deduction of the ends and the means is undertaken in accordance with the principle of the best rational deduction.

A comparison of Aquinas's statements regarding the nature of *ius gentium* in the context of the law and in the context of justice reveals that his doctrine holds a certain degree of ambiguity. In the explanation of the law, he states that the norms of ius gentium are immediately evident to human reason, which discovers them based on the first principles of practical reason. However, while explaining the concept of justice, the norms of ius gentium demand a complex deductive process that relegates these precepts to the realm of specific determinations, resembling those of the *ius civile.* This ambiguity on the place of ius gentium within the law gives rise to a lively debate amongst 16th-century theologians regarding the origin of the precepts of *ius gentium.* In fact, it can be deduced from an analysis of Aquinas's presentation of *ius gentium* in the Summa Theologiae that he implicitly acknowledges two types of precepts: those immediately and necessarily deduced from the *prima facie* principles of practical

reason, and those which require more complex a reasoning and more distant from the natural law, since they are not evident. The texts of the 16th century commentators on Aquinas's Summa Theologiae revel that a solution surrounding this ambiguity is to accept the existence of two types of *ius gentium* precepts. In the case of precepts deduced with evidence, they converge with natural morality, while the others are similar to those of positive law. The analysis of this debate and its solutions allows one to identify two aspects in changing in the interpretation of the origin of *ius gentium:* i) the discontinuation of Isidore's tripartite division of ius and the introduction of the division of law into natural and positive law and ii) the progressive statement of the distinction between the concepts of *lex* and *ius*.

3. The debate on the origin of *ius gentium* in 16th-century Iberian commentaries

The adoption of the texts of Aquinas in the teaching of theology in the Iberian Peninsula is linked to Francisco de Vitoria[12], as well as the creation of international law. However, the question here analyzed does not focus on these features, since it is limited to investigate the way some commentators on Aquinas in the 16th century Iberian universities conceive the origin of *ius gentium* and how they deal with Aquinas's dilemma. These two issues are inseparable from a third one, which we here only refer to marginally, concerning the mutability of the precepts of *ius gentium* and their compulsory conditions. The former question is completely theoretical, while this latter is practical and relates to specific and absolutely emergences issues of the contemporary Spanish and Portuguese crowns, resulting from the policies of territorial expansion and the legitimacy of the occupation and expropriation of overseas territories by non-peaceful means. The former question is that here in analysis. The latter is that which is commonly identified as the 16th-century debate on the concept of *ius gentium.* In the view of 16th-century academics, the first question is clearly secondary to the second

[12] Vitoria's influence on the popularisation of Aquinas's Summa in theological studies at the University of is incontrovertible. However, S. LANGELLA, asserts that this is the result of a process that began at least as early as the end of the 15th century in the universities of Valladolid, Seville and Alcalá. Cf. Francisco de Vitoria. *De Legibus.* S. LANGELLA, J. BARRIENTOS GARCÍA and P. GARCÍA (eds.). Ed. Universidad de Salamanca-Università degli Studi de Genova, 2010, p. 20, n.4.

one[13] . However, the decisions regarding practical issues depend upon the interpretation of the origin of *ius gentium*, a fact which can also be verified in the treatises analyzed. Nevertheless, because of their ethical and political implications, these discussions assumed a prominent role already in the 16th century and their analysis became decisive in later doctrines regarding both the modern distinction between objective and subjective rights[14] and the emergence of international law.

Here we intend to verify how some theologians which name is linked to the foundation of the so-called School of Salamanca commented on Aquinas's *Summa Theologiae* II-IIae, q. 57, a.3, and to identify their doctrines on the nature, whether natural or positive, of *ius gentium.*

a. The First School of Salamanca: Vitoria and Soto

When Vitoria raises the question in *De iustitia et iure* of *utrum ius gentium sit idem cum iure naturale*, he follows closely Aquinas's doctrine about the dependence of this *ius* regarding natural law. However, subtle discrepancies regarding Aquinas's doctrine can be identified in Vitoria's *De legibus*, namely regarding natural law[15].

[13] **See above notes 4 and 5. Também do ponto de vistas dos estudos hoje disponíveis acerca do *ius gentium* nos autores da designada Escola de Salamanca verifica-se que eles indagam sobretudo questões particulares (guerra justa, direitos de propriedade, direitos humanos), sendo a literatura disponível a este propósito muitíssimo extensa. Desde a perspectiva de análise que aqui assumimos – a génese do *ius gentium* dentro da lei e a sua relação com a justiça – referimos a existência de três estudos, publicados com grande distância temporal e díspares em estilo e finalidade: C. Arenal, Ensayo sobre el Derecho de Gentes, Madrid 2002 (reimp. da edição da Imprensa de la Revista de Legislación, Madrid 1879); S. M. Ramirez, El derecho de gentes, Madrid-Buenos Aires 1955. A. Poncela, Las raíces filosóficas y positivas de la doctrina del derecho de gentes en la Escuela de Salamanca, Léon 2010**.

[14] The writings of Vitória and Soto about S. Th., II-IIae, q. 62 sparked abundant scholarship both about the Aquinas doctrine at the Salamanca School as well as the debate that it prompted. See B. Tierney, *Op. cit*, v. spec, para Vitoria, pp. 256-272, de A. BRETT, *Liberty, right and nature*, Cambridge, Cambridge Univ. Press, 1997, e de John FINNIS, *Aquinas: Moral, Political, and Legal Theory*, Oxford Universiy Press, Oxford, 1998.

[15] *Francisco de Vitoria. De Legibus.* Estudio introductorio de S. LANGELLA, Transcripción y notas al texto latino, de J. BARRIENTOS GARCÍA, Traducción española de P. GARCÍA y Italiana de S. LANGELLA, Ed. Universidad de Salamanca-Università degli Studi de Genova, 2010. Francisco Vitoria's

Although Vitoria adopts the Thomistic doctrine of the objectivity of *ius gentium*, regarding natural law he makes two explicit statements which reveal a personal interpretation and feature his own position. First of all, he clarifies the statement already present in Aquinas's thought, on the multiple principles included in natural law. Of said principles, some are common to all humans, although they are not recognized by all with the same degree of certainty. Others are particular principles that vary in accordance with the subjective conditions of those who recognize them.[16] Secondly, Vitoria explicitly decide not to comment on the question posed by Aquinas in I-IIae, q. 95, a.4., about the suitability of Isidore's division of *ius*. He merely states it, pointing out the textual references to the places where Aquinas had mentioned it and affirming that Thomas had contradicted himself and indicates that he would explore the subject in q. 100, in the discussion of the precepts of the Decalogue.[17]

To understand Vitoria's doctrines on natural or positive foundation of *ius gentium*, the statements of *De legibus* are quite important. Vitoria sides with the intellectualism of Aquinas, regarding the deduction of the legal principles.[18] However, when referring to the analysis of the precepts of the Decalogue the question regarding the tripartite division of law proposed by Isidore, he admits that Aquinas had contradicted himself about the division of law and adopts a division of *ius* between divine and human, natural and positive, presenting it as more suitable.

In his commentary on *Summa Theologiae* II-IIae, q. 57, a.3, Vitoria once again brings his doctrine closely into line with that of Aquinas, beginning by defining *ius naturale.*[19] In the context of justice, *natural* indicates a type of relationship that

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De legibus (*De Lege commentarium in I-IIae* qq. 90-108) by Francisco de Vitoria includes his lectures at Salamanca in the year 1533-1534.

[16] F. Vitoria. *De legibus*, I-IIae, q. 94, a. 4 [lect. 123]: "Dicit [Thomas] secundum rei veritatem ius naturale in communi idem est apud omnes, sed non omnibus est aequaliter notum. Sed in particular non est idem, nam alia est lex infirmi, alia sani, etc." (*Op. cit*., p. 126).

[17] F. Vitoria. *De legibus*, I-IIae, q. 95, a. 4 [lect. 124]: "Vtrum convenienter Isidorus dividit legem in ius gentium et in ius civile. [Quaestio] 105, art. 1, et I p., quaest. 105, a.3, et II-IIae, q. 50 [possibly a copy error: 57], et Contra gentes lib III, cap. 114, et opuscula 20 art. 20, dicit contra ea quae in isto articulo dicit. Sed de his infra, quaest. 100." (*Op. cit*., p. 132).

[18] Cf. F. Vitoria, *De legibus*, I-IIae, q. 95, a.2 (*Op. cit*., p. 124).

[19] F. Vitoria, *De iure*, q. 57, a.3, 1: " jus naturale est (…) quod ex natura sua est alteri commensuratum. Et hoc dupliciter contingere potest. Uno modo, ut de se dicit aequalitatem quaedam et justitiam (…). Illud

presupposes certain equity. Such equity may either be considered *absolute et per*, if there is a similar nature between those who are subjects of this relationship or *secundum aliquid*, if for attaining equity the consideration of the ends of the goods concerned and of their appropriate use is required . In the wake of Aquinas, Vitoria also considers that *ius gentium* is a natural right *secundum aliquid* rather than a natural right *stricto sensu*, since its precepts are not based on an equality of nature. Therefore, rather than evaluating the particular aspects of the things involved in a relationship, Vitoria places the force of law of *ius gentium* on the fact that it results from a human statement established by means of reason[20]. Thus, ius gentium depends on a *virtual consensus* which is based on the universality of human reason and results from human rational nature. This feature grants its universality and justifies that its force of law does not depend on its public form. The dependency of the *ius gentium* on humans' rational nature is clearly present in Aquinas, as previously mentioned. However, Vitoria points out that the two elements that ensure the legal force of *ius gentium* are consensus and reason, which are products of human faculties. To this extent, *ius gentium* is established by human beings and thus is a positive law.

This way of grasp Aquinas is put forward by Vitoria precisely when he discusses the place of ius gentium within the law, based on Isidore's tripartite division. For the two Dominicans, *ius gentium* distinguishes from natural law. However, is it a mere result of a remote deduction starting from *ius naturale* - a natural law *secundum quid* - as Aquinas states? Vitoria takes up the question posed by Aquinas. According to Isidore's distinction, ius gentium is a positive law, different from both the natural and the civil one. But this statement becomes problematic when we focus on the various precepts contained in *ius naturale.* If *ius gentium* is, in fact, a positive law and if, as Vitoria demonstrates in *De legibus*, some of its precepts converge with those of the Decalogue, then these would also be norms of a positive law, dependent on human consensus. Vitoria therefore considers, as had Thomas Aquinas, that the precepts of the

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quod primo modo est adeaquatum et absolute justum vocatur jus naturale, id est de iure naturale." F. de Vitoria, *Comentarios a la Secunda secundae de Santo Tomas* [1534], Vicente Beltrán de Heredia (ed.), Tomo III, Salamanca, 1934, p. 12.

[20] F. Vitoria, *De iure*, q. 57, a.3, 1: "Illud quod est adaequatum et iustum (…) ut ordinatur ad aliud justum, est jus gentium. Itaque, illud quod non est aequum ex se, sed ex statuto humano in ratione fixo, illud vocatur jus gentium. ita quod propter se non importat aequitatem, se propter aliquid aliud, ut de bello et de aliis, etc." (*Op. cit*, p. 12).

Decalogue are norms of natural law *absolute et per se* considered: they are fair per se and their fairness do not rely on any relation with any other object, and this is the Thomist conception of *ius naturale*[21]. But Vitoria affirms that the specific feature of *ius gentium* is the fact that it is not a good in and of itself and so it requires human consensus for the rise of equity. Thus it is an *ius positum*, that means, established by human beigns. [22]

The statement of Victoria regarding the essence of *ius positivum* indeed diverges from Aquinas's doctrine. According to the latter, a law is positive if it is proclaimed. In the case of human law, it will be proclaimed by humans. But every human law results from natural law as a rationally deduced description of its contents. Precepts of *ius gentium* and of civil law are both included on human law, differing by the type of reasoning required to deduce their conclusions from the principles. According to the primacy of rationality on which Aquinas bases his philosophical and theological doctrine, the distinction between the types of *ius* is also based on an epistemological model.

Nevertheless, Vitoria does not adopt this paradigm as such, or at least he will modify it. He considers that what makes a law positive is the fact that it is established by a legislator, whether human or divine, and he emphasizes this feature as the main difference between natural and positive law. The former is based on the principle of necessity by which the nature of things is ruled. The latter is based on the determination and the will of the legislator[23]. *Ius gentium* is this latter type of *ius*, since it is established by rational deduction and common sense. However, there are two ways of establishing this agreement or consensus. It can be establish privately and in this case it does not transcend the relationship between two people and cannot, therefore, have the nature of a law. The other way is to establish it publically and in this case it becomes a

[21] F. Vitoria, *De iure*, q. 57, a.3, 2: " Dicimus ergo cum sancto Thoma, quod jus naturale est bonum de se sine ordine ad aliud." (*Op. cit*, p. 14).

[22] F. Vitoria, *De iure*, q. 57, a.3, 2: « Jus vero gentium de se non est bonum, id est jus gentium dicitur quod non habet in se aequitatem ex natura sua, sed ex condicto hominum sancitum est." (Op. cit, p. 14).

[23] F. Vitoria, *De iure*, q. 57, a.2, 2: " (…) omne aliud ius a iure naturale est positivum. Dicitur enim positivum quia est ex aliquo beneplácito (…). Communiter doctores dicunt quod idem est jus naturale sicut ius necessarium (…), puta quod non dependet ex voluntate aliqua. Et illud quod dependet ex voluntate et beneplacito hominum dicitur positivum." (op. cit., p. 7).

law. Therefore, the right of peoples is a right established by consensus among people and is of a public nature, a fact which implies the consensus shared by all peoples and all nations. The fact of the dependence between ius gentium and virtual consensus of all peoples does not mean, however, that Vitoria defends the subjectivism of positive law. In the specific case of *ius gentium*, the dependence on natural law is upheld by the link between this *ius* and the common human nature which tends to the natural judgment of rightness. In fact, to consider *ius gentium* as positive law could endanger its universal and obligatory nature. Vitoria resolves this issue by stating that the precepts of *ius gentium* are the guarantee of the achievement of the primary principles of natural law, such as the preservation of peaceful relations between humans[24]. Therefore, although *ius gentium* is based on consensus or mutual agreement, its link to natural law and its universality are ensured[25].

The problem with the arguments put forward by Vitoria and his followers stems from the fact that these arguments migrate from the consideration of the law in general to particular precepts without establishing a clear distinction, within the diversity of precepts included in *ius gentium*, between principles *per se naturalis* and precepts of *ius positivum*. Instead of a theoretical discussion on this distinction, these authors frequently utilize practical examples, and their conclusions cause perplexity. Vitoria, for example, illustrates the positive nature of *ius gentium* and its *pene necessitas* by speaking of the situation of prisoners of war. *Ius gentium* stipulates that prisoners of war become slaves. But this does not occur among Christians, since said prisoners, if they are Christians, can attend trial, a right denied to slaves. Vitoria considers in this case a change in the precepts of ius gentium brought about by Christianity and, in the case of slavery, he states that 'a Christian cannot under any circumstances sell a slave'. In this particular case, the law of nations has been modified, or in Vitoria's words, partly

[24] F. Vitoria, *De iure*, q. 57, a.3, 4: " Ius gentium non necessario sequitur ex jure naturali, nec est necessario simpliciter ad conservationem juris naturalis, quia si necessario sequeretur ex jure natural, jam esses jus naturale. (…) Nihilominus tamen jus gentium est necessarium ad conservationem juris naturalis, et non est omne necessarium, sed pene necessarium, quia male posset conservari jus naturale sine jure gentium. (…) Posset quidem orbis subsistere si possessiones essent in communi, ut est in religione; tamen esset cum magna difficultate ne homines in discoridas et bella prorrumperent." (op. cit., p. 16).

[25] F. Vitoria, De iure, q. 57, a.3, 5: " (…) quando semel ex virtuali consensu totius orbis aliquid statuitur et admittitur, oportet quod ad abrogationem talis júris toto orbis conveniat, quod tamen est impossibile, quia impossibile est quod consensos totius orbis conveniat in abrogatione juris gentium. " (op. cit., p. 16).

abolished.[26] However, slavery would be in practice for many centuries and would be particular aggressive at Victoria's time.

Vitoria does not clearly establish the criterion for distinguishing principles of natural law *per se* from those of *ius gentium* based on consensus. Thus, it could be possible to consider that precepts of *ius gentium* that coincide with those of the Decalogue are based on consensus, and that the precepts could be revoked once the consensus change. This vagueness of criterion opens up the way for the possibility of the precepts of *ius gentium* to be diverted from natural law, leaving their determination to human arbitrium. This seems to be the central reason behind the criticism addressed by later commentators namely to Domingo Soto, whose doctrine regarding the genesis of *ius gentium* closely follows that of Vitoria.

Doming Soto's commentaries on the questions of the Summa under study here appear in a volume entitled *De iustitia et iure* (1552)[27]. Following Aquinas and Vitoria when discussing natural law, Soto explains that it contains evident principles whose knowledge is immediate and, for this reason, they do not need the intermediate role of human reason or divine revelation in order to be known. Principles *per se nota*, however, may be evident either *per se* or *quoad nos*. These latter needs to be explained by wise men.[28] Furthermore, since human nature has three levels - being, living and reasoning - in human nature there could be find natural principles at each one of these levels. Therefore, precepts belonging to *naturalis ius* vary according to these different levels at which humans participate in nature and the knowledge of some of these principles requires its rational deduction. Those precepts derive from natural law, even though they do not derive from it with the same immediate fashion of those which are

[26] Cf. *Ibid*., op. cit., p. 17.

[27] Domingo de Soto, *De iustitia et iure libri decem*. V. Carro and M. González (eds), Madrid, Instituto de Estudios Politicos, Vol. I-V, Facsimile of the 1556 edition, Salmanticae, Andreas a Portonarijs with Spanish translation, Madrid, 1967-1969. There is also an independent work of Soto's about S. Th., I-IIae, qq. 90-97: Domingo de Soto, De *legibus* (Ms. Ottob. lat. nº 782). F. PUY e L. NUÑEZ (eds.), Universidad de Granada, Granada, 1965. This piece, which lies outside the scope of this research, reproduces Soto's Salamanca lectures of 1538-1539. Given their chronological proximity with Vitoria's lectures (De legibus e De iustitia et iure) we can identify the two authors' dependence on doctrine (Cf. *Op. cit*., Estudio introductório, pp. XXV-XXIX).

[28] Domingo de Soto, *De iustitia et iure*, Livro I, q. 4, a.2 (Op. cit., Vol. I, pp. 30-31).

evident. Natural law, therefore, includes multiplicity in its precepts and in the way they are known.[29]

Soto goes on to explain that the tripartite division of law stated by Isidore, denotes the assumption of the notion of *ius naturale lato sensu* i.e., that which contains precepts derived in an absolutely general way from all nature, and the statement that *ius gentium* is a specific form of this law. The first precepts derive from instinct *a natura indictum*. The seconds derive from nature *propter discursum*, which denotes of the act of reason. These latter precepts integrate both *ius gentium* and civil law. This is indeed the way Soto explains the origin and scope of *ius gentium*. It is a *ius naturale* deriving from what is rational in humans, which is common to civil law. However, it differentiates from this latter from its scope, which is common to all peoples, while civil law is limited to and instituted by a particular community or republic[30].

In the explanation of the question whether all human law derives from natural law, Soto retakes the argument of Augustine in *De libero arbitrio I*, which Aquinas also adopts: '*omnis lex humanitus posita, si recta est, a lege naturae derivat*"[31]. Like Aquinas, Soto also affirms that this derivation of human law from natural law is *bifariam* so it can occur i) as conclusion derives from principles; or ii) as specific determinations of some common gender . Human law which derives in the first manner consists merely of a explicitation of natural law. This is the case of the precepts of the Decalogue. But that which originates in the second manner adds a new element which will determine the conditions under which an action is fair.[32] According to this distinction, Soto analyses the suitability of Isidore's division of law and proposes a quadripartite division of *ius humanum*, in accordance with what is formally contained in

[29] This doctrine is in accordance with that propounded by Thomas in I-IIae, q. 94, a.2 as well as that found in the writings of Vitoria.

[30] The question had been discussed by Aquinas and Vitoria and is based on a legal concept of Vlpianus. They utilise the expression *inclinatio natura* in an overly broad manner. Aquinas speaks of the tripartite division of the natural in order to delineate what is specifically human; the 16th-century writers follow his example. They, therefore, reject the overly ample view of nature held by the jurists. Nevertheless, upon defining human nature by way of a rational mental exercise, Vitoria and Soto assert that rational deduction of the law is a product of people and, therefore, they define human law as being positive law.

[31] Cf. Domingo de Soto, *De iustitia et iure*, Livro I, q. 5, a.2 (*Op. cit*, Vol. I, p. 41).

[32] Cf. *Ibid*. (*Op. cit*, Vol. I, p. 41-42).

its nature and with what is its intrinsic property.[33] Thus, first of all, it is a characteristic of human law *derivari a iure divino* in the twofold manner described above: *per modum naturalis illationis et per modum arbitrariae determinationes*. According to these principles, the first division of *ius humanum* is between *ius gentium* and *ius civile*[34]. Soto thus admits three types of *naturale ius*: that which derives directly from law without reasoning (*ius naturale*) that which derives through the mediation of reasoning (*ius gentium*) and that which derives by means of arbitrium (ius civile). However, this doctrine gives rise to a problem which, according to Soto, must be resolved. The doctrine leads to the conclusion that the precepts of the Decalogue must be included within those of *ius gentium*, as they are derived from natural law through reasoning. To overcome this difficulty, Soto introduces a distinction between the origin of *ius gentium* and the principle that establishes it as law.[35] As a result of this distinction, Soto proves that, regarding to its origin, *ius gentium* derives from *ius naturae*, while regarding to its establishment, it is a right of peoples.[36]

In Book III of *De iustitia et iure*, q. 1, a.2, Soto discusses whether the division between natural and positive law is appropriate. He begins by establishing the absolute necessity that *ius* be understood by way of its divisions: those obtained as a function of law seen as a regulating principle as well as those obtained according to its fairness, which is the object of justice. In addition, Soto observes that careful consideration must be given to the fact that the tripartite division of *ius* offered by jurists cannot be supported by the principle of equity (*non est ex aequo*), which is the essence of *ius*, nor can it the quadripartite division which adds divine law to the aforementioned three. Soto doctrine denotes that he considers *ius* as a principle shared by God and by man, since he states it as the main concept from which derives any subdivision.

Subsequently, each one of this iura is divided into either positive or natural. *Ius positivum* is further subdivided into *ius gentium* and *civile* Soto takes this approach

[33] Cf. Domingo de Soto, *De iustitia et iure*, Livro I, q. 5, a.4 (*Op. cit*, Vol. I, p. 44).

[34] Soto, *De iustitia et iure*, I. q. 5, a. 4: "Dicitur enim ius gentium quicquid mortales ex principiis naturalibus per modum conclusionis ratiocinati sunt." (op. cit, p. 44).

[35] Soto, De iustitia et iure, I, q. 5, a. 4: "(…) *quantum ad radicem, de iure naturae censetur; quantum vero ad explicationem et positionem, de iure Divino, tam antiquo, tum etiam evangelico*." (op. cit. p. 45).

[36] Ibid.: "(…) ratione originis omne ius gentium dicitur de iure naturae licet ratione illationis ac positionis nuncupetur ius gentium." (op. cit., p. 45).

based on the essential role of equity in law. Thus, there will be equality in the origin of the law since it derives either *ex natura rerum* or *ex conditione humanae voluntatis.*

In fact, Soto clearly adopts a new division of the law, regarding that stated by Aquinas. Doing so, he clarifies to some extent Aquinas' ambiguity which root was the use of different criteria in the explanation of the law and of the justice, to describe the origin of ius gentium.

Thus, this division of the law based on equity is the starting point from which Soto faces Aquinas question q. 57, a.3 in II-IIae: *utrum ius gentium sit idem cum iure naturale*. Soto clearly affirms that this question is to be answered with one single conclusion: *ius gentium et a iure natural distinguitur et sub iure positivo comprehenditur*. He declares that, although Aquinas did not explicitly state it, this is the necessary conclusion of its doctrine.[37] Soto repeat the arguments he explained in Book I of his *De iustitia et iure,* and states that *ius gentium* cannot derives from the concept of *natura* adopted by jurists but from the concept of *natura rationale* insofar as it arises from human discourse and it is established by humans. It is, therefore, a right rooted in human nature insofar as it is rational and capable to produce reasoning based on principles *prima facies*. Thus, it is a right established by humans. It differs both from *ius natural absolute* considered and from civil law, insofar as this one is based on human will, it is constituted by specific determinations and requires the reunion of people in a specific territory governed by its legitimate authority.

Soto explicitly states that *ius gentium* is a positive right. However, in his explanation of the nature of law he established the dependency of ius gentium on natural law which, in turn, depends on divine law. Nevertheless, later theologians, among which are Luis de León and Antonio de S. Domingos, will explicitly criticize Soto's interpretation of the origin of *ius gentium.* The foundations of their criticism is the idea that determining the nature of ius gentium as a positive right its objectivity will be endangered, insofar as its norms would depends on a human statement. Soto's doctrine is twofold problematic. On the one hand, because there is a coincidence, as Soto himself

[37] Hanc conclusionem, etsi expresse hic sanctus Thomas non ponat, tamen argumenta eius quibus initio quaestionis arguit ius gentium esse naturale, insinuante eius esse mentem id negare, affirmareque subinde esse ius positivum. Praterea quam quod 1.2. q. 95, a.4 id plane affirmat: ubi ius positivum dividit in ius gentium et civile". (Op. cit., p. 196).

admits, between the precepts of the Decalogue and those of *ius* gentium. On the other hand, because prominent fields of jurisdiction, such as domination, restitution, slavery and just war, risk to become submitted to the subjective decision of the legislator.

A question arises: why is this debate directed towards Soto if, on the one hand, Vitoria had argued the same thing and, on the other, Soto had clearly established the origin of *ius gentium* in relation to natural law? This fact can be understood by the progressive introduction of human potencies and overall of the will and free choice in the determination of the law. Vitoria had asserted clearly that common consensus even virtual between people is what gives to ius gentium its force of law. In turn, Soto argues that *ius gentium* is established by humans who determine precepts that are not evidently deduced, and that are based on the knowledge of the ends and the circumstances of a specific *res.* On the other hand, although *ius gentium* depends on *ius naturale*, it is very similar to *ius civile* and only differs from this latter due to its more universal range. All of these features (to which the distinction between objective and subjective rights should be added, which is discussed by Vitoria and Soto particularly in their commentaries on I-IIae, q. 62 onward) led some contemporary theologians to consider that Soto's arguments could constitute the basis for a doctrine that would make the rules of *ius gentium* dependent on human will and knowledge and therefore, also would be the precepts of the Decalogue, given their mutual inclusion.[38]

a) The Second School of Salamanca and the Spread of the Debate among Portuguese Universities

The controversy either on the interpretation of Aquinas' doctrine on the origin of *ius gentium*, or on Soto's statement on the same issue appears cleary in two commentaries later written by two theologians of the so-called Second School of

[38] Soto finds that before the divine revelation to Moses, the tenets of the Decalogue may have been understood to the *ius gentium* and that they are not of divine origin, as they are supernatural, but that they have been set out by God: "(…) nihil vetat si ante legam scriptam Decalogus censeretur posteriori modo de iure gentium. Nam est Decalogus adeo patens, vt principijs naturalis iuris sit proximus. At vero quoniam caligante iam mortalium mente praescepta illa digito Dei in tabulis exarata sunt, nomen obtinuerunt diuini iuris. Non quod supra naturalis sunt, sed quia Deo authore exposita" (*De iustitia et iure*, I, q.5, a.4: op. cit., p. 45).

Salamanca: Luís of Léon and Domingo Bañez. The former, in his *De legibus*[39] categorically rejects Soto's statement on the positive nature of ius gentium, while the latter in his *Decisiones de iustitia et iure*[40], seeks to justify and clarify it.

The way Luis of Leon enunciates Aquinas' question from I-IIae, q. 95, a.4 shows that he is focusing on Soto's division of law: "*Dubitatur: Vtrum Isidorus convenienter posuerit divisionem iuris humani et positivi*". His doctrine on the origin of *ius gentium* is that it is a natural right, although he recognizes that regarding this subject matter there is a contradiction either in Aquinas' statement, or in those of the jurists and the philosophers. Be that as it may, Leon considers Soto's position totally untenable[41]. The arguments which separate him from Soto are basically the following: a) the principles of the Decalogue would be principles of ius gentium[42]; ii) principles deduced from the self-evident principles are required for moral rightness, therefore they belong to natural law[43]: iii) principles necessarily deduced but based on a deduction *supposito alio* (i.e. not deduced *ex natura rei simpliciter*) belong to natural law as is the case of *ius gentium*.

Luis de Leon does not assert that *ius gentium* is a natural right *simpliciter*, but he also withstands to affirm that it is a *positive ius*. His position is that such an *ius* has an

[39] Luis de León. *De legibus. Tratado sobre la Ley*. J. Barriento García and E. Fernandez Vallina (eds.). Ed. Escuralienses, Madrid, 2005. A obra corresponde às lições proferidas a partir da cátedra de Durando, em Salamanca no ano 1570-1571.

[40] Domingo BANEZ, *Decisiones de iustitia et iure*, Veneza, 1595, Apud Minimam Societatem). A obra contém as lições dadas por Bañez na cátedra de Durando, em Salamanca, entre 1577-1580.

[41] Luís de León, *De legibus*, VI, a. 4: "Soto, in hac re explicanda (lib. I De iustita et iure, quaest. 5, art. 4) hac ratione videtur dividere ius naturale et gentium: quod principia prima quae sunt indita humanis ab ipsa natura et quae homines congnoscunt sine discursu illo, pertinente sola ad legem naturae. At vero conclusiones quae inde deducuntur, pertinente ad ius gentium. Et hac sententia stare nullo modo potest: primo quia inde sequeretur quod omnia praecepta Decalogi essent de iure gentium (…). Hoc autem est manifeste falsum, ut probo, quia in his quae sunt de iure gentium possunt ab una alia republica abrogari et deleri; at vero nulla republica potes delere praecepta Decalogi nec ullum." (Luis de León, *op. cit*., p. 226-228).

[42] Cf. Ibid.; op. cit, p. 228.

[43] Ibid., op. cit., p. 228-230.

intermediate nature, partly *naturale* and partly *civile*[44]. After explaining which manner pertains to each one of these parts, he deduces a second corollary, which surprise one, for it is similar to that of Soto: *simpliciter loquendo, ius gentium pertinet ad ius positivum*[45].

The doctrine of Luis of Leon doen not have the coherence and the completeness of that of Soto. However, it shows some common features which will progressively became doctrine: i) he assumes without doubt the division of law in natural and positive one; and ii) *ius gentium* is defined as an intermediate law between natural and civil. However, the arguments put forward by Soto to determine that *ius gentium* is a *ius positivum* are still criticized. The thesis on the intermediate nature of *ius gentium* requires the statement of which of its precepts belong to *ius naturale*, thus benefiting from the relative changelessness of the natural law; and which of them belong to *ius positivum*, thus be depending on rational deduction and human consensus and therefore would benefit from the relative mutability of human law.

Domingo Bañez commentary on *Summa Theologiae* II-IIa q. 57, reaffirms the doctrines of Vitoria and Soto, on the one hand, while insists on Aquinas' statement on the objective foundation of *ius gentium*.

In his answer to Aquinas' question – *vtrum ius gentium sit idem cum iure naturale* – Bañez introduces a group of distinctions which main goal is to explain how jurists and theologians use the term *ius gentium*, in order to solve the equivocal use of the term *ius gentium* which is at the basis of the controversial interpretation of Aquinas' texts[46]. Bañez states three main conclusions about the nature of *ius gentium*, deduced

[44] Ibid.,: " Ex his sequuntur aliquot: corollarium primum quod ius gentium est medium inter ius natural proprie dictum et ius civile; et quia medium participar quadam ratione extremorum, ita fit ut ius gentium partim conveniat cum iure naturali, et quadam ex parte cum iure civili." (op. cit., p. 232).

[45] Ibid.: "Secundum corollarium quod ius gentium, simpliciter loquendo pertinet ad ius positivum. Patet quia, ut diximus, non constat [tam] natura quam beneplácito et consensu hominum." (op. cit. p. 232).

[46] Bañez posits that when Aquinas follows the line of Isidore in S Th. I-IIae, q. 95, a.4, arguing that *ius gentium* is a *ius positivum*, he is not speaking as a theologian *sed in gratiam et more jurisconsultorum* (Cf. *Op. cit*, p. 12, col. 1 B). Bañez maintains that the entire misconception comes from the use of the term *ius gentium:* "A equivocatio est in ipso nomine ius gentium. Potest enim denominare ex eo, quod vis illius communis est ciuitatibus, vel ex eo quod a ciuitatibus vel earum principe institutum est. Et in hac secunda denominatione vtuntur hoc nomine Iurisconsulti (…)." (cf. Ibid., *op. cit,* p.12, col. 1, B-C). Bañez lists several misconcepetions around the use of the term, and identifies that Aquinas did not in fact

from the different views he analyses. His first conclusion is drawn from the general division of the law in natural and positive, and shows that the three forms of human law (*ius gentium, humanum* and *civile*) are all partly natural and partly positive[47]. The second conclusion is drawn from da division of human law which is always by definition a positive law. From this viewpoint, *ius gentium* is a positive law, as is *ius civile*. The difficulty, he argues, lies in demonstrating how *ius gentium* is a positive law. To demonstrate this statement he uses the arguments already proposed by Vitoria and Soto. First he states that, independently of the type of deductive reasoning, whether general or specific, all of the precepts of *ius gentium* were instituted by deductive reasoning and, therefore, are produced by humans. Secondly, ultimate condition of the morality of natural law must be considered: it avoid *malum per se* and order *bonum per se*. But, as Aquinas stated, in the case of *ius gentium,* there are goods which nature is indifferent, and which goodness or guile depends on the consideration of the goods concerned and of their ends. Therefore, not all of the precepts of *ius gentium* are essentially good or bad and to this extent they from those of *ius naturale*. he same is also true regarding the rational deduction of those precepts, since those of *ius naturale* must necessarily derive from *prima facie* principles while those of *ius gentium* require a complex reasoning and the intellectual apprehension of the suitability of the goods concern regarding their ends. Despite these different origins, the precepts of *ius gentium* are deduced with such high proximity to those of *ius natural*, that it insures them the force of law[48]. Finally, the third conclusion places *ius gentium* in an intermediate position between *ius naturale* and *civile.*[49]

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contradict himself; he affirms that, theologians considered it an *ius positiuum* (cf. Ibid., *op. cit*, p.12, col. 1B-2D).

[47] Cf. Domingo Bañez, *Decisiones de iustitia et iure*, q. 57, a.3 (*Op. cit*, p. 12, col. 1 C).

[48] *Ibid*.: " At vero ea quae introducta sunt iure gentium neque sunt principia per se nota: neque ex illis per necessariam consequentiam deducuntur, quamvis colligantur per consequentiam usque adeo probabilem et utilem humanae societati, ut nulla sint nationes, quae talem consequentiam non admittant." (*Op. cit*. p. 12, col.2E).

[49] *Ibid*.: "(…) ius gentium est quasi medium affinitatem habens cum iure natural et civili positivo: quoniam cum iure natural convenit." (*Op. cit*., p. 13, col.1B). *Ius gentium* shares with *ius naturale* i) the fact that it has never been published and requires no meeting of peoples in order to be approved; ii) its configuration according to which it is *quasi modus quiddam maxime necessaries ut ius naturae servetur*; iii) the fact that it is a right that must be preserved by all nations and which, if it is not preserved, all peoples would find suck a lapse inappropriate.

This debate reached the Portuguese universities, as can be identified in some of the 16th century commentaries on the Summa Theologiae , II-IIae, q. 57, a.3 produced therein. Here we will briefly refer to the arguments of Antonio de S. Domingos and Fernando Perez, two theologians who taught in Coimbra and Évora, respectively[50]. The former emphasizes the proximity between *ius gentium* and natural law. He recognizes that Soto states opposite [51], but considers that Soto's views affirm the dependence of *ius gentium* on human will, and in that case it would be no way to justify universal consensus, which is the origin of the ius gentium's force of law[52]. He admits, however, that some precepts of *ius gentium* are closer than others to natural law. Those without which human coexistence cannot subsist are indispensable, while those which are unnecessary for it may be abolished. Nevertheless, such abolition can only be made by God, even in the second case, since, as he states, *ius gentium* does not recognizes any superior authority but God[53].

[50] Luciano Pereña states that at the University of Salamanca, there must have existed a collective research program whose goal would have been to study the legitimacy of the Spanish enterprise in America, and that it would have involved a plan to disseminate the doctrines of the School of Salamanca aiming to reach the universities of Coimbra and Évora (Cf. Luciano PEREÑA, "Glosas de interpretación", in Juan DE LA PEÑA, *De Bello Contra Insulanos. Intervención de España en América.* Corpus Hispanorum De Pace, Vol. X, CSIC, Madrid 1982, pp. 149-153). The authors of the two works mentioned herein are among those that Pereña mentions as having lectured relevant doctrine; theirs are the only 16th century, authorized texts extant in Portuguese libraries.

[51] Antonius a Sancto Dominico, …….: " (…) Dominicus à Soto libri 3 de iustitia et iure q.1 art 3 tenet oppositum, dicit enim quod ius gentium non pertinet ad ius naturale, sed ad ius positivum. Probat, ius naturale est illud quod ipsa natura constituit, ius autem gentium pendet ex placito hominum, ergo non est naturale. »

[52] Antonius a Sancto Dominico, …….: « [f7r] ius gentium quantum est de se non habet **unde** obliget, non **enim** fertur autoritate alicuius principis vel praelati, sed tantum ex commune hominum consensu non quidem communicato inter se, quia tunc haberet autoritatem à Republica, sed quia cuilibet ita visum est. (…) Igitur ius gentium si habet robur habet à lege naturale."

[53] Antonius a Sancto Dominico, …….: "Attendendum est ergo ad id quod ipsum ius praecipit id est ad materiam, et si illa talis fuerit quod sine illa humanus convictus vix aut nullo modo possit sine illo subsistere, tunc est indispensabile (…). Si autem aliqua fuerint sine quibus potest humanus convictus subsistere, tunc ista non quidem sunt dispensabilia nisi **solo** à Deo, quia nullum alium superiorem recognoscit ius gentium nisi solum Deum: sed nihilominos potuisset per dissuetudinem abrogari."

Although brief, the commentary by Ferdinandus Perez reformulates Aquinas' question and presents it in a disjointed manner - *vtrum ius gentium potius ad ius naturale quam ad positivum pertineat*. Doing so, he assumes the doctrine of the intermediate position of this *ius*, and states that the dilemma is based on knowing whether *ius gentium* is closer to natural or to positive law. He exposes the thesis defending one or another of the disjunctives and finally he states his doctrine. He ascertains that *ius gentium* includes a variety of precepts. Some of them belong to natural law and coincide with the principles of moral law contained in the Decalogue, while others are precepts of a positive law, depending on the laws established by humans and on the consensus among them, and this latter characteristic differentiate them from precepts established by the *respublica* .

Perez considers *ius naturale* as a right instituted by the creator of nature with no human interference or institution[54]. In contrast, *ius gentium* is a right sanctioned by human reason, and so it as a *ius positivum*[55]. However, since he formulated the question in an alternative way – is it nearer to natural or to positive law? – he finally adopts the thesis of Aquinas and affirms that *ius gentium* is nearer to natural right. In fact, even when it cannot be deduced as a necessary consequence of natural right, it can be deduced by an imperative and necessary reasoning. He ascertains that this is the right way to understand Aquinas' doctrines; otherwise he would be contradicting himself[56].

Despite the fact that this study has limited itself to a study of the debate among some 16th century commentators on Aquinas' Summa Theologiae and that it is focused on the origin of *ius gentium*, it has allowed us to confirm the heuristic usefulness of this method. Regarding the issue on the origin of ius gentium, the 16th century scholars

[54] Lisbon, BNp, Cod. 2326, f. 3r: " (…) vocamus ius naturale quod natura ipsa vel potius auctor naturae lumine naturae dictante instituit absque hominum consideratione et institutione".

[55] Lisbon, BNp, Cod. 2326, f. 3v: "ius gentium patet esse ex humana institutione. (…) Deum esse colendum, parentibus esse deferendum honore et caet., ea vero sunt iuris gentium, quae quamvis lumina natura consona sint, tamen ratione et institutione humana sunt sancionata, dum homines finis circunstantias et rerum eventus considerarunt."

[56] Lisbon, BNp, Cod. 2326, f. 3v: "(…) ius gentium quamvis simpliciter humanum sit tamen potest quodammodo ius naturale vocari, quia a naturale iure aliquo modo derivatur, quia etiamsi non per necessariam consequentiam tamen per vigentem rationem a iure naturale deducatur et ita videlicet explicandus Div. Th., alioquin ipse secum pugnabit."

adopt a division of the law based on both the concept of justice and on the legislator. The division established according to origin of the law, whether it is nature or reason, is subordinate to the aforementioned division. In the specific case of the determination of the nature and origin of *ius gentium*, the texts analysed show an increasing awareness of the intermediate nature of this *ius*, which is associated to the fact that ius gentium contain therein precepts either based in different principles (nature or reason considerated in a dichotomously manner) or differently derived from the same principle, which is the rational nature . The texts also show a the discussion of the issue of grasping that derives from grasping which precepts of *ius gentium* should be allocated to natural or to positive law, , or, for theologians who consider that ius gentium derives from human rational nature, the difficulty of grasping which precepts of ius gentium derive with immediateevidence of the primordial principles of practical reason and which are deduced by complex reasoning and thus derive from human institution . This difficulty does not arise only from a theoretical context and from the need to reformulate concepts which , from ancient and medieval worldview to the 16th century universities, suffered the erosion of the time. It is also linked to practical questions merging from the historical context surrounding this debate. In fact, these theologians arrive at reasoned deductions that are not easily reconcilable with the surrounding circumstances. This is the case for example, of the conclusions they reach about the legitimacy of slavery. The practice is understood by all to be a precept of human institution which ought to be abolished. However, they all demand for it the conditions of a *prima facie* principle (universal consensus, on the part of Vitoria[57], and a divine order, from Antonio de S. Domingos viewpoint[58]). The same paradox appeared in Soto's conclusion about the precept of the preservation of the live of the *legatores* in wartime. Soto recognizes that, according to ius gentium, , their lives must be protected. However, if they spread erroneous doctrines, they should be burnt by fire.

The ambiguities of Aquinas that formed our starting point as well as the contradictions among the 16th century commentators demonstrate the complexity of the discussion on the origin of *ius gentium.* However, they also highlight the importance of the analysis of these debates, either if they are investigate from the viewpoint of its dependency on the medieval texts and doctrines, or from the viewpoint of the doctrinal

[57] Vide supra, note 25.
[58] Vide supra, note 58.

debate held in their proper time. These kind of research, comparing texts and doctrines which are in appearance hard similar, has its own heuristic strongness, since it allows one to shed light on a period of the history of western philosophy which although decisive for a correct understand of the Europeans mental framework and identity, it is still hedged by dimness.