VOLUNTARISM IN THE EARLY MODERN PERIOD? ALPHONSUS DE CASTRO AND HIS PHILOSOPHY OF LAW

Sebastián Contreras Aguirre*

1. The debate on Voluntarism in Castro and Suárez

Elsewhere I have shown the inadequacy of characterizing Suárez's philosophy as voluntarist.[1] An attentive examination of his writings, not only of the *Tractatus* of 1612, but also, to name some, *De fine hominis*, *De anima* or *De bonitate et malitia humanorum actuum* – as well as some unpublished manuscripts[2] – clearly shows that the Eximius distances himself from the morality foundation theories proper to voluntarist thinkers, such as, in his opinion, that of William of Ockham.[3] Indeed, he holds that such models for justifying moral judgments disregard the order of nature, make divine rationality contradictory and end up legitimizing even the most corrupt of actions.

Those who insist on describing Suárez as a voluntarist philosopher usually observe that his voluntarism is, in some way, an inheritance from Alphonsus de Castro, since Suárez himself hints that he follows the reasoning of this

* sca@miuandes.cl, Universidad de los Andes, Chile, Law School, Monseñor Álvaro del Portillo 12455, 7620001 Santiago.

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[1] S. Contreras Aguirre, *Is Francisco Suárez a Voluntarist Philosopher?*, «Zeitschrift für Kirchengeschichte», 129/1 (2018), pp. 41-55.

[2] Among other texts, I am thinking about the *Quæstio de legibus* (National Library of Lisbon, ms. 3856), the *Commentarius in Aristotelis Ethica* (François Mitterrand Library, ms. 6775) and the *Quæstiones de iustitia et iure* (Archive of Gregorian University, ms. 534).

[3] Francisco Suárez, *De legibus ac Deo legislatore*, Conimbricæ 1612, l. II, c. 6, n. 4.

author in his definition of law.[4] Now, if we start from the assumption that Suárez's philosophy of law cannot be considered as voluntarist, and if we assume that Castro exerts a certain influence on Suárez's theory, then we will have to determine whether Castro's legal philosophy is voluntarist or not.

The theories of Suárez and Castro are undoubtedly related: both studied at the same university, both regard themselves as part of the medieval Scholasticism renewal initiated by Francisco de Vitoria and both try to faithfully interpret Aristotle, Saint Thomas and the tradition of classical ethics. Similarly, both think that the will plays a fundamental role in the establishment of law, but both conceive the act of the will as a type of rational act that is directed by the practical intellect. In light of the above, this paper seeks to broaden our general understanding of Castro's philosophical system, while showing that, as in the case of Suárez, we cannot speak of a voluntarist or decisionist theory of the legislative act.

Alphonsus de Castro, "a most learned man," according to Diego de Covarrubias,[5] was the first Castilian theologian to challenge the Protestant notion of *sola Scriptura*.[6] His work directly confronts the legal principles of Lutheran religion. In this context, it has been argued that Castro's theory of crime is an extension of his counter-Protestant theology.[7] Simultaneously, he was the author of the first penal dogmatics in modern history.

Despite his relevance for legal history, Castro's figure has not been sufficiently examined. Although his division of law (in moral, mixed and purely penal) has been studied, his doctrine on the determination of natural law by positive law has been left aside. In this article, alongside examining his explanation of the purely penal law and his theory of punishment, we will study his explanation of positive law as an imitation of natural law.[8]

2. Castro's theory of natural law

It is said that Castro moves away from the scholastic tradition by defining law as an act of the will. As we will see, there is no reason to suppose he departs from the scholastic doctrine, because, somehow, laws really express the goal/desire of the legislator: there only exists as a law what the authority, after of

[4] *Ibidem*, l. I, c. 5, nn. 8-24.

[5] Diego de Covarrubias y Leiva, *Regulæ, peccatum. De regulis iuris lib. 6 Relectio*, Salmanticæ 1558, Pars prima, § 6.

[6] S. Berke, *Neoscholasticism and the Rule of God's Law: The Thought of the Castilian Theologian Alfonso Castro*, «Historical Reflections», 15/1 (1988), p. 81.

[7] H. Maihold, *God's Wrath and Charity: Criminal Law in (Counter-) Reforming Discourse of Redemption and Retribution*, in W. Decock, J. Ballor, M. Germann, L. Waelkens (eds.), *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations*, Vandenhoeck & Ruprecht, Göttingen 2014, pp. 149-173.

[8] Alphonsus de Castro, *De potestate legis pœnalis*, Analecta, Pamplona 2005, l. I, c. 2.

corresponding prudential assessment, decides to set as a life's standard for citizens – he does it freely, but not arbitrarily, because the nature proper to each act and contract determines/limits his normative decisions.

Castro's account of natural law takes elements coming from a wide variety of sources. Castro deemed himself as an author free of dogmatic constraints (i.e., more committed to searching for the truth than conforming to great masters). He defends a nonpartisan Thomism, considering the opinion of Aquinas as one among many other. This is why he says: "I venerate the sanctity of Thomas Aquinas, I honor his doctrine very much [...] but I do not think we should always think like him".[9] Indeed, the same may be generally said of the so-called School of Salamanca –which is a highly, nay, an almost completely heterogenous group of thinkers, indeed too diverse to be considered as a true school of thought. For this reason, although in the past I have defended this concept, currently I prefer to simply talk of Second or Late Scholasticism.[10]

Castro considers natural law as the law of the heart, spoken of in *Romans* 2:14-15.[11] It is a universal and perpetual law that instructs man to live according to the rules of the Decalogue.[12] Castro, in this sense, identifies the natural and divine laws.[13] While the Decalogue contains several of the fundamental moral norms, such as not killing the innocent, it cannot be said that natural law is fully contained in it. Many moral standards emerge historically, under the circumstances of social changes, and many natural precepts are made explicit with time and reflection. Therefore, it may be said that, in a weak sense, natural law is not the same everywhere.

It has been suggested that Castro's natural law theory is rigid.[14] Yet neither Aquinas nor any of the Spanish Thomists, including Castro, considered the natural law entirely immutable. The principles of natural law admit changes by mutation of matter, similar to Plato's example of the mutation of the precept that orders to return a deposit.[15] However, the negative moral principles are totally immutable: their contravention always involves moral guilt and they may not be infringed in good faith.[16]

The natural laws are engraved in reason and the positive laws are derived

[9] Alphonsus de Castro, *Adversus omnes hæreses*, Matriti 1773, l. I, c. 7.

[10] It is worthwhile to note that Aquinas was fundamental for various authors – among them Vitoria and Suárez –, but all of them departed from Aquinas when they considered that truth demanded it – a principle valid not only for Suárez, but also for Vitoria.

[11] de Castro, *De potestate legis pœnalis*, cit., l. I, c. 2.

[12] *Ibidem*, l. I, c. 2; l. II, cc. 12 and 14.

[13] *Ibidem*, l. I, c. 4.

[14] M. Pulido, *La ley natural en Alfonso de Castro*, ofm, in A. Culleton, R. Pich (eds.), *Right and Nature in the First and Second Scholasticism*, Brepols, Turnhout 2014, p. 295.

[15] Plato, *Respublica*, Hackett, Indianapolis-Cambridge 1997, l. I, 331e-332a.

[16] de Castro, *De potestate legis pœnalis*, cit., l. I, c. 12.

from them as their determinations.[17] These determinations are binding only insofar as they are rooted in natural principles.[18] Castro, like Pedro de Osma, asserts that positive laws are related to natural law in the same way that species are related to their genus.[19]

Like other scholastics, Alphonsus de Castro finds it hard to justify the prohibition of homicide, taking into consideration that God ordered Abraham to kill Isaac. The author argues that "the entire Catholic school agrees that only God can order somebody to take someone's life" and that "nobody is allowed to take his own life without special permission from God."[20] At the same time, he assumes the hypothesis that God always acts according to nature, in such a way that He never intervenes arbitrarily in the development of human history.[21] The only way to reconcile these doctrines is to postulate that God, *de potentia ordinata*, does not act against the nature of things, but that, *de potentia absoluta*, He could intervene in human life by his omnipotence. Even though this is an *ad hoc* solution close to decisionism, it is perhaps the only possible solution for a thinker like Castro, who accepts the natural law.

Some natural precepts only oblige when presupposing a human law. This is the case with the law that prohibits theft, which is not binding if there is no right to property. Similarly, even if the example is not equivalent, Castro thinks that "the law that prohibits servile work on rest days would never obligate [...] if a human law had not ordered before which day was designated for rest."[22] The example is not identical, because the right to rest exists regardless of whether it is recognized by the particular legislator.

3. Positive law and the will in Alphonsus de Castro

In his homilies on psalm fifty, Alphonsus de Castro remarks that men falter in the pursuit of virtue.[23] Thomas Aquinas asserts the same in *STh* I-II q. 95 a. 1, where he argues that positive law boosts virtuous life and it is necessary owing to human weakness. Castro, then, in line with Saint Thomas, postulates that law is a tool for human perfection.

The law expresses a right will (it is "the right will of the one who leads the people, promulgated in word or in writing, and with the intention that the subjects become bound to it"[24]). Such will conveys a clear understanding of divine mandates. It is a sign of the ruler's will and a criterion for correct conduct. Although the author writes that the law is not the work of the intellect[25] – because without the efficient act of the will the dispositions of the legislator would have no motivating force – he emphasizes that without prudence there

[17] *Ibidem*, l. I, cc. 2 and 10.
[18] *Ibidem*, l. I, c. 2.
[19] *Ibidem*, l. I, c. 2.
[20] *Ibidem*, l. II, c. 3.
[21] *Ibidem*, l. I, c. 8.
[22] *Ibidem*, l. I, c. 12.
[23] Alphonsus de Castro, *Super psalmum Miserere mei Deus homiliæ*, Matriti 1773, hom. I.
[24] de Castro, *De potestate legis pœnalis*, cit., l. I, c. 1.
[25] *Ibidem*, l. I, c. 2.

is no law.[26] Moreover, the rectitude of the will derives from its conformity with practical reason.[27]

Lacking any argumentative – and textual – solid enough basis, some scholars, like Brett and Daniel, have seen here a form of *voluntarism* – some even say *Scotism*, as if *Scotism* and *voluntarism* were the same![28] I think they have overstated the role of the will. First, because Castro limits the power of the legislator's will. Second, because the definition of law as an act of the will refers and is limited to the positive law, what is, in a certain way, correct and accepted too by intellectualist authors such as Thomas Aquinas.[29] For Alphonsus de Castro, as for Thomas, the legislative decision freely adopted by the ruler becomes law, based on the wide range of options available to him.

In addition, law exists not when the legislator understands that something must be done, but instead when he orders citizens to do what is right.[30] Thus, Castro concludes that "what the prince wanted is called a law, not what he knew."[31] We also know that positive law belongs to the will by examining the

[26] *Ibidem*, l. I, c. 1.

[27] *Ibidem*, l. I, c. 1.

[28] A. Brett, *Luis de Molina on Law and Power*, in A. Aichele and M. Kaufmann (eds.), *A Companion to Luis de Molina*, Brill, Leiden 2014, p. 176; *id.*, *'The Good Man and the Good Citizen'. Miguel de Palacios and an Aristotelian Question in the Spanish Second Scholastic*, in F. Grunert, K. Seelmann (eds.), *Die Ordnung der Praxis*, Niemeyer, Tübingen 2001, p. 266; A. Pérez-Luño, *Francisco Suárez y la filosofia del derecho actual (Aspectos de su pensamiento jurídico ante el cuarto centenario de su muerte)*, «Anales de la Cátedra Francisco Suárez», 51 (2017), p. 12; R. Tuck, *Philosophy and Government: 1572–1651*, Cambridge University Press, Cambridge 1993, p. 139; M. Rodríguez Puerto, *La modernidad discutida (iurisprudentia frente a iusnaturalismo en el siglo XVI)*, Universidad de Cádiz, Cádiz 1998, p. 116; M. Rodríguez Molinero, *Alfonso de Castro y su doctrina penal: El origen de la ciencia del derecho penal*, Eunsa, Pamplona 2013, p. 51; C. J. Errázuriz, *La ley meramente penal*, Editorial Jurídica de Chile, Santiago 1981, p. 69; M. Pulido, *Posiciones antropológico-jurídicas en el tratado 'La fuerza de la ley penal' de Alfonso de Castro*, in J. Cruz (ed.), *Razón práctica y derecho. Cuestiones filosófico-jurídicas en el Siglo de Oro español*, Eunsa, Pamplona 2011, p. 144; *id.*, *La ley natural en Alfonso de Castro*, ofm, cit., pp. 290-295; *id.*, *Una reflexión sobre la tradición y modernidad en Alfonso de Castro a propósito de la ley*, «Cauriensia», 13 (2008), pp. 459-478; F. Todescan, *Lex, natura, beatitudo*, Cedam, Padova 1973, p. 108; S. Berke, *Neoscholasticism and the Rule of God's Law*, cit., p. 96; T. Olarte, *Alfonso de Castro (1495-1558). Su vida, su tiempo y sus ideas filosóficas-jurídicas*, Universidad Nacional, San José 1946, p. 107; A. Mañaricua Nuere, *La obligatoriedad de la ley penal en Alfonso de Castro*, «Revista Española de Derecho Canónico», 4 (1949), p. 43; W. Daniel, *The Purely Penal Law Theory in the Spanish Theologians from Vitoria to Suárez*, Gregorian University Press, Roma 1968, pp. 77-82.

[29] Thomas Aquinas, *Summa theologiæ. Aquinas: Political Writings*, Cambridge University Press, Cambridge 2004, I-II, q. 90, a. 1, ad 3.

[30] de Castro, *De potestate legis pœnalis*, cit., l. I, c. 2.

[31] *Ibidem*, l. I, c. 1. However, Castro writes: "of course I demand prudence in the legislator so that he knows how to discern what he must legislate; but from here it does not follow that the law is prudence or an act proper to it. With such a criterion we would have to conclude that all virtues called moral should be reduced to prudence, because none, without a prior prudence, can realize its object."

legislative acts: to command, to prohibit, to allow and to punish are all acts of the will. On top of that, the author says that the etymology leads us to the same conclusion: the noun "law" (*lex*) derives from the verb "to choose" (*eligere*), and the choice is an act of the will.[32]

Positive law is the product of the will because in the determination of the law almost everything is derived from free choice. So, the determination is a contingent and prudential process, which does not only reproduce the moral order of divine law, but it even defines what the human good in a given context is. That freedom is, in any case, regulated. Castro limits the legislative action through the divine will expressed in natural principles: positive law, to be just, must reproduce the order of values of those principles which it imitates ("these laws, although they are properly called human, since they depend on the human will in order to obligate the subjects, contain, however, something more than the human will, to the point that without that imitation or specification of natural law, the will of man alone could not create an obligation of a necessary character for the subjects"[33]).

Castro, like Saint Thomas, explains the determination of the will on the basis of the analogy between the activity of the craftsman and the legislative function of authority. In his opinion, the final characteristics of an artifact, although they depend on the genre to which it belongs, depend even more on the will of the architect. The same thing happens at the legislative level: whatever is good in political society depends on the natural law, but it depends even more on the authority's opinion.[34]

4. The nature of positive law according to Castro

Positive law must agree with natural law[35] ("if it departs from natural law, it is not just, but if it does not add something to that law, it is not positive law"[36]). If it contradicts natural principles it has no binding force.[37] Now, if positive law contradicts the natural precepts, it becomes unjust due to the defect of matter,[38] and a law like that will only be enforceable *per accidens* to avoid scandal.

Positive law has to transcend natural law. Castro gives an example: a certain ecclesiastical law prohibits clerics from taking lectures on medicine for more than two months. Regardless of the reasonableness of this norm, the author is interested in emphasizing that such a law does not have a direct foundation in natural law but it is all the same mandatory.[39] Castro seems to be repeating Aristotle's teaching about positive law. According to the Stagirite, positive law refers to actions in principle done indifferently in one way or another,

[32] *Ibidem*, l. 1, c. 1.
[33] *Ibidem*, l. 1, c. 2.
[34] *Ibidem*, l. 1, c. 2.
[35] *Ibidem*, l. 1, c. 5.
[36] *Ibidem*, l. 1, c. 2.
[37] *Ibidem*, l. 1, c. 5.
[38] *Ibidem*, l. 1, c. 5.
[39] *Ibidem*, l. 1, c. 4.

but, once regulated by law, one of the alternatives is just and its contrary unjust.[40]

Nobody may despise the legislator or ruler.[41] On the contrary, everybody must respect and obey them even more than our parents:

> in civil matters one must obey the king before the father [...] For example: if a father orders a son to cultivate the fields and a prince orders him to go to war to defend the fatherland, the prince's mandate is stronger than that of the father, and the son is bound to the obedience of the prior over the latter. Because the public good is greater and wider than the familiar good.[42]

As a side note, it is somehow puzzling how Castro extends the duty to honor authorities when they are unjust: we must obey them, he says, because thanks to their injustice men are purified.[43] Obviously, this is a supernatural reason. It exceeds the legal sphere. The author could have instead said that sometimes you have to obey unjust orders to avoid serious disorder, which is the common reason given by the late scholastics.

Additionally, Castro observes that "every hard-working citizen must fight for their national laws and for their vigilance as they would fight for the country itself."[44] Otherwise, through debilitating the force of laws, a weaker and more despicable country is built.[45] In the same sense: "if force is denied to the laws with whose motivation men are driven to good and cut off from evil, the republic will be exposed to the invasion of the worst enemies."[46]

Just like natural law, positive law must be possible.[47] In this regard, Castro teaches that no one can sin in what he could not avoid.[48] Law should look at the average man and what happens most of the time.[49] In addition, law must be appropriate to the place[50] (topographic differences carry sociological variations, and sociological variations imply legislative changes[51]). It must be also adjusted to time (laws once useful may be no longer convenient at another time).

Laws aim at promoting the political common good.[52] Starting from the common good, Castro speculates about the validity of certain laws that seem to seek the good of a few. He states that, if a law ensures the good of a private individual, but contributes to the public good, that law is fair. The reason is that such a law wants the welfare of the subject not as an individual, but

[40] Aristotle, *Ethica Nicomachea*, Hackett, Indianapolis-Cambridge 2014, v.7, 1134b 20-25.
[41] de Castro, *De potestate legis pœnalis*, cit., l. 1, c. 5.
[42] *Ibidem*, l. 1, c. 4. Thus, Castro concludes that "the power of the legislator is broader and more intense than the power of the father".
[43] *Ibidem*, l. 1, c. 4.
[44] *Ibidem*, l. 1, præfatio.
[45] *Ibidem*, l. 1, præfatio.
[46] *Ibidem*, l. 1, præfatio.
[47] *Ibidem*, l. 1, c. 1.
[48] *Ibidem*, l. 1, c. 1.
[49] *Ibidem*, l. 1, c. 1.
[50] *Ibidem*, l. 1, c. 1.
[51] *Ibidem*, l. 1, c. 1.
[52] *Ibidem*, l. 1, c. 4.

as part of society. His thesis, which is the common position of the late scholastics, is that insofar these laws benefit certain people, they also benefit the social body.[53] The same

> may be said of the laws that favor the ward, the orphan, the minors and the slaves. Although at first sight such laws might seem to have been dictated for the good of some individuals, they look in truth to the common good, because it is convenient for society that everybody respect their property, as it is said in the *Institutions*.[54]

For Castro, every law must be approved by the people. Naturally, this does not mean that each law must be subject to plebiscite. It is enough that the approval be tacit. This act of approval is required because lawmakers receive their power from society, which is the holder of the legislative power. In this sense, Castro writes that laws have value as expressions of the social will.[55] Now, to dictate a law against that will is tyranny: if a legislator dictates a law against the general will, that law may not obligate, unless the town had transferred all the power to the governor. But, Castro points out, "it is not credible that people be so detached from its own power."[56]

As an *image* of natural law, positive law obliges everyone, including those who did not give their consent to it. Castro explains this by saying that for those who were born after the law was enacted, a kind of implicit consent operates. Otherwise, "one would have to ask for consent from anyone who was born, or new laws would have to be passed every time new subjects were born, which is so absurd, that it is not worth taking it seriously."[57] This is because "on the occasion of the birth of a person, a society does not vary to the point that it can be conceived as another society."[58]

The just law is considered as dictated by God. As it is known, for Thomists God acts through human legislators, or, better, "God perfects through the just authorities."[59] For this reason, "the commands of superiors may not be called merely human mandates, since the authorities have received from God the power to bind."[60]

The power of legislators is not limited to the act of advising or enacting laws, but it is also coercive: legislators have the power to force citizens to comply with their laws. Otherwise, it should be said that the rulers do not have more authority over their subjects than a prudent man who teaches and advises.[61]

Modern societies solve the problem of the citizen's duty to know the law through fictions according to which each citizen is attentive to each act of promulgation. The defenders of this model argue it is the only way to ensure

[53] *Ibidem*, l. 1, c. 1.
[54] *Ibidem*, l. 1, c. 1.
[55] *Ibidem*, l. 1, c. 1.
[56] *Ibidem*, l. 1, c. 1.
[57] *Ibidem*, l. 1, c. 1.
[58] *Ibidem*, l. 1, c. 1.
[59] *Ibidem*, l. 1, c. 4.
[60] *Ibidem*, l. 1, c. 4.
[61] *Ibidem*, l. 1, c. 4.

the rule of law. Castro does not adhere to this system. In his opinion, "nobody is obliged to know all the laws."[62] Each citizen should only be aware of "those that are necessary for him to act with justice when he must act."[63] With this criterion, he continues, "it will not be necessary to know many laws, unless you want to get involved in many matters."[64] Despite the reasonableness of this opinion, the general criterion of legal theorists seems more appropriate because, from the procedural point of view, it causes less conflict and higher levels of legal certainty.

The authorities may dictate laws that regulate the subject's conscience. Castro confirms this doctrine against the opinion of the Lutherans, those "modern heretics who go beyond what Gerson opined" by denying obligatory force to human law.[65] Castro's thesis is that the Lutherans, because they deny the legislative power of men, "are convinced that no law or canon should be enacted, but that we must limit ourselves to the mandates of the divine law."[66]

Castro highlights the fact that human law seeks only the external order of the city.[67] In the terms of the current advocates of the natural law, it can be argued that Castro defends the hypothesis of limited government: public powers only regulate temporary tranquility and seek primarily to make good citizens over making good men.

It follows from Castro's teaching that the law modifies moral contexts. A simple contract of sale, which is consensual by definition, becomes solemn by the legislator's disposition. The same must be said of the contracting parties: every rational subject is, by nature, able to contract; however, the legislator can establish limitations to certain subjects – for example, with respect to age –, making them incapable of celebrating certain acts and contracts. Thus, the legislator can determine an age to reach criminal responsibility, specifying the original and abstract mandate of natural law, which only orders that adults who commit crimes be punished.

5. Castro and the criminal law

Criminal law is the law that sets the penalty that must be inflicted on a person for a fault committed.[68] Penalty is a passion that inflicts damage to the one who suffers it, or, at least, that by its nature can inflict it.[69] A criminal law is,

[62] *Ibidem*, l. II, c. 14. [63] *Ibidem*, l. II, c. 14. [64] *Ibidem*, l. II, c. 14.
[65] *Ibidem*, l. I, c. 4. [66] *Ibidem*, l. I, c. 4. [67] *Ibidem*, l. I, c. 4.
[68] *Ibidem*, l. I, c. 3. For a more detailed study of Castro's theory of punishment: H. Maihold, *Strafe für fremde Schuld? Die Systematisierung des Strafbegriffs in der Spanischen Spätscholastik und Naturrechtslehre*, Böhlau, Köln 2005; D. Müller, *Ketzerei und Ketzerbestrafung im Werk des Alfonso de Castro*, in F. Grunert, K. Seelmann (eds.), *Die Ordnung der Praxis*, Niemeyer, Tübingen 2001.
[69] de Castro, *De potestate legis pœnalis*, cit., l. I, c. 3; l. II, c. 3.

for instance, the statute of limitations, which sanctions the negligence of the owner in favor of the possessor in good faith.[70]

Criminal laws guarantee respect for moral laws and other non-criminal laws.[71] These laws have been enacted to permit the orderly running of society.[72] Castro writes that criminal laws are

> the sentinels that guarantee public order: they are the walls of the cities in which the security of the interior life is encrypted and with which the honest citizens are separated from the delinquents [...] They are like the social artillery, whose din make the vices [...] flee terrorized to other regions.[73]

The author thinks that no one would omit the punishment for terrible acts such as robbery or homicide. There is no one so barbarous, he says in *De iusta hæreticorum punitione*.[74] The criminal sanction ensures public order and the temporal tranquility of society. Without the penalty, Castro notes, men would be like the fish of the sea, where the biggest eat the smallest.

There are different kinds of criminal law. Sometimes the law pronounces the judgment against the offender, thus reducing the judge's action to a mere act of declaration. These laws are called *latæ sententiæ*. They expressly set the penalty and are endowed with punitive efficacy.[75] Of this kind are the laws that impose forms of *ipso iure* excommunication.[76] Other laws are *ferendæ sententiæ*. In these cases, the law orders something concerning the penalty and it is mandatory for the judge to impose it. A court sentence is required for these laws to be effective.[77]

When analyzing the nature and condition of the criminal laws *ferendæ sententiæ*, it is necessary to distinguish two moments: one before the judge pronounces the judgment, and another after he has passed it.[78] Regarding the moment prior to the issuance of the sentence, two conclusions must be established: before the judicial decision (i) the prisoner is not obligated in conscience to suffer the penalty established in the law and (ii) the judge has the legal power to investigate and, if the offense is proven, to impose the corresponding penalty on the accused.[79] After the sentence, it must be borne in mind that "the convicted person is therefore obliged in conscience to serve the sentence."[80]

[70] *Ibidem*, l. II, c. 5.
[71] M. Rodríguez Molinero, *Alfonso de Castro y su doctrina penal*, cit., pp. 94-95.
[72] *Ibidem*, p. 94.
[73] de Castro, *De potestate legis pœnalis*, cit, l. I, præfatio.
[74] Alphonsus de Castro, *De iusta hæreticorum punitione*, Lugduni 1556, l. II, c. 3.
[75] M. Rodríguez Molinero, *Alfonso de Castro y su doctrina penal*, cit., p. 203.
[76] de Castro, *De potestate legis pœnalis*, cit., l. I, c. 8.
[77] *Ibidem*, l. II, c. 1; M. Rodríguez Molinero, *Alfonso de Castro y su doctrina penal*, cit., p. 203.
[78] M. Rodríguez Molinero, *Alfonso de Castro y su doctrina penal*, cit., p. 204.
[79] de Castro, *De potestate legis pœnalis*, cit., l. II, c. 2.
[80] *Ibidem*, l. II, c. 3.

With regard to the moment before the ruling, it may be said that "whoever commits a crime punishable by law with deprivation *ferendæ sententiæ* of all his property, may, while the judicial decision is not yet issued, perform all transactions proper to whom holds dominion over them."[81] According to this, Castro argues that "who profited in a game of chance is not bound by the common law to the restitution of the perceived, unless, perhaps, by some circumstance adhering to the game, which binds by divine or human law to the restitution."[82] In effect, the game could be vitiated by circumstances that make it unfair or invalid. In this hypothesis, a duty of restitution is created, as when a man wins a bet with a religious, who, because of his choice of life, has no ownership over his property.[83]

Regarding the *latæ sententiæ* laws, the legislator takes on the office of judge.[84] Here Castro's thesis is that one may incur the penalty decreed by a law without more requirements than the commission of the crime. Against those who deny that laws of this kind may be passed, Castro postulates that the legislator is superior to the judge; just like the judge may bind to the punishment in conscience, the law may also do so. Likewise, every man may be obliged in conscience to undergo a penalty without any sentence (for example, to make a payment in case of not fulfilling a contract or not doing what he has promised). Now, taking into account that the superior has in the imposition of sentences greater power over subordinates than these over themselves, it seems sufficiently clear that the authority may impose that same obligation on any of the subjects.[85]

When the law establishes a penalty and does not entrust the judge with its application, the offender must impose the corresponding sanction to himself. Castro puts, among others, the following examples: "the statutes of the minor friars – now in disuse – order that those who do not get up at midnight to sing with their brothers in the choir [...] the next day will eat only bread and water, lying on the floor of the refectory, while the others make their ordinary food"; and "in the order of the preachers, there is a rule that prescribes that he who breaks the silence seven times in the interval of two chapters makes a meal sitting on the floor."[86] About these laws, he states: "It is evident that such laws entrust to the same culprits the application of the penalties, without waiting for the superiors to force them. Proof of this is that those who wait for this are severely reprimanded."[87]

Through these and other examples, Castro tries to disprove the objection according to which criminal law does not entail a penalty in conscience if

[81] M. Rodríguez Molinero, *Alfonso de Castro y su doctrina penal*, cit., p. 206.
[82] de Castro, *De potestate legis pœnalis*, cit., l. II, c. 2.
[83] *Ibidem*, l. II, c. 2.
[84] M. Rodríguez Molinero, *Alfonso de Castro y su doctrina penal*, cit., p. 223.
[85] *Ibidem*, p. 221.
[86] de Castro, *De potestate legis pœnalis*, cit., l. I, c. 3.
[87] *Ibidem*, l. I, c. 3.

there is no judicial sentence involved. Those who think so, says Castro, "demonstrate by this fact that they give to the law less force than to the judge."[88] The problem, he says, "is that those who support such a theory are neither few, nor undocumented, but many and most learned, both theologians and jurists from the two branches of law."[89]

The author proves that law is superior to the judge arguing that a court sentence can often be appealed, but not so a *latæ sententiæ* ruling: "The reason behind is that, although it is lawful to assume that the judge could be wrong, nobody is allowed to suspect that the law was wrong: hence it cannot be appealed, just as if it were a certain and infallible sentence."[90] Hence, the law is valuable in itself. Like other scholastics, Castro emphasizes the fact that the law is a good, because it is a means to achieve human development. In a certain manner, one could venture that here the author paves the way for the modern feeling of respect for the law, which, at least in Castro, refers to the recognition of the intrinsic value of the norm.

To avoid absurdities in the interpretation of the penal law, sometimes it is necessary to depart from the natural sense of the words. In order to clarify this issue, Castro gives an example: let us suppose a law that states that "whoever spills blood in the classroom will be punished with jail". If a doctor had to cut the skin of a student and shed blood in that place, he could not be qualified as a transgressor of the law. On the contrary, Castro thinks that he should be paid for his work.[91] The reason is that the words of the law should not be understood as referring to any outpouring of blood, but only to what means an attack on people. Otherwise, "we would have to suppose iniquity in the law, which is never legitimate to suspect."[92] For this reason, Castro remarks, a church is not violated with the effusion of blood made to preserve health [...] Because, although it is said that a church is stained with the effusion of blood, this cannot be understood from every outpouring, but only from that which supposes [...] an irreverence with the sacred place.[93]

The laws that determine solemnities for contracts are usually criminal: noncompliance with the law entails nullity of the act. The foregoing refers to omitted solemnities that do not replace the law and that affect the nature of the contract. That is to say, to the solemnities whose omission leads to the inexistence of the legal transaction.[94]

6. Castro and the purely penal laws

Castro distinguishes three classes of laws: purely moral, mixed and purely penal. Purely moral law is what commands or prohibits something without

[88] *Ibidem*, l. I, præfatio.
[89] *Ibidem*, l. I, præfatio.
[90] *Ibidem*, l. II, c. 8.
[91] *Ibidem*, l. I, c. 7.
[92] *Ibidem*, l. I, c. 7.
[93] *Ibidem*, l. I, c. 7.
[94] *Ibidem*, l. II, c. 7.

establishing a penalty. A purely penal law is one that nothing rules or prohibits, but only imposes a penalty on anyone who does something. Finally, mixed law is what commands or prohibits something, imposing a penalty for its transgression.[95]

This distinction is strictly formalistic and responds to the way the law is established.[96] That is, if the formulation of the law only incorporates a conditional directive for imposing a penalty, that law will be purely penal, and should be interpreted as not imposing any pattern of conduct. If the formulation of the law incorporates a pattern of conduct and expressly indicates that citizens have to perform some action at risk of punishment, that law will be mixed. Finally, if the formulation of the law only incorporates a pattern of conduct without associating it with a sanction, that law will be purely moral.[97]

From the historical point of view, according to Prodi, the existence of criminal laws that carry no moral blame for the offender intended to avoid the scruples of the conscience in those cases where non-observance of the law was considered unimportant, because they did not refer to relevant public life issues (for example, non-compliance with fasting or silence ordered by ecclesiastical law).[98] Finnis thinks that the reason why Castro relates verbal forms with legal or moral obligation has to do with the need to oppose the error, widespread at the time of Castro, that whenever the legislator establishes a penalty, he does not try to force the conscience of the subjects to do or omit something. In other words, the penalty does not establish any kind of moral obligation. The aim, then, is to limit the exemptions from the positive obligation to the few cases in which the authority decided to use verb forms that do not contain any guidelines for the subject.[99]

The whole doctrine of Castro is summarized in the affirmation that the obligation of the laws varies according to the intention of the legislator.[100] Thus, the legislator is free to dictate a law that does not compel with moral culpability. From Castro's thesis, it can be inferred that purely penal laws are not principles of action, because they do not attempt to lead the life of man. I think Castro is wrong. The mere prescription of a punishment in those laws is proof that the conduct sanctioned by these laws is negatively evaluated in society. Otherwise, it would not be criminally sanctioned. In addition, if the

[95] *Ibidem*, l. 1, c. 9.

[96] W. Daniel, *The Purely Penal Law Theory in the Spanish Theologians from Vitoria to Suárez*, cit., pp. 77-83 and 164-170; J. Finnis, *Natural Law and Natural Rights*, oup, Oxford 2011², pp. 325-326; C. J. Errázuriz, *La ley meramente penal*, cit., p. 67.

[97] J. Finnis, *Natural Law and Natural Rights*, cit., p. 326.

[98] P. Prodi, *Una storia della giustizia*, il Mulino, Bologna 2000, p. 208.

[99] J. Finnis, *Natural Law and Natural Rights*, cit., p. 327.

[100] de Castro, *De potestate legis pœnalis*, cit., l. 1, c. 12.

obligation in conscience is a natural effect of the law, what Castro would be postulating that is it is possible to enact laws that actually are not *stricto sensu* laws, because they do not suppose any degree of obligation in conscience.

The examples given by Castro himself invalidate his position. According to him, the following norm is merely penal: "If one lies with the wife of another and commits adultery with the wife of his neighbor, the two adulterers shall die." Such an example, taken from *Leviticus*, implies tacitly the disapproval of the behaviors it sanctions. Hence, it can be said that those laws impose penalties to prevent them from being transgressed. That is, they impose penalties because, in reality, and like any law, these laws are principles of action.

Moreover, the acceptance of purely penal laws calls into question the distinction between penalty and tribute, that is, between the damage (*passio*) inflicted on the one who has acted against the legal system and the damage (*passio*) that is imposed on the citizen for a conduct permitted by the authority.[101] If both the purely penal law and taxes burden the citizen in the same sense, the distinction between one institution and another is obscured. However, although, in practice, it is difficult to see the limits of this difference –"because legislators, when imposing taxes, may not be clear if they want to use that public charge as a way to stop a behavior (smoking, for example) or as a tool to raise public funds, or both"[102] – , it is nonetheless essential that citizens be aware of what their situation in relation to society is when evaluating some possible behavior. The issue is not superfluous, because the citizen has to know whether the behavior encumbered by the legislator is contrary to public order, in which case it deserves punishment; or it is allowed for the purpose of raising funds; or it is disapproved but accepted given the payment of a tax.[103]

7. Castro, a voluntarist?

Castro points out at the beginning of *De potestate legis pœnalis* that he will define the human law as a precept of the will[104] – which is true, because, although a *reasoned will,* it is still a pure act of the will. Hence, authors like Brett or Finnis probably jump into rash conclusions when they hold Castro's philosophy to be voluntarist, legalist, Scotist, etc. (This is not the place to do it, but it would be worth showing that the concepts "voluntarism" and "Scotism" or "voluntarism" and "nominalism" do not necessarily go hand in hand: neither

[101] In this regard, it is said that the tax imposed by the purely criminal law "is not a penalty, but an agreed or settled *price*, a fee that is paid to obtain a waiver of the law". J. Cruz, *Fragilidad humana y ley natural*, Eunsa, Pamplona 2009, p. 248.

[102] J. Finnis, *Natural Law and Natural Rights*, cit., p. 332.

[103] *Ibidem*, pp. 331-332.

[104] de Castro, *De potestate legis pœnalis*, cit., l. I, c. 1.

is it clear that Scotism is voluntarist, nor a moral theory that is considered voluntarist always entail nominalism[105]).

Castro does not hold that positive law is a capricious command of the legislator. He expressly points out that this act of the will must be adjusted to prudence[106] ("it is clear that the legislator needs prudence to conveniently decide what he has to impose as law"). When defining human positive law as a precept of will, Castro is simply emphasizing that the person in authority creates a law by freely choosing an option –which will serve as a guiding criterion for the citizens' behavior – from among the multiple legislative alternatives available to solve a coordination problem. Nothing of this should surprise us or seem a novelty to us. In juridical language, it is said that the legislator, when establishing a positive law, imposes excluding reasons for action. In other words, the positive laws – called *arbitraires* by Domat at the end of the seventeenth century[107] – are those that deal with matters that, in principle, could be indistinctly determined in one way or another, but that, once the authority has given the law, only one option is reasonable.[108] Aquinas sets forth the active role of the will in the creation of what is right as follows:

> The human will can make anything just by common agreement provided that the thing in question has nothing about it which is repugnant in itself to natural justice; and it is in matters of this kind that positive right has its place. Hence the Philosopher says at *Ethics* V that 'in the case of the legally just, it does not matter in the first instance whether it takes one form or another; it only matters once it is laid down.'[109]

Castro, like St. Thomas and Suárez, thinks that human laws must pass the rationality test of natural law. This law, engraved in nature,[110] evaluates, as a criterion of justice, the decisions of the authority, which cannot be contrary to the divine order or to the fully good development of the human person. Thus, for example, if a contract is prohibited by natural law, it cannot be remedied in any consideration. In terms of the theoreticians of law, it will be void from the outset.[111]

Human nature has a certain order and the world follows a certain logic. Correspondingly, Castro thinks that there is no place for contradiction in the

[105] The prologue to the Scotist *Ordinatio* is enough to realize that the indifferentism of the will of which Scotus speaks in some passages of his work does not amount to an absolute indetermination of freedom with respect to reason. Praxis is always a joint action of the intellect and the will, an intellect that governs and orders the will of the appetite. Thus, it is difficult to conclude that Scotus is a voluntarist author.

[106] DE CASTRO, *De potestate legis pœnalis*, cit., l. I, c. 1.

[107] J. DOMAT, *Traité des lois. Œuvres complètes de J. Domat*, Firmin Didot père et fils, Paris 1828, t. I, c. 1, § 1, p. 36.

[108] ARISTOTLE, *Ethica Nicomachea*, cit., v.7, 1134b 20-25.

[109] THOMAS AQUINAS, *Summa theologiæ*, cit., II-II, q. 57, a. 2.

[110] DE CASTRO, *De potestate legis pœnalis*, cit., l. I, c. 2.

[111] *Ibidem*, l. II, c. 2.

order of reality. God, although omnipotent, cannot go against his choices, for the divine will is supremely perfect insofar as it is guided by the most perfect divine intelligence. God, then, who cannot act against his *potentia ordinata*, cannot contravene the order of the universe imposed by his creative reason, not even through an infinite act of his will. God is no evil genius who governs the world in a capricious way. Precisely because he is the supremely perfect being, the best possible universe or the best plan of life for man he has thought will in fact be the best that can exist – although the supernatural help is required to perceive that it is really so.

Another reason to exclude Castro from the *voluntarist party* comes from his definition of law as a "right will."[112] The justice of every law depends on its conformity to divine law, so that every law must reflect the order that Providence has given to the world.[113] Regarding human law, it can be said that it indicates an "upright will" because it is a tool of peace, a good that the citizen freely decides to take on himself. In other words, because human law is a good, the citizen wants it. What in the philosophy of Thomas Aquinas was an extrinsic principle of action,[114] the law, becomes here an intrinsic principle of operation,[115] because, if the citizen values life in society, his conscience will suffice to fulfill the commands of the norm (no external compulsion or coercion of any kind will be required). Yet, Castro suggests that a law will be a good only as far as it is possible, i.e., "only to the extent that it can be observed by all."[116] A law that is impossible to comply with will therefore be unjust. Consequently, that law must be resisted unless its resistance causes serious social disorder. In sum, a law will be a good only if it does not contravene the will of the people, which is the legitimate repository of power,[117] and only insofar as it seeks the welfare of all citizens, without preferring some over others.[118]

Castro adds that the understanding does not have the force to command effectively. Any intellectual judgment, such as "one must do good and not evil," is nothing more than an advice if the act of reason is not accompanied by the mandate of the will.[119] Now, the motivational force that the act of the will imparts to the intellectual judgement is also a kind of willing directed by practical reason. Then, it never happens that the will alone defines what is a good to be done or an evil to be avoided. The definition of human goods is the task of reason and not of appetite. What is good for man, according to

[112] *Ibidem*, l. I, c. 1.
[113] *Ibidem*, l. II, c. 10.
[114] Thomas Aquinas, *Summa theologiæ*, cit., I-II, q. 90, prœmium.
[115] See *Quæstio de legibus*, ms. 3856, National Library of Lisbon, prœmium.
[116] de Castro, *De potestate legis pœnalis*, cit., l. I, c. 1.
[117] *Ibidem*, l. I, c. 1.
[118] *Ibidem*, l. I, c. 5.
[119] *Ibidem*, l. I, c. 1. Since the command or prohibition of the will is required, Castro notes that "what the ruler knew is not law, but what he wanted".

the language of Castro and the scholastics, is given by comparison to the *recta ratio*.

The idea of man as a *causa sui* is also a reason why Castro inclines towards defining law as a precept of the will. What distinguishes man from other creatures is his free will. Neither God nor angels, let alone the stars, as some late medieval thinkers did, can force man to do something. To be free is man's nature, and God has arranged for all beings to act according to their nature. This freedom is such a precious gift that even when God wants to do good in man's life, man himself, because of his malice, may prevent Him from doing it.[120]

We must not forget that the will is a rational power. Now, the common thesis of Scholasticism, to which Castro subscribes, is that, among the rational powers, the perfection of the intellect is greater than the perfection of the appetite because of the greater perfection of its object. Hence, the operation of the will cannot take place apart from the act of knowledge that conceives an object as good. As late scholastics repeated, *the will is a blind power, but it sees thanks to understanding*. It should also be pointed out that the will is not simply a passionate impulse. The will implies a *deliberate, intelligent desire*, proper to man himself, according to Aristotle's teaching.[121] For that reason, the will can become the efficient cause of our conduct –just as it is the efficient cause of the act of legislation.

Notwithstanding that Castro is not a voluntarist thinker, he does consider the divine will as the highest norm of life from a supernatural point of view.[122] The whole Franciscanism is founded on the basis of abandonment to the will of Christ, which is not arbitrary, as the Gospels make clear, but just, healing and transforming.[123] In some way, Castro thinks, the will of Christ is the canon of every action.[124]

Finally, since nobody can claim ignorance or aversion to natural law,[125] Castro, like Suárez, denies that moral norms may be dispensed. In relation to these norms there is no place for *epikeia* or dispensation, neither on the part of God, even though he is its legislator, nor on the part of man, who can only dispense the conventions that he himself has given himself.[126]

[120] *Ibidem*, l. II, c. 14.

[121] ARISTOTLE, *Ethica Nicomachea*, cit., VI.2, 139b 5.

[122] DE CASTRO, *De potestate legis pœnalis*, cit., l. II, c. 5. God's will expressed in natural law is the norm of life, Castro says.

[123] FRANCIS OF ASSISI, *The Writings of Saint Francis of Assisi*, Dolphin Press, Philadelphia 1906, First Rule of the Friars Minor, c. 22.

[124] For example, it is Castro's interpretation of the Gospel passage in which Christ invites us to abandon everything to follow him. In any case, although our norm of life is nothing other than the will of Christ, "the Lord does not judge us harshly when he applies the law to us, but he moderates the rigor of law by having pity on us." (*Super psalmum Miserere mei Deus homiliæ*, hom. III).

[125] DE CASTRO, *De potestate legis pœnalis*, cit., l. II, c. 14.

[126] *Ibidem*, l. II, c. 5.

8. Conclusion

Castro is a merepenalist author. That means that he subscribes to the thesis according to which the legislator can dictate laws that do not obligate in conscience to act in a certain way. The center of its position resides on that legislators can force the citizens with varying intensities.

Castro has earned the fame of a voluntarist for his definition of human law as an act of the will. This is an unfair criticism, which does not consider the nuances that the author makes, as well as his affirmation that the rectitude of the will depends on its conformity with reason. The end of the positive law is the external order of society. Here Castro moves away from the perfectionist currents that postulate that laws seek to make men absolutely good. Castro, rather, subscribes to the hypothesis that positive law, by its natural limitation, only aims to make good citizens.

Castro's philosophy of law cannot be described as voluntarist. For this author, law is an act of the will only to the extent that the will of the legislator is right and adequate to the dictates of prudence. Put in such terms, Castro does not depart from the argumentative model of Aristotle, Aquinas or Francisco Suárez about the combined action of intellectual powers: the act of the will depends on and is directed by reason. The law is thus an act of the will adjusted to practical reason. Castro emphasizes the role of the will in defining the law only to show that the knowledge of the ruler alone does not bind the citizen. The intellectual apprehension by which a certain normative decision is conceived as reasonable only becomes law when it is accompanied by the efficient mandate of the will.

Finally, the positive law is an imitation of natural law. Imitation is not a simple reproduction. It is said, then, that positive law adds to natural law determinations that make it appropriate to different social contexts. The idea of Castro, which is an idea common to the Second Scholasticism, is that positive law changes with time and place, although it maintains the order of values expressed in natural principles. These principles coincide, in Castro's proposal, with the rules of the Decalogue. At this point the author does not take into account the long tradition of thought that begins with Aristotle and defends the possibility of change in natural law. If this law changes and adjusts to social circumstances, it is impossible to match the norms of the Tables of the Law. As it has been said, many natural precepts emerge historically, and many are also born from experience and reflection.

Abstract · This paper discusses the work of Alphonsus de Castro, one of the main sources of Francisco Suárez. Alphonsus de Castro is known among present-day scholars as "the father of criminal law", at least of the Spanish criminal law. He elaborates a theory of justice that is usually identified as being voluntarist and contrary to the

great tradition of Salamanca initiated by Francisco de Vitoria and Domingo de Soto. A detailed reading of de Castro's work leads, however, to a different conclusion: though de Castro comes close to a decisionist stance, for example, when explaining issues such as the immutability of the natural law in view of the sacrifice of Isaac, his overall teaching is more closely related to the tradition of Salamanca than what it is usually believed. Hence, although he defines the law as a precept of the will, he does not concede absolute autonomy to the will, for it is a power that must always follow the mandates of reason in its practical exercise.

Keywords · Alphonsus de Castro, voluntarism, will, law, Francisco Suárez.