

---

Artículos de Investigación  
La naturaleza, características e instituciones del *ius gentium*  
según Francisco Suárez



Carlos Isler Soto  
Universidad San Sebastián, Chile  
carlos.isler@uss.cl

**Prudentia Iuris**  
núm. 100, 2025  
Pontificia Universidad Católica Argentina Santa María de los Buenos Aires, Argentina  
ISSN: 0326-2774  
ISSN-E: 2524-9525  
Periodicidad: Semestral  
prudentia\_iuris@uca.edu.ar

Recepción: 15 marzo 2025  
Aprobación: 29 junio 2025

DOI: <https://doi.org/10.46553/prudentia.100.2025.7>

URL: <https://portal.amelica.org/ameli/journal/797/7975482010/>

**Resumen:** Francisco Suárez es ampliamente considerado como uno de los fundadores del derecho internacional, junto a otros escolásticos españoles. En su obra, así como en la de Vitoria, se diferencia por primera vez de modo claro la idea de un sistema de reglas consuetudinarias positivas que regulan las relaciones internacionales. Aunque se ha escrito mucho sobre el tema, en este artículo presentamos una contribución original a la bibliografía sobre el *ius gentium* en Suárez en cuanto exponemos de modo claro y analítico las características del *ius gentium* según Suárez, su lugar dentro de la jerarquía de sistemas jurídicos, y explicamos las razones que llevaron a Suárez a asignarle un rol subsidiario en la regulación de los asuntos internacionales, razones que tienen su fundamento en los principios de su filosofía política. Se muestra, asimismo, cómo su noción de *ius gentium* no coincide enteramente con la actual de derecho internacional, aunque se asemeja a ella.

**Palabras clave:** Francisco Suárez, *Ius gentium*, Derecho natural, Derecho internacional, Soberanía nacional.

**Abstract:** Francisco Suárez is widely considered to be one of the founders of International Law, among other fellow Spanish Scholastics. In his work, as in that of Vitoria, the notion of a system of positive legal customary rules regulating international affairs was for the first time clearly differentiated. Although much has been written on that matter, in this paper we present a novel contribution to the literature on Suárez's views on *ius gentium* in the sense that we carefully and analytically expose the features of *ius gentium*, its place among the legal hierarchy of legal systems, and explain the reasons that led to Suárez to assign to *ius gentium* a subsidiary role in regulating international affairs, reasons which are rooted in the basic tenets of his political philosophy. We also show how his notion of *ius gentium* does not exactly correspond to, although it resembles, our notion of International Law.

**Keywords:** *Francisco Suárez, Ius gentium, Natural law, International law, National sovereignty.*

## LA NATURALEZA, CARACTERÍSTICAS E INSTITUCIONES DEL

## References

- Aquinas, Thomas. *Summa Theologiae*, available in <https://www.corpusthomicum.org>.
- Borges de Macedo, Paulo Emílio Vauthier. *Catholic and Reformed Traditions in International Law. A Comparison Between the Suarezian and the Grotian Concept of Ius Gentium*. Cham: Springer, 2017.
- Castro Prieto, Jesús. “El derecho consuetudinario en Suárez. Su doctrina e influjo. Estudio histórico-jurídico comparativo”. *Revista Española de Derecho Canónico* 4, 10 (1949): 65-120.
- Domingo, Rafael *Elementos de Derecho Romano*. Pamplona: Aranzadi, 2010.
- Hart, H.L.A. *The Concept of Law*. Oxford: Clarendon Press, 1997.
- Hernández O.P., Ramón. *Francisco de Vitoria. Vida y pensamiento internacionalista*. Madrid: Biblioteca de Autores Cristianos, 1995.
- Iurlaro, Francesca. *The Invention of Custom: Natural Law and the Law of Nations, ca. 1550-1750*. New York: Oxford University Press, 2022.
- Larrainzar, Carlos. “La naturaleza del ‘derecho consuetudinario’ según Francisco Suárez”. *Ius Canonicum* 22, 44 (1982): 763-782.
- Raz, Joseph. “On the Nature of Law”. In id, *Between Authority and Interpretation. On the Theory of Law and Practical Reason*. New York: Oxford University Press, 2009, 91-124, Kindle Edition.
- Ross, Alf. *On Law and Justice*. Clark, New Jersey: The Lawbook Exchange, 2004 (1959).
- Schaffner, Tobias. “Francisco Suárez S.J. on the End of Peaceful Order among States and Systematic Doctrinal Scholarship”. In *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, ed. Stefan Kalenbach et al. New York: Oxford University Press, 2017, 56-77.
- Skinner, Quentin. *The Foundations of Modern Political Thought*, vol 2. New York: Cambridge University Press, 1978.
- Suárez, Francisco. *De Legibus*, vols. I-IV. Madrid: Consejo Superior de Investigaciones Científicas, 1971-1973.
- Suárez, Francisco. *Additiones Suarecii ad ius gentium*. In Suárez, Francisco, *De Legibus (II 13-20). De Iure Gentium*. Ed. L. Pereña, V. Abril and P. Suñer. Madrid: Consejo Superior de Investigaciones Científicas, 1973, 151-165. Vol. IV of the edition of the CSIC of the *De Legibus* and XIV of the *Corpus Hispanorum de Pace*.
- Suárez, Francisco. *De Legibus*, libri VI-X. In *Francisci Suarez e Societate Iesu Opera Omnia*. Ed. Charles Berton, vol. VI, Paris: Ludovico Vivès, 1856.
- Tierney, Brian. “Vitoria and Suárez on *ius gentium*, natural law, and custom”. In *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James B. Murphy. Cambridge: Cambridge University Press, 2007, 101-124.
- Vitoria, Francisco de. *Relectio de Potestate Civili*, 21, in id. *Relectio de Potestate Civili. Estudios sobre su Filosofía Política*. Ed. Jesús Cordero Pando. Madrid: Consejo Superior de Investigaciones Científicas, 2008, 7-67.

## NOTAS

- [1] Professor of Legal Philosophy, Faculty of Law and Social Sciences, Universidad San Sebastián, Valdivia, Chile. Licenciante in Legal and Social Sciences, Universidad Austral de Chile. Lawyer. Licenciante in Philosophy, Universidad de los Andes, Chile. Ph.D. in Law, Pontifical Catholic University of Chile. Ph.D. in Philosophy, Rheinische Friedrich-Wilhelms-Universität Bonn.
- [2] See Quentin Skinner, *The Foundations of Modern Political Thought*, vol. 2 (New York: Cambridge University Press, 1978), 135-187.
- [3] According to Rafael Domingo, the first author to use the phrase “*ius gentium*” was Cicero: see Rafael Domingo, *Elementos de Derecho Romano* (Pamplona: Aranzadi, 2010), 28.
- [4] See, especially, Justinian’s *Digest* I, I, 1; I, I, 4; I, I, 5; I, I, 9.
- [5] For instance, see Aquinas’s *Summa Theologiae* II-II, q. 57, a.3.
- [6] See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1997), 193-200.
- [7] Of course, the normative system we call “international law” itself is as old as man lives in diverse political communities, ever since having been concluded treaties among them. The novelty in the work of Vitoria was the theoretical differentiation of the concept that describes the practice. I take this distinction between having –and using– a normative system, and having the concept of it, from Joseph Raz, “On the Nature of Law”, in *id*, *Between Authority and Interpretation. On the Theory of Law and Practical Reason* (New York: Oxford University Press, 2009), 91-124. Kindle Edition. Of course, the normative system we call “international law” itself is as old as man lives in diverse political communities, ever since having been concluded treaties among them. The novelty in the work of Vitoria was the theoretical differentiation of the concept that describes the practice. I take this distinction between having –and using– a normative system, and having the concept of it, from Joseph Raz, “On the Nature of Law”, in *id*, *Between Authority and Interpretation. On the Theory of Law and Practical Reason* (New York: Oxford University Press, 2009), 91-124. Kindle Edition. On Vitoria and International Law, see Ramón Hernández O.P., *Francisco de Vitoria. Vida y pensamiento internacionalista* (Madrid: Biblioteca de Autores Cristianos, 1995).
- [8] See *De Legibus*, II, XVII, 3; vol. IV, 103. When quoting Suárez’s *Tractatus de Legibus, ac Deo Legislatore* (hereafter, *De Legibus*), I quote, as it is usual, the book, chapter and paragraph (here, II, XVII, 3), followed by the volume and page of the edition of the CSIC (Madrid: Consejo Superior de Investigaciones Científicas, vols. I-IV, 1971-1973) (here, vol. IV, 103), which is widely regarded the best one, so that the reader may easily find the quotation in this edition. Only when quoting *infra* book VII of *De Legibus*, I quote using the edition of the *Opera Omnia* of Charles Berton (Paris: Ludovico Vivés, 1856), since, as it is known, the CSIC edition of Suárez’s *De Legibus* has not reached book VII yet. Book VII of *De Legibus* is included in vol. VI of that *Opera Omnia*.
- 9] “Hoc autem ad omnia quae de iure gentium adducuntur, accomodari non potest”: *De Legibus* II, XVII, 7; vol. IV, 107.
- [10] “Addo vero ad maiorem declarationem duobus modis (quantum ex Isidoro et aliis iuribus et auctoribus colligo) dici aliquid de iure gentium: uno modo, quia est ius quod omnes populi et gentes variae inter se servare debent; alio modo, quia est ius quod singulae civitates vel regna intra se observant, per similitudinem autem et convenientiam ius gentium appellatur”: *De Legibus* II, XIX, 8; vol. IV, 134.
- [11] “Item foedera pacis et induciarum possunt sub hoc capite collocari; non quatenus servanda sunt, postquam sunt facta (hoc enim potius pertinent ad ius naturale), sed quatenus admittenda sunt et non neganda quando debito modo et rationabiliter petuntur. Hoc enim licet sit valde

consentaneum rationi naturali, tamen usu ipso et iure gentium videtur magis firmatum et sub maiori esse obligatione”: De Legibus, II, XIX, 8; vol. IV, 135.

- [12] See, “Sic etiam multa ex exemplis Isidori videntur dici de iure gentium, ut sedium occupatio, aedificio, munitio, usus pecuniae. Contractus etiam multi particulares possunt, hoc modo, dici de iure gentium, ut emptio et venditio et similia, quibus nationes singulares intra se utuntur”: De Legibus, II, XIX, 10; vol. IV, 137.
- [13] See: “[...] de iure gentium est ut nullus privetur possessione sua, etiam ad publicam utilitatem, nisi soluto pretio”: Additiones Suarezii, 10, in Suárez, Francisco, De Legibus (II 13-20). De Iure Gentium. Ed. L. Pereña, V. Abril and P. Suñer (Madrid: Consejo Superior de Investigaciones Científicas, 1973), vol. IV, 163.
- [14] See De Legibus II, XVIII, 7; vol. IV, 120.
- [15] “Nam lex naturalis una dicitur et plura continet praecepta, licet modo longe diverso. Nam in lege naturali est unitas collectionis”: De Legibus II, III, 16; vol. III, 45.
- [16] “Lex autem sicut et providentia respicit bonum commune in finem, et ideo omnia praecepta quae ordinantur ad finem eiusdem rationis, censentur unum ius et unam legem constituere”: De Legibus II, III, 16; vol. III, 45.
- [17] “[...] dicendum est in unoquoque homine plura esse naturalia praecepta; ex omnibus vero componi unum ius naturale”: De Legibus II, VIII, 2; vol. III, 126.
- [18] “[...] magnam habet cum iure naturali affinitatem”: De Legibus II, XVII, 1; vol. IV, 100.
- [19] See De Legibus II, XIX, 1; vol. IV, 125.
- [20] “[...] multa dicuntur esse de iure gentium quae non habent illam intrinsecam necessitatem, ut divisio rerum, servitus et alia quae infra videbimus. Secundo ac praecipue, quia ius gentium, nec circa prima principia moralia, nec circa conclusiones quae ex illis necessario inferuntur, versari potest”: De Legibus II, XVII, 8; vol. IV, 108.

For Scholastic philosophers, the main problem was that not only the Roman sources, but also Aquinas, one of the main authorities on the issue, had not been clear on whether *ius gentium* belonged to natural or positive law. In *Summa Theologiae* II-II q. 57, a3. resp, he seems to say, commenting on Ulpian’s doctrine, that *ius gentium* was a part of natural law, namely, that part that is proper only to man and that is not shared by other animals. Here, the whole idea of a natural law (*ius naturae*) common to man and other animals seems only to be a concession to Ulpian’s authority, since Aquinas is quite clear that irrational beings are no subjects of moral laws, unless this idea is understood as referring to that part of moral natural law that refers to inclinations that man has in common with other animals, like the inclination to reproduction, of which he speaks in I-II q. 94 a. 2.

In I-II q. 95 a. 4, resp, on the other hand, he had said that *ius gentium* was that part of positive law that could be derived with little or no reasoning from natural law as conclusions from principles.

- [21] “[...] praecepta iuris gentium ab hominibus introducta sunt per arbitrium et consensum illorum, sive in tota hominum communitate, sive in maiori parte”: De Legibus II, XVII, 8; vol. IV, 108-109.
- [22] “Unde tandem concludi videtur *ius gentium simpliciter esse humanum ac positivum*”: De Legibus II, XIX, 3; vol. IV, p. 127.
- [23] See De Legibus II, XIX, 2; vol. IV, 126.
- [24] “Est enim hoc *ius tam propinquum naturae et tam conveniens omnibus nationibus et societati earum, ut fere naturaliter propagatum fuerit cum humano genere*”: De Legibus II, XX, 1; vol. IV, 140.
- [25] “Praecepta iuris gentium in hoc differunt a praeceptis iuris civilis quia non scripto sed moribus, non unius vel alterius civitatis aut provinciae sed omnium vel fere omnium nationum constant. *Ius*

enim humanum duplex est, scilicet, scriptum et non scriptum [...] Constat autem ius gentium scriptum non esse; et ita in hoc differre ab omni iure civili scripto, etiam imperiali et communi”: De Legibus II, XIX, 6; vol. IV, 131.

- [26] “Nam si sermo sit de proprio iure gentium priori modo declarato, facile constat potuisse, ipso usu et traditione, in universo introduci paulatim et per successionem, propagationem et imitationem mutuam populorum, sine speciali conventu vel consensu omnium populorum, uno tempore facto”: De Legibus II, XX, 1; vol. IV, 140.
- [27] “[...] humanum genus, quantumvis in varios populos et regna divisum, semper habet aliquam unitatem, non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale praeceptum mutui amoris et misericordiae quod ad omnes extenditur, etiam extraneos et cuiuscumque nationis”: De Legibus, II, XIX, 9; vol. IV, 135.
- [28] See, “Hac ergo ratione indigent aliquo iure quo dirigantur et recte ordinentur in hoc genere communicationis et societatis. Et quamvis magna ex parte hoc fiat per rationem naturalem, non tamen sufficienter et immediate quoad omnia; ideoque aliqua specialia iura potuerunt usu earundem gentium introduci. Nam sicut in una civitate vel provincia consuetudo introducit ius, ita in universo humano genere potuerunt iura gentium moribus introduci. Eo vel maxime quod ea quae ad hoc ius pertinent, et pauca sunt, et iuri naturali valde propinqua”: De Legibus, II, XIX, 9; vol. IV, 136.
- [29] Suárez also says that some of the precepts of natural law regulate warfare, that is, they are part of what is today called the law of armed conflicts. See, De Legibus II, VIII, 9; vol. III, 135: “[...] etiam in statu naturae corruptae aliud est tempus pacis, aliud belli, in quibus diversa praecepta [of natural law] servanda sunt”.
- [30] Suárez says also that the rule “pacta sunt servanda” pertains to natural law, and he connects it explicitly with international treaties: “Idemque cum proportione dicendum est in octavo, nono et decimo exemplis de pace, induciis et legatis. Nam illa omnia fundantur in pacto aliquo humano; in quo tam facultas contrahendi quam obligationes fidelitatis et iustitiae, quae ex foedere seu conventionem nascuntur, ad ius naturae spectant. Solus usus potest dici de iure gentium propter convenientiam omnium gentium in usu talium rerum in genere. Veruntamen hic etiam usus est effectus iuris, non ipsum ius, quia hoc ius non ex usu, sed usus ex iure est”: De Legibus, II, XVIII, 7; vol. IV, 121.
- [31] “Item foedera pacis et induciarum possunt sub hoc capite collocari; non quatenus servanda sunt, postquam sunt facta (hoc enim potius pertinent ad ius naturale), sed quatenus admittenda sunt et non neganda quando debito modo et rationabiliter petuntur. Hoc enim licet sit valde consentaneum rationi naturali, tamen usu ipso et iure gentium videtur magis firmatum et sub maiori esse obligatione”: De Legibus, II, XIX, 8; vol. IV, 135.
- For Suárez, ultimately, every kind of obligation, of every kind of normative system, depends, at least remotely, from natural law: “Aliquando vero habet lex humana alios effectus circa res ipsas in quibus actus virtutum versantur, et tunc saepe fieri potest ut licet aliqua mutatio in rebus facta sit per legem humanam aut per ius gentium aut etiam per voluntatem privatam, obligatio postea sic vel aliter operandi immediate nascatur ex lege naturali”: DL II, IX, 12; vol. III, 145. Suárez says that this is the case even of divine positive law: see De Legibus II, IX, 12-13; vol. III, 144-146.
- [32] A fact noted by Borges de Macedo: “This does not mean that only the Law of Nations regulates relations between peoples. Natural Law also does. The pacta sunt servanda, the mutual obligation of the communities to respect their possessions reciprocally, as well as to repair the damage they may cause, and perhaps other provisions, are natural principles that rule the life of states”: Paulo

Emílio Vauthier Borges de Macedo, *Catholic and Reformed Traditions in International Law. A Comparison Between the Suarezian and the Grotian Concept of Ius Gentium* (Cham: Springer, 2017), 203.

Similarly, Tobias Schaffner says that “For Suárez, positive jus gentium is only one part of the law governing the relationship between nations. In addition to positive jus gentium, these relationships, e. g. war, are subject to rules belonging to natural law, (positive) divine law and, in the dealings between Christians, to canon law”: Tobias Schaffner, “Francisco Suárez S.J. on the End of Peaceful Order among States and Systematic Doctrinal Scholarship”, in *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*. Ed. Stefan Kalenbach et al. (New York: Oxford University Press, 2017), 71.

[33] Paulo Emílio Vauthier Borges de Macedo, *Catholic and Reformed Traditions...*, 205.

However, it has to be clarified that, contrary to what Borges de Macedo says, it is not simply the repetition of a practice that introduces customary law according to Suárez. Suárez makes clear that the practice has to be repeated with the intention to introduce a customary rule. Mere repetition of an action does not create a rule. See, on this, Jesús Castro Prieto, “El derecho consuetudinario en Suárez. Su doctrina e influjo. Estudio histórico-jurídico comparativo”, *Revista Española de Derecho Canónico*, 4, 10 (1949), 116-117.

[34] “[...] pactum vel promissio non inducitur sola consuetudine, nisi intercedat praescriptio vel supponatur aliqua lex vel institutio in qua talis consensus in obligationem pacti fundetur”: *Additiones Suarecii*, 6; vol. IV, 159. This phrase is repeated verbatim in *De Legibus VII, IV, 9*; *Opera Omnia*, Ed. Vivés, vol. VI, 144.

[35] Book VII of *De Legibus* is entitled “De Lege non Scripta quae consuetudo appellatur”: custom is a kind of law.

[36] Notice that this same conception seems to have also been that of Vitoria, who says that ius gentium does not stem only from human pacts, because it has the “force of law”, whose legislator is, then, the whole world: “[...] ius gentium non solum habet vim ex pacto et condicto inter homines, sed habet vim legis. Habet enim totus orbis, qui aliquo modo est una respublica, potestatem ferendi leges aequas et convenientes omnibus, quales sunt in iure gentium”: Francisco de Vitoria, *Relectio de Potestate Civili*, 21, in id. *Relectio de Potestate Civili. Estudios sobre su Filosofía Política*. Ed. Jesús Cordero Pando (Madrid: Consejo Superior de Investigaciones Científicas, 2008), 62.

[37] “[...] ipsamet gentium discretio et regnorum divisio est de iure gentium”: *De Legibus II, XVIII, 3*; vol. IV, 117.

[38] See *De Legibus II, XIX, 1*; vol. IV, 125.

[39] “Nam consuetudo recipiendi legatos sub lege immunitatis et securitatis, absolute spectata, non est de necessitate iuris naturalis; quia potuisset unaquaqueque communitas hominum non habere apud se legatos alterius, nec velle illos admittere; nunc tamen admittere est de iure gentium, et illos repudiare esset signum inimicitiae et esset violatio iuris gentium, esto non esset iniustitia contra rationem naturalem. Quocirca licet, supposita admissione legatorum sub pacto subintellecto, contra ius naturale sit non servare illis immunitatem, quia est contra iustitiam et debitam fidelitatem, tamen illa suppositio et pactum illud sub tali conditione iure gentium est introductum”: *De Legibus II, XIX, 7*; vol. IV, 133.

[40] “Iure autem gentium introductum est ut commercia sint libera, violareterque ius gentium si absque causa rationabili prohiberentur”: *De Legibus II, XIX, 7*; vol. IV, 134-135.

[41] See, “Nam si sermo sit de proprio iure gentium priori modo declarato, facile constat potuisse, ipso usu et traditione, in universo introduci paulatim et per successionem, propagationem et imitationem

mutuam populorum, sine speciali conventu vel consensu omnium populorum, uno tempore facto. Est enim hoc ius tam propinquum naturae et tam conveniens omnibus nationibus et societati earum, ut fere naturaliter propagatum fuerit cum humano genere; et ideo scriptum non est, quia a nullo legislatore est dictatum, sed usu convaluit”: De Legibus, II, XX, 1; vol. IV, 140.

[42] See, “In alio autem iure gentium longe difficilior est mutatio, quia respicit ius commune omnium nationum et omnium auctoritate videtur introductum, et ideo non sine omnium consensu tolli potest. Nihilominus tamen non repugnat mutatio ex vi materiae, si nationes omnes consentirent vel si paulatim introduceretur consuetudo contraria et praevaleret. Sed hoc licet cogitari possit ut non repugnans, moraliter non videtur possibile”: De Legibus, II, XX, 8; vol. IV, 147.

[43] “Alio vero modo potest aliqua communitas praecipere ut inter partes et membra sua tale ius gentium non servetur; et hic modus est possibilis et moralis”: De Legibus, II, XX, 8; vol. IV, 147. See, similarly, “dico quod principem fortasse posse ferre legem contra ius gentium, derogando illi quoad aliquid quod in suo regno et respectu suorum subditorum expedit non servari; ut v.g. quod in tali regno homines non sint servi, sed omnis sint liberi vel quid simile”: Additiones Suarezii, 12, vol. IV, p. 165. Similarly, De Legibus VII, IV, 6; Opera Omnia, vol. VI, 146: “Quapropter dicendum censeo absolute non repugnare aliquid de jure gentium per consuetudinem abrogari; ratio est, quia illud quod tantum est contra jus gentium proprium non est intrinsece malum, cum oppositum non sit de intrinseca obligatione legis naturae”.

[44] Brian Tierney, “Vitoria and Suárez on ius gentium, natural law, and custom”, in *The Nature of Customary Law. Legal, Historical and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James B. Murphy (Cambridge: Cambridge University Press, 2007), 122.

[45] Tierney, “Vitoria and Suárez...”, 124.

[46] Alf Ross, for instance, who also wrote on many issues of International Law, even denies that the term “law”, when applied to international law, has the same meaning as when it is applied to municipal law. See Alf Ross, 2004 [1959], *On Law and Justice* (Clark, New Jersey: The Lawbook Exchange, 2004 [1959]), 59-64.

[47] Notice that this does not mean that a state may be free not to comply with a bilateral treaty with another state. The rule “pacta sunt servanda” is a rule of natural law. We are speaking here of possible contradictions between the customary international rules and national legal rules.

However, let us add a further point: for the international treaty to obligate the state, it has to be compatible with the state’s constitution. The reason is clear: otherwise, it would be from the very beginning void since, Suárez says, when the lawgiver establishes a statute outside of its legislative powers, the statute is void: “Ad iustitiam autem ex parte agentis seu commutativam pertinent omnia quae capite octavo diximus, et inde etiam satis constat legem sine iurisdictione latam esse nulam”: De Legibus I, IX, 15; vol. II, 20. He follows here Aquinas who, among the causes of possible injustice of a statute, mentions the lack of powers of the lawgiver. “Quod vero haec iniustitia sufficiat ad nullitatem legis affirmat expresse divus Thomas”: DL I, IX, 16; vol. II, 21.

Since, in contemporary polities, a written constitution normally sets the limits of legislation, every act of an authority of that polity, including the signing of international treaties, be they unilateral or multilateral, that contradicts that constitution would be clearly, according to Suárez, void, and would not oblige that state.

Let us give an example: as it is widely known, the US Constitution recognizes a right to keep and bear arms. In the –highly unlikely– scenario that the US President signed an international treaty promoting civilian disarmament, that treaty would not oblige the United States.

- [48] Francesca Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations*, ca. 1550-1750 (New York: Oxford University Press, 2022), 73-74.
- [49] When commenting on the division of custom in universal, common, and particular, he says that “Ego vero sub primo membro praecipue pono illas consuetudines totius orbis, quae jus gentium constituunt, l. 2 diximus: nam illud revera est jus, et in suo ordine tamquam vera lex obligat, ut ibi probavi. Est etiam jus non scriptum, ut etiam est manifestum: ergo usu introductum, et moribus non unius vel alterius gentis, sed totius orbis”: *De Legibus*, VII, III, 7; *Opera Omnia*, vol. VI, 143.
- [50] See, “Unde, sicut rex potest statuere contra aliam consuetudinem, ita etiam contra hanc quoad illam partem quae suum regnum concernit, quia propter solam universalitatem ibi non est fortior vel immutabilior respectu suorum subditorum, sed solum respectu aliarum nationum”: *De Legibus*, VII, IV, 8; *Opera Omnia* vol. VI, 147.
- [51] Notice that the other *ius gentium*, the “local” one, also has subsidiary force in relation to national rules, but concerning internal affairs of the state, for instance, private law matters.
- [52] See, *De Legibus* II, XIX, 6; vol. IV, 132.
- [53] “Prima est movere et applicare subditum ad exercendam actionem, sub actione semper omissionem intelligendo. Principium enim movens et applicans ad exercitium actionis est voluntas”: *De Legibus* I, V, 15; vol. I, 91.
- [54] “Secunda est habere vim obligandi, quae proprie est in voluntate et non in intellectu; nam intellectus solum potest ostendere necessitatem, quae est in ipso obiecto; quod si illo non sit, non potest ipse eam tribuere; voluntas autem confert necessitatem, quae in obiecto non erat”: *De Legibus* I, V, 15; vol. I, 91.
- [55] See, “Est ergo tertia et vera sententia, quae imprimis statuit generatim, principis consensum ad vim consuetudinis esse necessarium”: *De Legibus*, VII, XIII, 6; *Opera Omnia*, vol. VI, 186. He speaks sometimes of a “tacit” consent of the prince: see *De Legibus*, VII, IX, 7; *Opera Omnia*, vol. VI, 172.

As it is widely known, the theory of custom as a tacit command of the sovereign, as espoused by John Austin, was devastatingly criticized by H.L.A. Hart. See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1997), 46-49. Hart asserted that it is illicit to conclude, from the inaction of a superior, that he necessarily approves, and therefore tacitly commands, the actions of state's officials, as judges are. This superior may ignore what the official does, or even knowing his actions, may not intervene for reasons other than mere approval.

However, it is not clear whether this criticism is valid concerning Suárez's theory of custom as a tacit command, since he expressly recognizes a kind of “legal consent” of the sovereign, which is different from the “personal consent” of the prince, and which is given by law itself.

“Est ergo tertia et vera sententia, quae imprimis statuit generatim, principis consensum ad vim consuetudinis esse necessarium [...] Deinde vero addit haec opinio, hunc consensum duobus modis posse intelligi: unum voco personalem, quia datur a persona principis, vel expresse consentientis, vel antecedenter dando licentiam ad introducendam consuetudinem, vel consequenter, aut concomitanter approbando illam, aut expresse, aut videndo et non impediendo. Alium vocare possumus consensum legalem, seu juridicum, quia non datur personaliter a principe, sed per ipsum ius. Quia si princeps statuit legem, ut consuetudo habens illas vel illas condiciones valeat, ex tunc consentit, et in particulari applicatur ille consensus ad similes consuetudines, quando introducuntur in virtute illius legis”: *De Legibus*, VII, XIII, 6; *Opera Omnia*, vol. VI, 186.

The key point here is whether this legal consent requires a previous statute by the prince stating which features should have the custom to be valid. If, as Suárez seems to say, this legal consent, “given by

law”, requires such a previous statute, then Suárez's theory can't withstand Hart's criticism of the theory of custom as a tacit command, since Suárez would still be unable to explain the legal nature of customs not expressly and personally approved by the prince in those countries which lack such a previous statute. Suárez is quite clear that, in some communities, customary law precedes historically written law: “[...] nunc constat consuetudinem saepe esse antiquorem jure scripto, et saepe noviozem, et aliunde scriptum esse praecipuum”: *De Legibus*, VII, proemium; *Opera Omnia*, vol. VI, 135. He mentions here the examples of Sparta and Athens.

However, according to Carlos Larrainzar, Suárez thinks that this “legal consent” is given by law every time a certain custom has certain features, especially its justice and reasonability, and therefore has to be presumed wherever a customary rule has these features: See Carlos Larrainzar, “La naturaleza del ‘derecho consuetudinario’ según Francisco Suárez”, *Ius Canonicum*, 22, 44 (1982), 781-782. If that were the case, Suárez's theory would be immune to Hart's criticism.

Notice, on the other hand, that Suárez is fully aware of some of the bases of Hart's criticism of Austin, namely, that mere inaction of a superior does not necessarily show approval: “[...] tolerantia sola, supposita scientia, non indicat sufficienter consensum, quia multa per patientiam toleratur, quae non approbantur”: *De Legibus*, VII, XIII, 12; *Opera Omnia*, vol. VI, 187, and that a prince can't know all the customs being applied in his kingdom: “[...] moraliter impossibile est consuetudines omnes ad principis notitiam pervenire”: *De Legibus*, VII, XIII, 8; *Opera Omnia*, vol. VI, 186.

## AmeliCA

### Disponible en:

<https://portal.amelica.org/ameli/ameli/journal/797/7975482010/7975482010.pdf>

Cómo citar el artículo

Número completo

Más información del artículo

Página de la revista en [portal.amelica.org](http://portal.amelica.org)

AmeliCA

Ciencia Abierta para el Bien Común

Carlos Isler Soto

**La naturaleza, características e instituciones del ius gentium según Francisco Suárez**

*Prudentia Iuris*

núm. 100, 2025

Pontificia Universidad Católica Argentina Santa María de los Buenos Aires, Argentina

[prudentia\\_iuris@uca.edu.ar](mailto:prudentia_iuris@uca.edu.ar)

**ISSN:** 0326-2774

**ISSN-E:** 2524-9525

**DOI:** <https://doi.org/10.46553/prudentia.100.2025.7>