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A Case against State Sovereignty from the Natural Law Tradition

"It is my contention that political philosophy must get rid of the word, as well as the concept, of Sovereignty: – not because it is an antiquated concept, or by virtue of a sociological-juridical theory of "objective law", and not only because the concept of Sovereignty creates insuperable difficulties and theoretical entanglements in the field of international law; but because, considered in its genuine meaning, and in the perspective of the proper scientific realm to which it belongs – this concept is intrinsically wrong and bound to mislead us if we keep using it – assuming that it has been too long and too largely accepted to be permissibly rejected, and unaware of the false connotations that are inherent in it". (J. Maritain, Man and the State, 29-30).

Keywords: civil sovereignty, disobedience, natural law, political philosophy, Thomas Aquinas's anthropology

When Jacques Maritain composed the lectures that became *Man and the State* he was less than a year removed from his service as French Ambassador to the Holy See and as a member of the U.N. Commission that drafted the Universal Declaration of Human Rights at Paris in 1948[1]. Given the frustration that drips from his text, it conveys a disappointment at the language of the United Nations Charter and the Universal Decla-

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[1] This paper incorporates materials from presentations for panels on the "Medieval Tradition of Natural Law," organized by Professor Harvey Brown for the 46th and 47th annual International Congress of Medieval Studies, held at the Medieval Institute, Western Michigan University, Kalamazoo, MI, May12, 2011 and May 12, 2012. I thank Professor Brown, Magdalena Plotka, and all of the panelists for their interest and support.

ration, as both included references to the sovereignty of member states. Maritain's concern may seem prescient in light of the threat to religious freedom posed by the secular and actively secularizing states in Europe and North America, and in light of the express concerns of Popes John Paul II and Benedict XVI about the tyranny of relativism in contemporary culture. Contemporary studies, written from different philosophical and religious perspectives, reopen the problem of sovereignty by reminding us how the concept was slowly developed into the modern doctrine of the absolute sovereignty of the state, whether the state was ruled as a monarchy by *divine right* or through the *general will* of the people[2]. From the first modern justification of political absolutism, some would argue, the final step to the totalitarianism and the culture of death was inevitable.

Be that as it may, the concept of sovereignty still is pervasive in all manner of political discourse. In serious academic studies of political thought and international relations, in economic critiques of globalization, and in crude popular condemnations of illegal immigration into the United States, "sovereignty" is the common term used to denote the territorial integrity of a state, the right of people to self-determination, and the rule of law in a constitutional democracy. The multiple permutations of qualifiers used by scholars to explain the 'softening' of the concept of sovereignty may be taken as evidence of what Maritain warned; namely, that the concept is bound to cause misunderstandings because of its false connotations. A quick search on Amazon.com reveals books on "complex sovereignty," "conditional sovereignty," "ecological sovereignty," "food sovereignty," and so on. It seems that Maritain may have been correct, but that he was jousting with windmills. There is never a lack of demand for 'soft' concepts in academia.

To assess whether Maritain's case against sovereignty is hopeless or irrelevant we must first try to understand more clearly the concept of sovereignty Maritain had declared to be "intrinsically wrong." Maritain was speaking from a particular historical and philosophical position. He was engaged in a struggle to defend liberal democracy in the aftermath of World War II and in the face of Soviet domination of Central and Eastern Europe; part of that struggle was the institution of international organizations to provide collective security and human dignity on a global scale. Philosophically he was committed to metaphysical realism; otherwise he would not speak of an intrinsically wrong concept. Furthermore, Maritain as a Catholic and an adherent to the philosophical teaching of St. Thomas Aquinas, understood human life to have an ultimate end that was supernatural, and, therefore, beyond the reach of any human authority, including the authority of the modern or postmodern state.

In what follows I will begin by discussing the textual sources and structure of the concept of sovereignty that Maritain condemned. I will then turn directly to the works of Saint Thomas Aquinas and give an account of the way that his theistic anthropology provides a framework to help us understand, even today, the way that human freedom and natural law set bounds on the scope of human authority in general, and civil authority in particular. I then turn to some applications in Aquinas own works, in the works of the John Courtney Murray, SJ, in the works of representatives of the second scholasticism in Sixteenth Century Spain, and in contemporary essays that interpret Maritain's contribution to the natural law tradition. In the concluding section of the work I consider what

[2] M. A. Gillespie, *The Theological Origins of Modernity*, University of Chicago, 2008; J. B. Elshtain, *Sovereignty: God, State, and Self* , Basic Books 2008; M. Burleigh, *Sacred Causes*, HarperCollins, 2007; idem, *Earthly Power*, Harper Collins 2005; G. Agamben, *State of Exception*, transl. by K. Attel, Chicago 2005.

we may have to give up if we are determined to apply a secularized version of the concept of sovereignty in contemporary democratic life, namely the idea that religious freedom and the freedom of conscience place real moral limits on the exercise of civil authority.

1. The Sovereignty Maritain Condemned

The concept "sovereignty" Maritain condemned arises from early modern arguments about the separate and absolute power of the ruler of a civil commonwealth[3]. So it cannot be viewed as entirely distinct from the process of secularization in society and politics in early modern Europe. Maritain's discussion of sovereignty begins with Jean Bodin's definition of sovereignty in his *Six Books on the Commonwealth*. Sovereignty is defined there as the absolute and perpetual power of the commonwealth. In order for a sovereign prince to exercise this power, it must be separated from the people and transcend the commonwealth, so that the sovereign prince is bound by the law of God and nature, but has supreme and uncontested authority over the commonwealth. Bodin was still under the influence of medieval constitutionalism, but his emphasis on the separateness and transcendence of the prince over the commonwealth is a step on the way to Thomas Hobbes's 'mortal god'. According to Maritain the original error in this account is that Bodin describes sovereignty as a right that is possessed in essence by the sovereign prince, when in fact the power is only exercised vicariously, as the prince is the vicar of the people of the commonwealth. For Maritain the right of self-government is always held by the members of the people, even as they submit to the civil government[4].

According to this 'intrinsically wrong' view sovereignty is a natural and inalienable right to complete independence and supreme power (implicitly independence from the Pope, and supreme authority over the church within the realm of the commonwealth) that is held separately from and absolutely over the body politic. It is not relative to the commonwealth, it cannot be conditional and it cannot be divided. This concept is expressed most clearly and supported most systematically in Hobbes's vision of the *Leviathan*, that mortal god who holds the members of the commonwealth in awe. Hobbes made it clear that justice has its origin of the will of him who by right has command over others, namely the sovereign representative. If we accept this concept of sovereignty we deny the reasonableness of protests against the law as unjust. A claim of injustice cannot be made against the person who is the origin of the standards of justice[5].

Maritain goes on to show that neither the body politic, nor the people, nor the nation nor the state could be sovereign in this separate and transcendent sense. The state, in particular, is an instrumental agency of the body politic, and remains bound by the laws and administration of the commonwealth, which we may call its constitution. The original error was later converted into the concept of the sovereignty of the people in Rousseau's myth of the general will. Like Hobbes' mortal god, the general will of the whole people is never wrong, and rules absolutely over the republic[6]. Thus the absolutism of early modern monarchs is turned on its head in the Jacobin movement of revolutionary France. It

[3] J. Maritain, *Man and the State*, University of Chicago, Chicago 1951, p. 28-53.
[4] Ibidem, p. 30-36.
[5] Ibidem, p. 36-40.
[6] Ibidem, p. 43-49.

was also in revolutionary France that we see the development of the doctrine and practice of ideology imposed through terror, which the historian Michael Burleigh describes as the attempt to replace Christianity with a secular religion[7].

If there is no standard of justice that transcends the law of the sovereign state, there can be no limit on the means that the sovereign state employs to achieve its ends. The development of 'ideology' as a technique of political education during the French Revolution clearly points us in the direction of modern totalitarianism. We here gloss over many problems of historical interpretation, including the way that philosophical doctrines of history, progress and the stages of human civilization contribute to the transformation of sovereignty from the divine right of kings to totalitarianism, and the technological and organizational innovations that produced the systematic violence utilized by totalitarian regimes.

2. The Alternative: Natural Law

Thomas Aquinas understood the human being to be made according to image and likeness of God. He undertakes an analysis of the type of lordship (*dominium*) human beings would exercise in the state of innocence[8], as part of a detailed commentary on *Genesis*, 1[9]. Thomas believed human beings were created in an order of grace and justice. The original order and innocence of human nature was possible because of God's creative grace. In that original state, human beings would have ruled over the other animals, not because they would have needed them for food or clothing, but in order to gain a certain experiential knowledge of animal life[10].

So far Thomas's account seems to be adhering to Augustine's view that God made rational creatures to be shepherds, not masters over slaves. In two subsequent questions he develops a complicated anthropology related to the concepts of hierarchy and microcosm. The key points for our inquiry are that Aquinas understands human beings to rule over created things in a way that is appropriate to the nature of the thing ruled, and that civil lordship, unlike mastery over slaves, has its origin in the order of human nature[11]. Human beings may be situated among a variety of categories of created beings. Human beings, like the angels, have intellect; like the other animals, have sensual powers; like plants, have powers of nutrition and respiration; and like inanimate objects, bodily existence. Since the intellect is the ruling capacity of human nature, human beings could not have ruled over the angels who have intellect in a more perfect way, but could have had lordship over all creatures that were not made according to image and likeness of God. Reason, in the order of human nature God created, is able to govern the irascible and concupiscent appetites by command. Human reason uses the bodily powers, and consumes external goods for hydration and nutrition.

Now in a society of people sharing this type of lordship, would all be equal? Yes, in the sense that none were condemned by sin. However, Thomas points out that there are other kinds of disparities among human beings that are not rooted in sin.

[7] See M. Burleigh, op. cit.
[8] St. Thomas Aquinas, *Summa Theologiae*, I, 96, Blackfriars, 1963 & other dates.
[9] Ibidem, I, 90-102.
[10] Ibidem, I, 96, 1.
[11] Ibidem, I, 96, 2-4.

Disparities of sex and age, and disparities of moral and intellectual virtue are not necessarily rooted in sin, but rather are natural parts of the diversity of human nature in society, and would have existed in the original state.

At this point, Thomas turns to the very common ancient and medieval distinction between two kinds of lordship or ruling activity: ruling over slaves and ruling over free people. He posits a natural appetite of the human being to pursue one's own good, citing Aristotle's statement from *Metaphysics* that the free man is because of himself (*Metaphysics* X). To be a slave is to belong to another, and therefore to be directed toward the good of another. Since slaves are driven from their appetite to guide their own existence, and ruled for the good of another, slavery must cause suffering, and could not be appropriate to the order created by God in the state of innocence. Civil rule entails directing free people to their proper good and coordinating their actions for the common good. In addition, someone who is superior in knowledge and wisdom would have a responsibility to care for the community. So, civil lordship has its origin in human nature, and is not merely remedial for sin, but necessary to direct people to the common good.

Human nature involves inclinations to many kinds of goods. If civil rule is to allow the members of a society to pursue their own goods and direct them to the common good, it must observe limits on the role of civil authority that are imposed by the natural order of human goods. In the article on the various precepts of natural law in the question on natural law[12], Thomas uses a framework borrowed from Cicero's discussion of the cardinal virtues in *De officiis*[13] to explain the way that the various precepts of natural law arise from the variety of inclinations to natural goods. To begin with, human beings share with all substances an inclination to preserve their being, and so human beings have an inclination to preserve their lives. Human beings share with other animals an inclination to reproduce, and thus an inclination to marriage and the education of children. Finally there are specific inclinations of human beings as rational animals, namely that they seek to know the truth about God and to live in society.

Since human beings are social and political animals, Thomas must admit a duty of obedience to people who exercise authority in social and religious societies as well as to people who exercise civil authority. This is discussed in a question from the treatise of justice on the virtue of obedience, which is placed within a series of questions on virtues annexed to justice[14]. The limits of obedience to authority identified in the articles of the question correspond, to a large extent, to his account of the natural inclinations that give rise to the precepts of natural law. Thomas was first and foremost a Catholic theologian, so his discussion of obedience is situated within a framework that recommends simple obedience to God in all things.

Contemporary political liberalism (to use John Rawls's terminology for the secular version of liberalism developed in Anglo-American philosophy after World War II) sees the Christian acceptance of the sovereignty of a God as a threat to the civil order in a pluralist society, despite the fact that God's sovereignty was actually understood to be a reason *for* constitutional government in the struggle for American independence in the 18th Century. Maritain's contemporary, John

[12]Ibidem, I-II, 94, 2.

[13]Ibidem, I,4, 11ff.

[14]Ibidem, II-II, 10; see P. Cornish, *John Courtney Murray and Thomas Aquinas on Obedience and the Civil Conversation*, "Vera Lex", Second Series, 9: 1 & 2 (2008/09), p. 49-75; idem, *Aquinas on Marriage, Slavery, and Natural Rights*, "Review of Politics" 60: 3 (1998), p. 545-561.

Courtney Murray argued that this earlier understanding of the way that God's sovereignty limits civil authority arose because of the fact of religious pluralism and the drive for religious freedom in the colonies of British North America: *As it arose in America, the problem of pluralism was unique in the modern world, chiefly because pluralism was the native condition of American society. It was not, as in Europe and in England, the result of a disruption or decay of a previously existent religious unity. This fact created the possibility of a new solution; indeed, it created a demand for a new solution. The possibility was exploited and the demand was met by the American constitution*[15].

Fr. Murray's brief explanation of the way in which religious pluralism in the United States is protected by and grounded in the conception of the Sovereignty of God deserves careful consideration. The *Declaration of Independence* declares all men to be created equal and to be endowed by their creator with inalienable rights. Thus the powers of government are always to be bounded within the laws of nature and nature's God as embodied in the equal dignity and basic rights with which each person is endowed. That statement loses its meaning if one removes the Creator from the equation. The acknowledgement that God rules over nations and individuals distinguishes what Murray called "the conservative Christian tradition of America from the Jacobin tradition of continental Europe"[16].

On this account Jacobinism declares that the autonomous reason of man is the sole and absolute source of political institutions and authority. By its nature civil government must be agnostic or atheist, and religion is at best a private affair quite irrelevant to politics. The actions of the statesman cannot arise from any source other than the will of the people, "in whom resides ultimate and total sovereignty." This doctrine is indeed what John Adams refers to in his proclamation using the following terms (John Adams, "Presidential Proclamation-Recommending a National Day of Humiliation, Fasting, and Prayer," March 6, 1799): *...the most precious interests of the people of the United States are still held in jeopardy by the hostile designs and insidious acts of a foreign nation, as well as by the dissemination among them of those principles, subversive of the foundations of all religious, moral, and social obligations, that have produced incalculable mischief and misery in other countries...* Having observed this, it is worth stepping back and examining some earlier work by another American Jesuit scholar that traces the error in Jacobin thought to the Roman law doctrine of *lex regia*, and which helps to develop the contrast between religious pluralism in colonial North America and the European context.

Fr. Moorhouse F.X. Millar, S.J. shows that the idea of absolute civil power is inconsistent with the Augustinian and Thomist understanding of political authority he advocated, and argues that modern absolutism amounted to a reversion to a pre-Christian understanding of law. He did this by contrasting the "fundamental ideas underlying (classical) Roman law in both its legal and philosophical aspect" with the new Christian principles established in late antiquity. For the Roman to be free was to be empowered to exercise one's will; in essence to do as one pleases. All laws derive from the people, and since the freedom of the people is absolute the sovereignty of the emperor was absolute. The *lex regia* conferred on the emperor absolute power and authority[17]. Millar argues that although it is true that the Roman lawyers used the terminology of "right reason", this is the Stoic, pantheistic concept right reason: *Right Reason in the Stoic sense was but another name*

[15]J. C. Murray, S.J., *We Hold These Truths*, Sheed & Ward 1960, expanded and reprinted 2005, p. 43.

[16]Ibidem, p. 44

[17]M. F. X. Millar, S.J., *The Origin of Sound Democratic Principles in the Catholic Tradition*, in: "The Catholic Historical Review" 14: 1 (1928), p. 104-126.

for that all-pervading force in nature which was termed reasonable only because it was deemed in so many ways to issue in what was considered not otherwise than as a bare physical order... Hence at the bottom reason in Stoic and Roman systems was a function of will, and Seneca gives the key in a statement all too little noted when he says that a man "is good if reason is developed and properly constituted (recta) and in conformity with the will of his nature (*Epist.* 76)"[18]. In another essay Millar, like Maritain, associates this misunderstanding with Bodin's defense of the sovereignty of the commonwealth[19]. The logic of *lex regia* prefigures Hobbes' conception of sovereignty and the Jacobin ideology of revolutionary France in that it posits an absolute civil authority derived by consent from the absolute liberty of the people. If we recall that the original issue has to do with a consensus about justice in the context of religious, and by extension cultural pluralism, the logical basis for the judgment against *lex regia* and Jacobinism becomes clear. Both doctrines result in the collapse society into the hands of a state claiming absolute sovereignty. Freedom is achieved by the voluntary submission of all to one.

In an important study of St. Robert Bellarmine's defense of the indirect power of the Pope to depose a civil ruler[20], Fr. Murray suggested that Bellarmine's arguments must be understood in terms of his assumptions about the religious pluralism of 17th century Europe. Namely, that it was an aberration in the development of Christendom that would be overcome and Christian unity would be restored. (Note too that Bellarmine's arguments were in part a response to the assertion of absolute civil authority based on divine right made by James I and his defenders, most notably William Barclay.) According to Murray in this Bellarmine made the mistake of assuming that a specific temporal form, the *respublica Christiana*, was permanent:

The (civil) authority of the Church was filling a political vacuum, It was the only power in the "one society" that could do so. And in the circumstances, which gave specification to its native empowerments, it acted rightfully, jure divino. However, this had its being, and was asserted, relatively to a certain segment of mankind's political development — the age of respublica christiana of a special type, undeveloped, it stood in need of tutelage of a special kind, which only the church could supply[21]. This of course leads to an important question: of what help is the medieval natural law tradition in our contemporary struggle to understand civil power in an age of more or less permanent religious pluralism and constitutional maturity?

One thing that should be clear in the context of constitutional government in the United States is that a restatement of Abraham Lincoln's assertion that the nation is "under God" is in no way a call for theocracy. The government of the Constitution has always acknowledged the existence of religious pluralism in society. The passage from Adams quoted by Murray may now be helpful...: *...it is also most reasonable in itself that men who are capable of social arts and relations, who owe their improvements to the social state, and who derive enjoyments from it, should, as a society, make acknowledgements of dependence and obligation to Him who hath endowed them with these capacities and elevated them in the scale of existence by these distinctions*...[22]. Notice that

[18]Ibidem, p. 111-112.

[19]M. F. X. Millar, S.J., *Scholasticism and American Political Philosophy*, in: J. S. Zybura (ed.), *Present Day Thinkers and the New Scholasticism: An International Symposium*, B. Herder Book Co. 1927, p. 329ff.

[20] J. C. Murray, *St. Robert Bellarmine on the Indirect Power*, in: "Theological Studies" 10, 491-535, retrieved from Works by John Courtney Murray, S.J. Woodstock Theological Center Library, online at ttp://woodstock.georgetown.edu/library/Murray/1948i.htm 5/29/2009.

[21]Ibidem, p. 530

[22]J. C. Murray, op. cit., 2005, p. 45.

Adams echoes the language of endowment by a Creator from the *Declaration of Independence*. Here the people in question are endowed with the capacity to engage in society and to enjoy the benefits thereof. For Adams the pursuit of happiness was clearly a social endeavor, and one that is rooted in gifts bestowed upon individuals by their Creator.

However, none of this disposes of the issue of the duty of obedience to human authorities in society (and especially civil authority), and how we might understand the limits of that obedience. Thomas opens his discussion of that issue with a reference to St. Paul's statement that servants should obey their master in all things according to the flesh (*Colossians* 3:22). The bodily nature of human experience in society is central to the subsequent argument, in which Thomas claims that human commands can only pertain to the outward actions of the body and not to the interior life of the will.

Thomas explains three categories of actions within which human beings are not bound to obey their superiors. The first is when someone is bound to a precept from a higher authority. The second involves the idea that human authorities can only command the outward act of the body, and not the inward act of the will. Finally, even authority over bodily action must be limited in two distinct ways: one must always obey the command of a higher authority before that of a lesser, and there can be no human authority over what belongs to the nature of bodily life since in those things all "people are equal." This second category of limitations on due obedience is illustrated with reference to the consumption of food and procreation. Further illustration is provided by an argument to the effect that slaves are not obliged to their masters nor children to their parents with regards to contracting marriage or taking a vow of virginity or the like[23]. On the other hand, the civil authority is bound by the order of justice, which it is intended to uphold. Thomas argues against any notion of Christian faith that would assert that faith in Christ supersedes civil authority or frees people from their obligation to obey the civil law. However, if someone comes to hold civil authority through usurpation, or commands that which is wrong, one is not bound to obey except to avoid scandal or persecution[24]. If we conclude with Aquinas that one is able to discern when authority has been usurped, or when a law commands injustice, we must reject the concept of sovereignty as it is explained in *Leviathan*.

Another way to look at this would be to say that the three orders of human inclination that give rise to the various precepts of natural law place boundaries on the scope of civil rule. To illustrate this understanding of civil authority and how it is distinct from the concept of sovereignty, it will be helpful to describe arguments from Aquinas and later exponents of his natural law framework that illustrate the ways that each of the three orders of inclinations entail a sphere of liberty within which individuals and societies may claim rights that limit the civil authority.

3. Applications of the Order of Inclinations

Following this approach we begin with the inclination to preserve life. In her recently published study *Changes of State* Annabel Brett (2011) engages in a wide-ranging exa-

[23]St. Thomas Aquinas, op. cit., II-II, 104, 5.
[24]Ibidem, 104, 6.

mination of the nature and limits of the city in early modern natural law. In a chapter entitled "Traveling the Borderline (11-36)" she reviews the argument of the 16th Century Spanish Dominican Domingo de Soto in his work in opposition to a poor law passed in Spain in 1540 and promulgated in 1544, that was intended to help cities deal with problems of vagrancy and begging. Reasoning from the Thomist framework for the understanding of the natural right and property, Soto argued that the fundamental issue involved is the individual's right to stay alive. When one views the action of a beggar as being directed toward their own survival, the beggar may be said to have a natural right to beg. The necessity that leads to begging cannot be understood in terms of extreme necessity, since it would then be justified for the beggar to use what was necessary without permission. Soto is talking about one's right to choose to beg as a legitimate act of prudence, and not just out of necessity: *Paupers who are truly in need cannot be expelled from any place within the realm; but are either to be permitted to beg, or supported in some other way, just like the native inhabitant... First reason. No one unless he is an enemy or assailant of the Commonwealth, or who is guilty of some crime or dreadful deed, can be kept out of any town. And the reason is ready to hand. For since by the law of nature and of nations roads and cities lie open to everyone regardless, no one, unless for some fault of his own, can be deprived of the right of staying where he wants*[25].

Soto was taking a very clear and decisive stance against the tendency then prevalent throughout the Catholic and Protestant regions of the Hapsburg Empire, as well as in Spain, to prohibit wandering beggars from leaving their city or region of origin to seek hospitality elsewhere. He even went so far as to argue that begging may be pursued on a permanent basis as a way of making a living. Notice that these arguments raise fundamental problems about the concept of sovereignty. Does the state have the authority to exclude or imprison traveling beggars, or migrant workers as the case may be? The concept of sovereignty Maritain considered intrinsically wrong entails not only the power of the sovereign representative to exclude people who are not members of the commonwealth, but even the duty to do so. Historically it also has been understood to allow the denationalization of people that the sovereign government no longer wants to belong to the commonwealth.

The second order of inclinations involves marriage and the education of children. Here it is useful to turn away from the currently contentious issues of same-sex marriage and the adoption of children by homosexuals, and to consider the way that Thomas argues against the practice of baptizing Jewish children against the wishes of their parents. He makes two interesting arguments in this context, both of which are inconsistent with the concept of sovereignty. First, he argues that the right of parental authority would be violated if children were baptized without the consent of the parents. Secondly, the tradition of the church had forbidden it for two reasons: because children baptized at a young age may be convinced to renounce their baptism, thus causing the scandal of apostasy; and because it is against the order of natural justice within which the family is analogous to a spiritual womb for the child[26].

These issues were revisited in the debates over the proper way to evangelize among the peoples of the New World in the 16th Century. Soto's Dominican colleague Francisco de Vitoria (*De Indis*) and Bartolomé de las Casas (*De unico vocationis modo*) both made natu-

[25]Domingo Soto, *In causa pauperum deliberario*, cap. IV, fo. 103, cited in: A. Brett, *Changes of State*, Princeton 2011, p. 28.

[26]St. Thomas Aquinas, op. cit., II-II, 10, 10.

ral law arguments against the practices of forced conversion and of mass baptism without instruction as ways to advance the Gospel. Las Casas went even further than this by arguing that the native populations that killed preachers had done so based on their right of self-defense since the Spanish had approached them as armed conquerors rather than in a posture of peace and charity appropriate to a preacher of the Gospel. Notice the way that these arguments about the requirement of nonviolence in religious preaching could be turned inward, that is toward the inner working of the commonwealth, and if they were they would undermine not only the Hobbesian and Catholic divine right model of civil peace based on the imposition of outward religious orthodoxy by the sovereign representative, but also the secular orthodoxy of modern liberal states like revolutionary France, and Bismarck's Germany.

This points us toward the third order of natural inclinations, those having to do with knowing the truth about God and living in society. Contemporary legal philosopher Russell Hittinger[27] provides an interesting approach to these issues in a brief study of Aquinas' argument in defense of the mendicant orders at the University of Paris in 1256 (*Liber Contra Impugnantes Dei Cultum et Religionem*, hereafter CI). Hittinger's study is directed toward an explanation of the reasons for the subsidiary corporate entities and societies in liberal states that political scientists have come to refer to collectively as civil society, and was presented in a response to the 50th anniversary of the publication of Maritain's *Man and the State*. It is worth remembering that, while the valuing of civil society is widespread among contemporary democratic theorists, in Hobbes' framework these subsidiary bodies politic are considered to be related to the commonwealth in a way analogous to worms in the bowels of a natural body[28].

Hittinger's study takes off from the distinction in Maritain's work between the substantial and instrumental understanding of the state. He wishes to explain how Maritain's instrumentalist view of the state helps to bring about a convergence between Thomist and Aristotelian arguments on the one hand, and the value placed of human rights in modern political philosophy on the other[29]. He finds an interesting source in the arguments Aquinas put forth to defend the rights of the mendicant orders in response to the charges that William of Saint-Armour had published. William's work argued that the mendicant practices perverted the civil and ecclesial orders by mixing the contemplative religious life with active service in other social institutions, like the University of Paris. His work was condemned by the Vatican, and may have been condemned before Thomas undertook his work[30]. Aquinas response then, was not merely a defense of the mendicant orders, but an argument that the 'active life' in society may be understood to go well beyond the activities of magistrates and businessmen.

The active life may be described generically in terms of the "communication of gifts", whereby people who are particularly well-suited to a given task within the commonwealth and its subsidiary groupings must not be prevented from fulfilling their particular function. As Hittinger puts it, "Society for Thom-

[27]R. Hittinger. *The First Grace*, ISI Books, 2003; idem, *Reasons for Civil Society*, in: J. Hittinger and T. Fuller eds., *Reassessing the Liberal State: Reading Maritain's Man and the State*, Catholic University Press, 2001, p. 11-23.

[28]Thomas Hobbes, *Leviathan*, Ch. XXIX.

[29]See J. Hittinger and T. Fuller, op. cit.

[30]J.-P. Torrell, O.P., *St. Thomas Aquinas, Volume I: The Person and His Work*, Catholic University of America Press, 1996, p. 75-95.

as is not a thing, but an activity"[31]. Accordingly, everyone who is particularly suited to fulfill one of the multiplicities of functions human society requires has a right to be admitted into the society of those selected to perform that function. *Again any person who is competent to perform some special function has a right to be admitted to the society of those who are selected for the exercise of that function. For an association means the union of men, gathered together for the accomplishment of some specific work. Thus, all soldiers have a right to associate with one another in the same army; for an army is nothing but a society of men, banded together for the purpose of fighting*[32]. Notice that while this argument was primarily made on behalf of the Franciscan and Dominican orders who were teaching at Paris, it was developed in a way that clearly entails rights for all people in society at-large. On this view society comes to be understood in terms of numerous voluntary associations that serve the common good by providing individuals with the opportunity to communicate their gifts. The argument is not that these associations should interfere with, let alone usurp the proper law making authority of the civil government. Rather the argument defends their liberty within the civil association.

Thomas understood human beings, as rational creatures, to have inclinations both to know the truth about God and to live in society. The two inclinations are integrally connected in his own life experience. He sought the society of the University in order to communicate his gifts with the students and his fellow masters. The purpose of their activity was to examine the truth about God and creation, and to mutually strengthen one another in their faith, and in the pursuit of knowledge of the truth. In contemporary life we have come to believe that all members of society should have education; and, consequently, some capacity to participate in a conversation about the truth and through which they can find an associational life appropriate to the communication of their particular gifts.

It seems that this vision of society, as an activity to which humans have rights, entails or includes, the natural inclinations to the preservation of life and the procreation and education of new generations, and also helps us to understand how and why these inclinations are directed toward things that are intrinsically good. Soto's emphasis on the rights of beggars and Las Casas' rejection of violence as a mode of evangelism have a very contemporary feel to them if we view them in this light. They appears to be a sort of moral residue of the natural law tradition, and of medieval ideas about law and constitutional government, that helped to bring modern liberal democracy into being.

4. Truth and the Purification of Means

Near the end of his book, *We Hold These Truths*, Father John Courtney Murray asks us to consider the conscience of a person protesting an injustice done to other people through technically valid legislation that did not touch upon his own interests: *He is asserting that there is an idea of justice; that this idea is transcendent to the actually expressed will of the legislator; that it is rooted somehow in the nature of things; that he really knows this idea;*

[31] J. Hittinger, op. cit., p. 15.

[32] St. Thomas Aquians, *Contra Impugnantes*, Pt. 2, Ch. 2, translated by J. Proctor (1902), retrieved at http://dhspriory.org/thomas/Contalimpugnantes.htm.

that it is not made by his judgment; that this idea is of a kind that ought to be realized in law and action; that its violation is injury, which his mind rejects as unreason; that this unreason is an offense not only against his own intelligence but against God, Who commands justice and forbids injustice[33]. Murray's hypothetical is intended to show that the tradition of natural law was still an important, and indeed inevitable, part of political reasoning in pluralist democracies like the United States. To move our critique of sovereignty forward it will be helpful to consider what political means may be employed by Murray's protesting person, whether individually or as a member of an association formed to protest the hypothetical injustice.

Jacques Maritain discussed the problem of means in political action before and after World War II[34]. In both contexts he defended a modified version of Mohandas Gandhi's philosophy of nonviolence, and the practice of *Satyagraha*, as an attempt to purify the means of political action in the modern world. Maritain commended Gandhi and reacted with some frustration towards those who scoffed at him and ridiculed him in the French press. He considered Gandhi's contribution important enough that he included the text of a formal public statement of his doctrine as an appendix to his work, *Freedom in the Modern World* (1936). These texts reveal the optimism Maritain had about the future, and the possibility that modern democracy could be purified through the adoption of Christian spirit in political action, an optimism that was not shared by Father Murray.

To speak crudely, Maritain believed that the means we use to pursue political ends in the modern world had to be purified because of the taint of Machiavellianism. He saw Machiavelli's philosophy as an attempt to reduce politics to the technical question of what works, without reference to the moral order. Indeed, one might argue that Hobbes' sovereign is instituted to impose an artificial moral order, since no order of justice exists outside the commonwealth; or that the revolutionary state must be allowed to use the necessary means to produce the morally superior order that is the end of the ideology of the revolution. In a chapter on the problem of means in *Man and the State*, Maritain stressed the need to approach political action with a realization that there is always an order of right and wrong choices[35]. To deny the relevance of the moral order, or to reject its existence, in no way frees one from its limits.

Gandhi's doctrine of *Satyagraha* is recast through an analysis of the use of force and the virtue of fortitude in Aquinas in Maritain's framework[36]. Acts of fortitude in society may be viewed in the context of one of two orders of life. One order pertains to the body, and involves the active application of force, which Maritain labeled secular force. The other order pertains to the soul, and involves the willingness to suffer on behalf of others, and Maritain labeled this spiritual force. This distinction creates a hierarchy of means in political life, with spiritual life and spiritual force occupying a superior moral plain than secular force. However, while Gandhi's original attempt to separate out the organization of voluntary suffering as a mode of political action through spiritual force was important, it could not replace the secular force necessary to resist the totalitarian regimes of Europe in 1936, or to secure liberal democracies against the threat of the Soviet empire after World War II.

Maritain delved into the darkest and most hopeless of human experiences during the war: including the concentration camps

[33]J. C. Murray, op. cit., 2005, p. 296 (emphasis in the original).

[34]N. C. Lund-Malfese, *Maritain's Contribution to the Development of the Magisterium on Means*, in: Hittinger and Fuller, op. cit., p. 228-240.

[35]J. Maritain, op. cit., 1951, p. 54-75.

[36]M. Gandhi, 1936, p. 168-188.

and the circles of resistance to Nazi tyranny in France. Even in these contexts he maintained a focus on the means that the people may use to influence the government, and the moral order of the world[37]. Maritain gave favorable reference, indirectly through a Saul Alinsky work, to Tocqueville's favorable judgment of associational life in the United States in 1830's. On this view, the practice of popular suffrage is insufficient to allow people to transcend the "minor details of their life.[38]" Through associational life people must take responsibility for their daily actions as members of the body politic, and communicate their gifts to their neighbors. In a contemporary pluralist democracy it is vital that everything in the body politic that can be managed by the smaller component societies within the commonwealth be done by them, and not by the state. Maritain agreed with Tocqueville that self-government, once abandoned, is unlikely to be regained.

Dr. Martin Luther King, Jr., another admirer of Mahatma Ghandi, was a Baptist minister who had studied the natural law tradition[39]. In his "Letter from Birmingham City Jail," King expressly invoked St. Augustine and St. Thomas Aquinas in arguing that an unjust law should not be obeyed[40]. The letter was a response to representatives of the Christian and Jewish clergy in Birmingham who had criticized the nonviolent protests King had helped to organize, and who had accused the Southern Christian Leadership Council of fomenting violence in the city. King's argument is relevant to this discussion because of the legal reasoning he used to defend open, but nonviolent, resistance to unjust laws. His arguments assume the existence of an order of justice that transcends the authority of the government, and by which the actions of the government can and must be judged. That is, he claimed that injustice was being done, and argued that his claims could be assessed as being true or false.

One expression King used to explain the true injustice of segregation laws in Alabama alludes to a principles stressed in *The Treatise of Law* in the *Summa Theologiae;* namely, that civil law promote the common good. King states: *An unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal. On the other hand a just law is a code that a majority compels a minority to follow that it is willing to follow itself. This is sameness made legal*[41]. This statement echoes St. Thomas' discussion of the way in which laws bind in conscience, and why some human laws are not binding[42]. There Thomas explains that laws may be unjust from their end, from their authority or from their form, which he explicitly describes in terms of imposing proportionally equal burdens on the citizens for the common good.

The concept of sovereignty that Maritain condemned could not accept the idea that subjects of the commonwealth should organize themselves into groups to engage in nonviolent protest against the policies of the state based on claims that formally valid civil laws were unjust. This sort of protest could only be viewed as an attempt by a faction in the commonwealth to usurp the power of the sovereign representative. The sovereign is the author of justice, and, unless the commonwealth were dissolved, it would make no sense to resist the sovereign's laws based on claims of truth. It would be an absurd or nonsensical mode of speech. The sovereignty of the state does not issue statements that are open to de-

[37] J. Maritian, op. cit., 1951, p. 54-75.

[38] Ibidem, p. 66.

[39] M. L. King Jr., *Letter from Birmingham City Jail*, in: J. W. Washington (ed.), *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.*, HarperCollins, 1986, p. 289-302.

[40] Ibidem, p. 293.

[41] Ibidem, p. 294.

[42] St. Thomas Aquinas, *Summa Theologiae*, op. cit., I-II, 96, 4.

bate, but rather issues laws that are final determinations of "the will of him who by right hath command over others." That hardly seems democratic, and certainly does not fit the self-understanding of John Rawls' and other secular liberals.

But consider, isn't Dr. King's argument, based as it is on a substantive moral doctrine concerning the human good, precisely the type of controversial moral statement that philosophers like John Dewey and John Rawls argued should be excluded from the public sphere of life in contemporary pluralist democracy? If one considers these things with care, they will recognize that Pope Benedict's warnings about the tyranny of relativism are very important for contemporary people of faith. As professor Jean Bethke Elshtain has shown, we now live in an age of the sovereign self[43]. This is an age in which democratic majorities of sovereign selves may demand, not only that they be allowed to do as they list, but that the government use the coercive force of the state to tax others to support their actions, and punish those who refuse to comply.

[43] J. B. Elshtain, op. cit., s. 159-226.

Tradycja prawa naturalnego przeciwko władzy państwowej

Słowa kluczowe: władza polityczna, nieposłuszeństwo, prawo naturalne, filozofia polityczna, antropologia św. Tomasza z Akwinu

Artykuł koncentruje się na problemie władzy politycznej, zwłaszcza we współczesnych demokracjach, np. demokracji w Stanach Zjednoczonych, oraz jest próbą umocnienia pojęcia władzy u Maritaina jako praktycznego rozumienia autorytetu państwowego we współczesnych, pluralistycznych demokracjach. Artykuł rozpoczyna się od rozważań wokół stwierdzenia Jacques'a Maritain'a z książki *Człowiek i państwo* (wyd. polskie, Kraków 1993), w którym Maritian argumentuje, że filozofia polityczna powinna wykluczyć ze swojego słownika termin „władza polityczna". Termin ten, choć współcześnie bardzo popularny, występuje jako człon wyrażeń, których konotacja jest zwyczajnie fałszywa. Sam termin „władza państwowa" jest dodatkowo wewnętrznie niepoprawny i prowadzi do nieporozumień. Maritain, określając termin „władzy państwowej" jako wewnętrznie niepoprawny, wychodzi z pozycji realizmu metafizycznego. Dodatkowo, krytycznie odwołuje się do definicji Jean'a Bodin, który „władzę państwową" utożsamił z prawem do jej sprawowania, które to prawo w sposób naturalny i ze swej istoty posiada książę lub inny monarcha. Władza, która nie posiada transcendentnego odniesienia sprawiedliwości, ze swej istoty staje się nieograniczona – argumentuje Maritian. Alternatywą dla wczesnego nowożytnego rozumienia „władzy państwowej" jest koncepcja prawa naturalnego w ujęciu św. Tomasza z Akwinu, dlatego dalsza część artykułu koncentruje się na teologicznej argumentacji Akwinaty dotyczącej granic władzy państwowej. Ta część rozważań zawiera wyjaśnienie sposobu, w jaki filozoficzna antropologia Tomasza stanowi podstawę rozumienia ograniczeń ludzkiego autorytetu w ogólności, a władzy państwowej w szczególności, które to ograniczenia są nakładane przez nakazy prawa naturalnego. Rozważania koncentrują się wokół pytania: w jaki sposób średniowieczna tradycja prawa naturalnego może stanowić pomoc w naszej współczesnej walce o zrozumienie władzy obywatelskiej w epoce pluralizmu religijnego i konstytucyjnej dojrzałości? Tomaszowa wizja społeczeństwa pociąga za sobą stwierdzenie naturalnych inklinacji do zachowania życia, zapewnienia edukacji nowym pokoleniom, ale również pomaga nam zrozumieć, dlaczego i w jaki sposób te inklinacje są kierowane ku dobru. Argument kończy się konkluzją dotyczącą problemu demokratycznych społeczeństw oraz środków politycznych w ujęciu Maritaina i o. Johna Courtneya Murraya SJ, którzy występując w obronie intelektualnego dziedzictwa średniowiecznej filozofii, uznają tradycję prawa naturalnego za wciąż bardzo ważny i nieuchronny element dyskursu politycznego w demokracjach pluralistycznych. Podobnie Martin Luther King, wyjaśniając niesprawiedliwość praw segregacyjnych, powoływał się na Tomaszowy „Traktat o prawie" z *Sumy teologii*. Wymienieni autorzy wskazują na uzasadnione wątpliwości, czy obrońca władzy w państwie świeckim może bez popełnienia logicznej sprzeczności tolerować praktykę nieposłuszeństwa (bez stosowania przemocy), w sensie proponowanym przez Mohandasa Gandhiego i dra M. L. Kinga.

A Case against State Sovereignty from the Natural Law Tradition

This study develops out of two decades of study focused on the problem of political authority, especially in contemporary democracies like the United States of America. It begins as a meditation on a statement in Jacques Maritain's *Man and the State* (1951). There Maritain argued that political philosophy must get rid of the word and the concept of sovereignty because it is "intrinsically wrong and bound to cause misunderstandings". After an investigation of what Maritain understood by the concept of sovereignty, the argument turns to a consideration of the way that St. Thomas Aquinas' theological reasoning about the limits of civil authority. This includes a brief explanation of the way that Thomas's philosophical anthropology grounds his understanding of the way that natural law precepts place limits on human authority in general, and on civil authority in particular. The argument concludes with some reflections of the problem of democratic society and the problem of political means as they are treated in the works of Maritain and Father John Courtney Murray, S.J. The study raises doubts about whether a defender of the sovereignty of a secular state could tolerate the practice of nonviolent disobedience as it was understood by Mohandas Gandhi and Dr. Martin Luther King Jr. without logical contradiction, and consequently should raise reinforce Maritain's doubts about the concept of sovereignty as a practical understanding of civil authority in a contemporary pluralist democracy.