

subtopic

Natural Law and the Law of Nations

NATURAL LAW and the LAW of NATIONS

Samuel Gregg, Acton Institute

The origins of the idea of the law of nations – the *ius gentium* – are not to be found in the early modern period. It was first articulated by Greek and Roman classical philosophers and jurists. In the [Institutes](#) of the Roman jurist Gaius (130–180), the *ius gentium* is closely associated with the *ius naturale*. “Every people”, Gaius wrote, “that is governed by statutes and customs observes partly its own peculiar law and partly the law common to all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius civile* as being the special law of that state, while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* as being the law observed by all mankind.”^[1] Gaius’s distinction between *ius naturale* and *ius gentium* lies in the notion that the *origins* of this law lie in human reason while *ius gentium* represents its *application*.^[2]

Roman law, however, also articulated a second sense of *ius gentium*.^[3] In the ancient world, the law applicable to persons depended on the person rather than where they lived. Athenians were governed by Athenian law, while Romans were governed by Roman law. The problem was determining what law was applicable to a person (e.g., an Athenian) living within a Roman jurisdiction, especially when it came to his relationships with people of other jurisdictions. To address potential conflicts, a Roman body of law had emerged by the first century B.C. applicable to citizen and non-citizen alike and distinguishable from the *ius civile* (the law specific to a particular state).

Following Rome’s fall in the West, Isidore of Seville (560–636) played a major role in preserving and codifying Gaius’ concept of the *ius gentium*. In his [Etymologiae](#), Isidore listed a number of institutions (such as peace treaties and the treatment of prisoners in wartime) that he regarded as belonging to the law of nations.^[4] He added that this law was so called because it is in force among *almost* all peoples.^[5] The adverb “almost” was a minor but important modification insofar as it weakened the association between natural law and the *ius gentium*.

The medieval treatment of *ius gentium* differed slightly from that of the Roman jurists. While [Thomas Aquinas](#) (1225–1274) agreed with Gaius’s distinction between *ius civile* and *ius gentium*,^[6] Aquinas’ scattered references to the *ius gentium* specified that the *ius gentium* was that aspect of positive law that was immediately derived by deduction from the natural law and which was universally applicable across jurisdictional boundaries.^[7] In this sense, the force of *ius gentium* was grounded *both* in natural law *and* the human reasoning that created the institutions that flow directly from natural law. For Aquinas, an example of this is the norm of *pacta sunt servanda* (agreements are to be performed). On one level, making a contract is a social convention which has developed and been given legal force because it has been proved to serve the common good.^[8] Contract (and other legal institutions such as property) is thus a matter of positive law by means of its mode of promulgation. Yet contract is so essential for justice and social order in *any* human community that it should be understood as immediately deducible from principles of natural law. It thus belongs to the *ius gentium* rather than the *ius civile*. In short the convention of contract would be meaningless unless there was a general natural law principle that promises should be kept. To this extent, Aquinas held that fulfilling contracts is not a *principle* of natural law per se. Rather it is a principle of *ius gentium*, which is nonetheless a *matter* of natural law.^[9]

These distinctions – which were not without their ambiguities – began breaking down in the early modern period. To some Jesuit and Dominican scholastics, it seemed that the precepts of the law of nations could be assigned to either the natural law or the positive law, thus rendering the category of

ius gentium redundant. Rather than taking this step, they argued that the *ius gentium* had become invested with the definitional feature that it was constituted by “the common consent of peoples”, even though consent had not been mentioned by any of the medieval or classical authorities.^[10]

Francisco Suárez (1548-1617) maintained that the *ius gentium* was somewhere between natural and positive law. It was “a mean between natural and human law, and very much closer to the former”.^[11] Suárez then used an adapted version of Isidore’s description of the contents of *ius gentium*, and divided it into two groups. The first group was those laws that were part of the domestic law of most commonwealths, such as laws governing property and domestic commerce. These intrinsically belonged to the civil law.^[12] The second group was those laws that were common in the way they coordinated relationships between peoples and commonwealths (laws *inter nationes*). Examples included the laws governing war, international commercial interactions, and the treatment of diplomats.^[13] These, Suárez held, were most worthy of the title of *ius gentium*.^[14] Francisco de Vitoria (1483/1486-1546) had tentatively made a similar point when he shifted the emphasis of *ius gentium* from *inter omnes homines* to *inter omnes gentes*.^[15]

It was the almost completely universal character of the *ius gentium*, Suárez held, that invested it with a moral status more authoritative than other positive laws. According to Suárez, the *ius gentium* emerged through “by practice itself and by tradition” and “without any special meeting or consent of all peoples at a particular time.” Its universal usage, however, was derived from the fact that the *ius gentium* “is so close to nature and so suited to all nations and the fellowship between them that it would have been almost naturally propagated along with the human race itself, and thus it was not written, because it was laid down by no lawgiver, but prevailed by usage”.^[16] Clearly Suárez regarded the *ius gentium* as an instance of customary law and tradition rather than formal prescription.^[17] Nevertheless, in light of people’s propensity to disagree about so many things, agreement about something across the divisions of nation and people was, in Suárez’s view, significant proof of the reasonability of the matter upon which almost everyone agreed.^[18]

Suárez also made the crucial point – perhaps partly because of the impact of the European encounter with the Americas – that, regarding the *ius gentium*, there was a type of *res publica* that bound people together over and above the political community once thought to be the *communitates perfectae*. The *ius gentium*’s provisions thus extended to everyone, “even foreigners and members of any nation whatsoever”.^[19] This did not mean that humanity in its entirety had at some time consented to the content of the *ius gentium*. Rather all peoples were expected to have independently recognized its content. Failure to know the *ius gentium* was considered proof of a society’s corruption.

These arguments underwent further modification following the rise of the modern nation-state with its particular claim to sovereignty and the increasing instances of war between such states after the Reformation. The effect was to generate an appropriation and rethinking of the principles of the *ius gentium* as part of the public international law designed to govern relations between sovereign nation-states after the Treaty of Westphalia (1648). In the works of Hugo Grotius (1583-1645) the connection of the *ius gentium* to the natural law remains, but is less evident than in Suárez’s writings. Grotius sought to discover “a body of law that is maintained between states” which was conceptually distinct from the civil law of states and grounded in “the law of nature and nations”.^[20] Grotius did not deny that the natural law ought to be the basis for relations between sovereign states. He did, however, stress that the *ius gentium* – like all positive law – was the result of human will.

Another prominent seventeenth-century philosopher and jurist, Samuel von Pufendorf (1632-1694), played a major role in weakening the links between the older traditions of natural law and the idea of the *ius gentium*. Pufendorf insisted that the *ius gentium* was more than just convention, but accepted Grotius’ argument that the law of nations was, strictly speaking, the law between states as opposed to the law shared by all humanity.^[21] Pufendorf, however, largely adopted [Thomas Hobbes](#)’ idea of the law of nature: i.e., the law which all rational humans follow in order to survive and prosper. He also accepted Hobbes’ division of the law of nature into the laws of man and that of states, the latter being, according to Hobbes, the law of nations.^[22] While Pufendorf argued that the law of nations was the state of nature

applied to relations between states, he disagreed with Hobbes's claim that the state of nature was one of war. But Pufendorf also believed that the peaceful relations naturally prevailing between states were sufficiently weak that laws were inevitably developed to maintain the peace.

By the eighteenth century, concepts of the *ius gentium* as the common law of humanity, or customs shared by almost all peoples, or that aspect of positive law immediately deduced from the first principles of natural law had been largely marginalized. In his highly influential [Droits des Gens](#) (1758), Emer de Vattel presented the law of nations as simply the law of nature of individuals in the state of nature applied to states.^[23] Vattel disagreed, however, with Hobbes (and Pufendorf) that "the maxims of the law of nature and those of the law of nations were precisely the same".^[24] Nations and individuals were very different entities and there subsequently results, Vattel wrote, "in many cases, very different obligations and rights".^[25] This was particularly true when it came to international commercial relations which, from Vattel's standpoint, increasingly formed the subject matter of the law of nations. Discerning these differences involved "the art of thus applying [the law of nature] with a precision founded on right reason". It was this, Vattel added, "that renders the law of nations a distinct science".^[26] With this reference to "right reason", we find a very faint echo of the classical, Thomistic, and early-modern natural law tradition of conceptualizing the *ius gentium*.

[1] *Gai Institutiones or Institutes of Roman Law by Gaius*, with a Translation and Commentary by Edward Poste, 4th ed. revised and enlarged by E.A. Whittuck, with an historical introduction by A.H.J. Greenidge (Oxford: Clarendon Press, 1904), 1.

[2] A slightly different distinction appears in Justinian's *Institutes*. This defines natural law as "that which nature has taught all animals" (rather than simply humans). *Ius gentium* is interpreted as the law common to humans and derived from human reason See Justinian, *Institutes*, trs. and introduction by Peter Birks and Grant McLeod (New York: Cornell University Press, 1987), Book I, 2.

[3] See Barry Nichols, *An Introduction to Roman Law* (Oxford: OUP, 1962), pp. 57-58.

[4] Isidore of Seville, *Etymologiae*, tr. W. M. Lindsay (Oxford: OUP, 1911), 5.6.

[5] *Ibid.*, 5.9.

[6] Fathers of the English Dominican Province, eds., *Summa Theologica*, 3 vols. (New York: Benziger Brothers, 1947) (hereafter ST) I-II, q.95, a.2, 4.

[7] *Ibid.*

[8] ST II-II, q.77 a. 1c.

[9] ST I-II, p. 95 a. 4c and II-II q. 57 a. 3c.

[10] See Harro Höpfl, *Jesuit Political Thought: The Society of Jesus and the State, c. 1540-1630* (Cambridge: CUP, 2004), p. 302.

[11] Francisco Suárez, S.J., *De Legibus*, II.17.1. *Selections from three works of Francisco Suárez, S.J: De legibus, ac deo legislatore, 1612; Defensio fidei catholicae, et apostolicae adversus anglicanae ... theologiae, fide, spe, et charitate, 1621* (New York: W.S. Hein, 1995).

[12] *Ibid.* II.20.7.

[13] *Ibid.* II.19.8.

[14] Ibid. II.19.8.

[15] Francisco de Vitoria, O.P., *De indis et iure belli relectiones*, ed. Ernest Nys (Washington, The Carnegie Institution of Washington, 1917), rel. I, sect III: "Quod naturalis ratio inter omnes gentes constituit vocatur ius gentium".

[16] Suárez, *De Legibus*, II.20.1.

[17] Ibid., III.2.6.

[18] Ibid. II.19.50.

[19] Ibid., II.10.9.

[20] See Hugo Grotius, *De jure belli ac pacis*, ed. and introduction by Richard Tuck, from the Edition by Jean Barbeyrac (Indianapolis: Liberty Fund, 2005), vol.1, Prolegomena, 17-18, 39-41.

[21] See Samuel von Pufendorf, *De jure naturae et gentium*, ed. Frank Böhling (Berlin: Akademie Verlag, 1998), Bk.II, chp.III, 23.

[22] See Thomas Hobbes, *De Cive*, ed. H. Warrender, (Oxford: Clarendon Press, 1983), 28.

[23] See Emer de Vattel, *Les Droits des Gens*, ed. and with an introduction by Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), Preface, 9.

[24] Ibid., 9

[25] Ibid. Preliminaries, 6.

[26] Ibid. Preliminaries, 6.

Published 2011 by the Witherspoon Institute

Source URL: <https://nlmrac.org/earlymodern/law-of-nations>