1. Introduction

It is a fascinating experience to return to Suárez's theory of law after having neglected him for five whole years. In that period I have been busy with contemporary legal theory, especially with the question of how we should think of the moral quality of law in relation to its formal features. Is law to be appreciated as a manifestation of the common good (and if so, what or whose common good?) or should we content ourselves with the idea that law is a formal and neutral tool for order and decision making, which has no moral quality of its own, but owes its moral quality wholly to the external aims and ends imposed by the legislator?

These were the problems that engaged me and that now coloured my re-reading of Suárez. I was surprised to find out that my appreciation of Suárez had changed. I must admit now that I have been rather harsh on him in my book (Westerman 1998, 107). Although not so harsh as some modern natural lawyers, notably John Finnis and Germain Grisez, who blame Suárez for his misunderstanding of Aquinas' theory of natural law, I had nevertheless interpreted Suárez as someone without any sense of contingency, and as someone who turned natural law into a rigid legalistic system.

This picture is at best one-sided. It may be true that Suárez had no proper place for the concept of eternal law, as I demonstrated at some length in my book, and that he had no room for a notion of natural law as a set of aspirational guidelines for creatures to arrive at their natural ends. This is due to the kind of legalistic turn that natural law theory underwent in his hands. Natural law for Suárez is a body of real “law”, promulgated by a sovereign and accompanied by sanctions. But to characterise this notion of law as “law-as-precept”, as I did in my book, was plainly wrong. For it seems to me now that Suárez is precisely struggling to point out the differences between true law and a set of commands or precepts. And this attempt turns him into a much more interesting figure than I ever thought he was. The problems he struggled with are still persistent until the present day and his solutions are therefore highly relevant for contemporary legal theory as well.

In this article I shall discuss some of these problems in a deliberately anachronistic way. What could modern legal philosophers have learnt, had they taken the trouble to read Suárez? will
be my leading question. No doubt, this question requires me to remodel and shape Suárez’s writings as if his writings can be regarded as an answer to the concerns of H.L.A. Hart or Fuller, but I think that is a small price to pay if we can thereby show that Suárez is not an adherent of obsolete natural law theory only, but has some interesting things to say about puzzling and intriguing features of law.

2. Continuity and independence

Exactly the differences between law and precepts have been central to the debate that ensued after John Austin’s attempt to provide for a truly empirical theory of law. Austin, generally considered the founding father of English legal positivism, tried to explain terms like “rule” and “obligation” by analysing them in terms that are open to empirical observation.

Austin therefore defines law as a set of commands, wishes issued by the sovereign, addressed to an independent political community and accompanied by sanctions. Sovereigns are obeyed not because their subjects think that they exercise legitimate authority (the existence of law should be seen as independent from morality) but because subjects are used to do so. They habitually obey the commands of sovereigns. In fact, the definition of the sovereign is built upon the notion of habit. It is someone who is habitually obeyed and who himself is not in the habit to obey another, superior power.

Austin’s theory met with fierce criticism and it is here that the famous legal positivist H.L.A. Hart comes in. Hart shared Austin’s assumption that we should demarcate law from morality, and like Austin he wanted to provide for an empirically testable theory of law. But he acknowledged that Austin’s account of law as command was too crude to be defended and that it should be refined. Law was indeed more than simply a set of commands. But what was this more?

In his still famous book “The Concept of Law”, Hart observes that law cannot be reduced to mere precepts or commands, precisely because they lack the kind of continuity that is so characteristic of law. This continuity is left unexplained in Austin’s theory. If we understand law as a command issued by a sovereign, let us say Rex I., how can we explain that also the commands of his son Rex II. are generally regarded as law? We may have acquired a habit to obey Rex I., but we haven't acquired that habit vis-à-vis the commands of Rex II. Would that imply that the period in which we are still in the process of getting accustomed to the reign of Rex II. no genuine law can be made (Hart 1961, 53)? Of course, such an implication would be absurd. In order then to account for the continuity of law, Hart asserts that we should presuppose that “a more complex social practice” has been established, that is: “the acceptance of the rule under which the new legislator is entitled to succeed”. According to Hart, the notion of command presupposes the existence of a rule indicating who has the authority to issue commands. Therefore, rules cannot be analysed in terms of commands without arguing in circles.
This discussion by Hart of Austin's defective theory forms part and parcel of almost any serious course on legal philosophy. Hart's criticism is heralded as an innovatory insight. The more surprising it is that we see that Suárez advances exactly the same point. According to Suárez, an individual precept “[...] lapses with the death of a person who lays down the precept, or it lapses when that person has been removed from his office [...]” (DL, I, VI, 11). Whereas law “[...] ought to have that perpetuity and that independence of the person imposing it [...]” (ibid.). In our rapidly changing world, we might not be inclined to talk about perpetuity but about continuity, but of course Suárez here expresses the same idea as Hart had in mind.

As we see in these passages, the idea of continuity is coupled with another essential feature of law: independence. Suárez sees very clearly that law cannot be understood as the direct outcome of the immediate intents and purposes of legislators. Law starts to lead a life of its own, so to speak. That is why he asserts: “But this good and virtuous behaviour on the part of the legislator who makes a given law, is not necessary to the validity of law. For a prince may conduct himself wickedly and unjustly when he makes a law, while the law which he makes may nevertheless be just and good, and also valid.” (DL, I, IX, 12)

This does not mean that according to Suárez validity should be seen as separate from its degree of justice. Suárez is not a legal positivist, for sure. But what is crucial here is that law is clearly seen as a product that is somehow cut loose from the mind of the lawgiver and leads an independent existence. Whether a law serves the common good is not dependent on the character of the legislator and is not connected to his intentions. The aims the legislator has in mind, his direct intentions, should be seen apart from the end that is served by the law as a product. The end of law is not to be identified with the aim of the legislator: “[...] the common good must be sought in the law itself, and not in the extrinsic intention of the lawgiver.” (DL I, VII, 9) Nowadays we would express this insight by remarking that law has gained autonomy and cannot merely be regarded as an instrument of government (Unger 1976, 48-56).

In short: It is the continuity of law which accounts for the fact that we obey Rex II. even if we are not used to do so, and it is its independence that explains why we do so even if Rex II. is a wicked fool.

3. Normativity

On the basis of the insight that law is marked by a certain degree of continuity and independence, Austin’s mistakes could have been avoided. But the deeper question remains: what does law turn into such a persistent and continuous entity? How can we understand the fact that law can lead this life, independent of the mind of its framer?

This problem, which we might refer to as the problem of the normativity of law, is a persistent one and especially hard to deal with within a legal positivist framework in which moral explanations are rejected. The German legal positivist Hans Kelsen and the above mentioned Hart both offer solutions in terms of rules. In Kelsen’s case it is the fictitious Grundnorm that
should account for the normativity of rules; in Hart's case it is the rule of recognition which fulfills that role. In both theories therefore, the existence and persistence of rules is ex-plained by... rules. The only way then to avoid arguing in circles is to assert that the latter type of rules, the explanans, figure at a higher level than the rules the working of which should be explained. In short, the account of the normativity of law in terms of rules requires a hierarchical ordering of sets of rules, which easily leads to infinite re-gress.

This tendency to understand law as a set of rules, conceived as things, as entities, was eloquently criticised by Fuller, who wrote: “It is truly astounding to what an extent there runs through modern thinking in legal philosophy the assumption that law is like a piece of inert matter – it is there or not there.” (Fuller 1964, 123) According to Fuller, law should not be seen as a system of hierarchically ordered rules, but es-sentially as an activity. And he defines law as “the enterprise of sub-jecting human conduct to the governance of rules”. The definition of law as an activity enables Fuller to assert that there is a point, a pur-pose in that activity and that we should be able to develop criteria in order to assess whether that activity has been successful or not in achieving that purpose (Westerman 1999, 145-168). All these insights were and are still hotly debated by philosophers and sociologists of law, who are all brought up with the idea that law is essentially a sys-tem of things, namely rules, and who take the analysis of a rule as their starting-point.

Having these debates in mind, it is refreshing to return to Suárez. Suárez maintains, right from the start, that law can be considered from three angles: as to how it is made, as to its manifestation, and as to whom it is addressed (DL I, IV, 4). As for the first angle, the point of view of the lawmaker, law appears as essentially an act. In Suárez's words: “Law [...] is the act whereby a superior wills to bind an inferior to the performance of a particular deed.” (DL I, VI, 24. See also I, IV, 3) Suárez spends a lot of attention to the intricate ways in which intel-lect and will are interwoven in this act of lawmaking. The intellect perceives the purpose of lawmaking, the will wills that purpose, the intellect perceives that the will wills that purpose, whereupon the will finally wills the obligation. That is, at least, how I understand the complicated story, but I hope that you will enlighten me if I am wrong. I don't think that for our purpose it is very important how will and intellect are precisely connected as long as it is clear that for laws to be obligatory the will of the legislator is indispensable. According to Suárez, there is no obligation without the will to bind.

It is important to keep in mind here, that seen from this first angle, as an activity on the part of the lawmaker, there are not yet any differ-ences between law and commands or precepts. Both are obligatory if the sovereign has willed them to bind. The will of the legislator, there-fore, only serves to explain the binding character of laws or com-mands and to differentiate them from mere counsels. In modern termi-nology: to differentiate mandatory rules from rules of thumb. Unlike in modern legal theory, however, these differences are not explained in terms of their formal or logical features, but conceived solely in terms of power relations. Counsels are exchanged among equals, whereas only superiors can issue mandatory rules (Cf. DL I, XII, 4).

4. Obligatory force
In order to differentiate between commands and true law, it is necessary to leave the perspective of the lawmaker behind and to inquire into the second aspect of law, which is explicitly mentioned by Suárez: law in its manifestation. Here, law is not seen as an act but as the product resulting from that act. In Suárez’s words, we speak here of law as sign, as signum.

Signum does not only stand for the written form in which codified law is promulgated. Suárez seems to understand signum as any explicit form in which law is expressed, be it spoken words or even tradition. The point is that by speaking or writing, the law is rendered into something that endures, that is permanent and fixed. Even though “the audible word passes away”, Suárez writes: “in so far as this word endures in human memory, the law is sufficiently enduring.” (DL I, IV, 4) And insofar as “unwritten law is preserved through tradition”, Suárez adds, “custom may also at times attain the force of law.” (ibid.) What interests him is not codification but the process by means of which tacit norms are rendered explicit.

His remarks on the matter, although scattered, suggest that he is aware of the fact that the validity of law is to a large extent determined not only by substantive or moral considerations but also, and even more so, by formal and procedural factors. The process by means of which an occasional precept is turned into law is constrained by formal requirements. In the words of Suárez: “For law is so to speak a certain artificial product resulting from a given act with the accompaniment of given circumstances, conditions or habitual relations, without which it is not true law, even though it may be of the same nature with respect to the act of commanding.” (DL I, VI, 16) Suárez is very clear here, I think. The last sentence indicates that in so far as law is an act resulting from the will of the commander, there is no difference between commands and law. The differences are brought about by the procedures followed at its enactment.

At this point the question arises what the relationship is between the validity and the obligatory force of law. The validity of law may depend on formal and procedural criteria which make up for its continuous and independent character, but the obligatory force of law Suárez derives from the will of the legislator. The question arises: if the obligation to obey the law is wholly derived from the will of the legislator, how can we account for the fact that we are primarily bound by the law rather than by the legislator? Put more precisely: are we bound by the will of the legislator (of which the sign is a mere external representation) or are we bound by the sign of that will?

Suárez seems to waver on this point. On the one hand he asserts that “[...] this external law has the force of law only in that it stands for something else, something in which there dwells the virtue of law; therefore it necessarily presupposes the existence of another thing which is law in its essence.” (DL I, V, 6) According to this passage it is Suárez’s view that signs do not create obligations, but merely represent them. Here, the obligatory force of norms still resides in “law in its essence” which is the will of the legislator.

But this view is at odds with Suárez’s awareness of the independent character of law. And indeed, there is another passage which suggests an alternative reading. Here, Suárez maintains that “[...] law is that act of the prince which of itself and by its own force creates an obligation
and binds the subject. It may, indeed, be objected that the term law (lex) refers, not to a binding act, but to the sign of such an act [...]

In this version, the problem of normativity is solved by saying that although the will originally causes the law to have binding force, that binding force somehow becomes attached to the sign of that will, which is why we are obliged primarily to obey the law rather than the legislator.

From the point of view of legal theory, this latter account is far more interesting than the first. But it is at odds with almost anything that Suárez writes about the obligatory force of norms, including the obligatory force of natural law which is also brought about by the ad-ditional will of God, as I have shown in my book (Westerman 1998, 99).

So how can Suárez account for the obligatory force of law as inde-pendent from the legislator? He can only solve this dilemma by stating that also the sign, the external manifestation of law is willed. That is what makes the sign obligatory (DL I, V, 13-14). That is the back-ground of his statement that “[...] willing to command is nothing more nor less than willing to bind, or at least, willing to indicate a will to bind.” (DL I, V, 18) But of course, that makes the sign wholly de-pendent upon the will of the lawgiver who formulates the sign. The whole idea that law as sign is independent from the intentions and aims of the legislator is thereby undermined. The vocabulary brought about by the dichotomy between will and reason seems indeed ill-suited for the problems Suárez wanted to solve.

5. Validity

Although the obligatory force of law remains located in the will of the legislator, the validity of law is determined on other grounds. In order to understand these grounds on the basis of which a precept can be turned into a valid law, we should inquire into the third aspect of law: namely as to whom law is addressed. According to Suárez, the subject of law is not a private person and neither a so-called imperfect com-munity such as a household. Law is addressed to a so-called perfect community, which is independent and capable of leading a continued existence. According to Kobusch (1993, 55-66) Suárez also regards institutions as such perfect communities (Cf. DL I, VI, 17). To Suárez, a perfect community is “[...] a true political body, governed by means of its own jurisdiction, which has a coercive power that is legislative.” (DL, I, VI, 21)

Only those precepts that are addressed to a political community can be called law. We are not very far removed here from Austin who simi-larly based his definition of law for a large part on the existence of an independent political community (Austin 1835, Lect. VI.). For both Austin and Suárez legislative power is to a large extent dependent on “coercive force” (see also DL I, VI, 22). In fact, the argument is circu-lar here: laws should only be framed for perfect communities, and only those precepts who are laid down for a perfect community can properly be called law. But, circular or not, this implies that for law in order to be valid, certain requirements should be met that are derived from the fact that laws are addressed to a perfect community. I shall mention these requirements briefly.
The first of these requirements is generality. And by that Suárez does not refer to the
generality of the acts prescribed, but to the requirement that the addresses of law should be
described in general terms. That does not imply that laws should be directed to every member
of political society, but the norm should at least be directed to classes of persons (Cf. DL I, VI,
24). Even if individual members are mentioned, these should always be understood as
representatives of a category or class (DL I, VII, 10).

The second requirement is quite familiar: law should be enacted for the sake of the common
good. We have already seen that this does not entail the requirement that the legislator has
the common good in mind, but only that the law can be interpreted as striving towards the
common good. Here again this requirement is directly derived from the nature of the norm-
address. A perfect community is not a mere aggregate of individual members. It is only a
community in so far as its members are “...+ bound together by a particular agreement, looking
toward a particular end, and existing under a particular head.” (DL, I, VI, 19, also DL III, II,
4). If a rule does not serve the end of that community it is not a law but a private precept,
according to Suárez.

The third requirement is more formal in nature: it consists simply in the demand that “[...] the
legislator shall not exceed his own power in laying down his commands.” (DL I, IX, 13) Suárez
regards this re-requirement as “in the highest degree essential for the validity of law” (ibid.)
because only those should be regulated by law, which are truly subject and member of the
community.

The fourth requirement at last is the legal principle of equality. Benefits and burdens should
be distributed equally among the members of society. Suárez goes even so far as to say that “a
law which apportions burdens unequally will be unjust, even if the things which it prescribes is
not inequitable.” (ibid.)

Summarising, we see that Suárez presents us with an elaborate list of criteria which should be
met by a rule in order to count as a valid legal rule. Law should be enacted according to proper
procedure, should be addressed to a perfect community, should be formulated in general
terms, should aim at the common good, should not exceed coercive power and should
distribute according to proportional equality.

6. Between formality and morality

Looking at this list, it is hard to define these requirements as either purely moral or purely
formal. They are rather situated in a kind of twilight-zone between formality and morality.
Except for the criterion of the common good, all requirements pertain to the manner in which
law proceeds, not to the specific aims that should be achieved by law. And even the notion of
the common good here does not refer to a spe-cific aim with a particular moral content. It
merely says that the ratio legis should somehow reflect the purpose that unites the
community. So these requirements are to a large extent formal. But at the same time they are
more than that. Law which is administered equally and generally, without making exceptions or granting privileges under the guise of generality (DL I, VII, 10-11) is also just law.

In this sense Suárez’s requirements for the validity of law are very similar to the list of requirements Lon Fuller drew up for law in order to count as true law. They also linger in that twilight-zone between formality and morality. Fuller thought that law should meet eight requirements: they should be general, they should be promulgated, not retroactive, understandable, not changed overnight, not impossible to comply with, internally coherent, applied by rules that are stable, clear and coherent, and administered by persons who can be held accountable and who are consistent. Law which dramatically falls short of these demands cannot properly be called law, but should be conceived of as a kind of “managerial direction”. Like Suárez’s requirements, they do not necessarily refer to moral and substantive aims of law (which is called “external morality” by Fuller) but pertain to the way law should achieve these aims in order to count as true law. He therefore calls them elements of “internal morality”.

This labelling proved to be an unhappy one. The word “morality” worked as an alarmbell. Fuller was immediately criticised for having made a mistake of category. Fuller’s requirements, Hart remarked, were no moral requirements at all. They were purely formal. In other words: according to Hart the morality of law has to do with the quality of its aims, not of the means by which these aims are brought about. Fuller could have quoted Suárez in maintaining that a separation between means and ends, or, correspondingly, between formality and morality is hard to sustain. The manner in which law is established and in which it operates is just as vital for the moral value of law as the choice of ends. Suárez even sometimes asserts that these formal features are more important than moral ones. Even if a law is morally good, it should not violate the principle of proportionate equality. One should not transgress one’s jurisdiction, even though the law might be advantageous and just.

This is why Suárez writes: “[...] in order that law may be in conformity with reason, it is not enough that the subject-matter of law should be righteous; on the contrary, its form must also be just and reasonable, which is to say that law must be established in a just manner [...] (my italics, DL, I, IX, 12). According to Suárez, righteousness and validity of law should not be separated because both are dependent on formal requirements. Although formal requirements are certainly not enough to warrant morally just law, they are nevertheless indispensable conditions. If this is indeed the lesson we can learn from Suárez, it is a very important one.

Literature:

Austin, John (1832): The Province of Jurisprudence Determined, Lon-don.


