Early Modern Sovereignties

*Theory and Practice of a Burgeoning
Concept in the Netherlands*

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Ideas on Sovereignty

Soto, Vázquez and Grotius

Gustaaf van Nifterik

1 Introduction

Theories on sovereignty of course have their political and socio-economic dimensions. In the Spanish sixteenth century they had a strong theological dimension as well. Presumably they still have many other dimensions. As state power and sovereignty also deal with legal questions, theories on state power and sovereignty certainly and necessarily also have a legal dimension. However, dominant literature on sovereignty often does not study this dimension in depth. For instance, the brilliant 1978 study of Quentin Skinner on the foundations of modern political thought contains an excellent chapter on Spanish late-scholastic thought ('the Thomists'). One gets all the answers there, and one question in addition: is there any legal coherence in their solutions and answers to the specific topics and questions discussed; is there a common legal ground?¹

This chapter tries to elucidate the main legal frameworks behind the ideas of Domingo de Soto (1494–1560), Fernando Vázquez (1512–1569), and (especially) Hugo Grotius (1583–1645) on state power and its origin. What follows is a concise discussion of their most basic and general legal ideas or paradigms that support their views on specific political, economic, theological, legal (etc.) topics and questions.

In the light of the volume's subject the focus could well have been on other authors, such as Vitoria, Althusius, and Suárez, to list only the most obvious candidates. Let me put forward the following in defence of my choice for Soto, Vázquez and Grotius. I started with Grotius, and I still think his theory on state power in *De iure belli ac pacis* is the one most in need of clarification, since indeed all too often modern scholars run off with his texts

1 Quentin Skinner, *The Foundation of Modern Political Thought*, 2 vols (Cambridge, 1978), vol. 2, chapter 5 (The Age of Reformation).

without a sound understanding of the main (legal) structure of his political theory. Therefore, in this chapter his theory gets most of the attention. To give his story more of a contextual constitutional background, and given the volume's subject, several of the Spanish late-scholastics came to the fore. However, as for the legal dimension of their constitutional ideas it turns out that on the most basic level the Spanish scholastics, from Vitoria in the early sixteenth century to Suárez in the early seventeenth century, are on the same wavelength, that their constitutional ideas are built upon the same fundament.² The notorious and in his days influential exception is Fernando Vázquez, 'decus illud Hispaniae', as he was labelled by Grotius, who often quoted him in his early work *De iure praedae* (written around 1604) and in his magnum opus *De iure belli ac pacis* (1625).³ Therefore Vázquez is included in this chapter. The main discussion partner for Vázquez when he is taking position vis a vis his contemporary countrymen, and a leading figure in his days, is Soto.

Again, the aim is to shed some light on the basic legal structure of the theories on state power and sovereignty of Soto, Vázquez, and Grotius. Doing so reveals both basic differences and similar outcomes. There is in fact a line to be drawn from Soto via Vázquez to Grotius, a seemingly logical sequence where Grotius's theory contains important elements of the other two. This is not to say, however, that the development of the ideas indeed went along that line, although, as indicated above, it is obvious that Vázquez knew the works of Soto well, and that Grotius was familiar with the works of both Soto and Vázquez when he wrote his *De iure belli ac pacis*. I will conclude that there are similarities in the ideas on sovereignty of these three scholars, but that their ideas do not converge on a deeper level. They so to say stick to different paradigms concerning sovereignty. Indeed, as we will see below, Vázquez's basic principles can be said to lack the very idea of sovereignty all together.

2 The same can be distracted from the study of Bernice Hamilton, *Political Thought in Sixteenth-Century Spain. A Study of the Political Ideas of Vitoria, De Soto, Suárez, and Molina* (Oxford, 1963), which is, I think, still a valuable study, precisely because the common ground of these scholars is clearly brought to the fore. On 7: 'Whatever theological differences there may have been, we can find in the field of political ideas no great difference between Jesuit and Dominican ways of thinking. Vitoria and Suárez are extremely close to one another; the differences are those of personality'.

3 Hugo Grotius, *De iure praedae commentarius* (1604), chapter 13. See also *De iure belli ac pacis* (Paris, 1625), Prolegomena 55.

2 Domingo de Soto, *De Iustitia et Iure* (1553)

The fundament, or basic presumption of all Soto's 'constitutional' ideas, as of those of his teacher Vitoria and most of the other Spanish late-scholastics, is the idea of the community as a body, as a being, an entity existing in and for itself, as a creation of God.⁴ The community is natural, indeed, and indispensable, given the vulnerable nature of man who is unable to survive on his own, and who therefore is dependent on cooperation with other humans. Since God created men as social beings human communities are necessarily part of God's natural design.

Had all men been good, a simple community of men living and working together peacefully would probably have been enough for humanity to flourish. But men are not just good, at least not all men are. Consequently men need coercive power to hold them together peacefully. Without such power the community would fall apart and men would not be able to live socially according to God's design. Absence of coercive power would hamper humanity to flourish.

As both human sociability and the human tendencies to dispute and fight are natural, so too must be the means to preserve the community. Consequently men did not have to create something out of nothing when they tried organize their political community in order to achieve their peaceful goal. The moment that human selfishness becomes a threat to the community, men only have to effectuate the community's right of self-preservation in order to keep it together. From a legal point of view one could argue that the community being itself a God-created, natural entity, a 'body' indeed as these scholars often say, is just as every other body furnished with a natural, God-given right to defend itself in its being and to resist forces that work to the contrary.

The pivotal point in the 'constitutional' theories of the Spanish School of Salamanca from Vitoria to Suárez, is that state power is in its essence this community's natural right to preserve the entity, or 'body', and to protect it against dangers, both internal and external. State power is not created by men, not even by the community of men; it is inherent in the community as such. Neither is it transferred by the community to the ruler(s); these theorists would argue that it could only possibly be 'transferred' to a compatible body, that is, to another community, making two bodies one. Since a community as a whole

4 See Domingo de Soto, *De iustitia et iure* (revised edition; Salamanca, 1556), IV.4.1. I have used the edition Lyon (Lugduni) 1582. The same basic ideas can for instance be found in the work of his teacher, Francisco de Vitoria, especially in his *De potestate civili* (1528). I have used the English translation in Francisco de Vitoria, *Political Writings* (eds. Anthony Pagden and Jeremy Lawrance; Cambridge, 1991).

cannot itself wield this power, it authorizes one, or a few, or many persons to use this natural right of self-preservation vested in the body-community. The ruler(s) receive(s) the *auctoritas* to use the God-given *potestas* of the community. Evidently this *potestas* is not to be used in just any way the ruler(s) would like. It is a power created by God for the sake of the community, a power that is created to preserve the community, to protect this natural body. The ruler, then, is the community's defender, its guardian or *custos*. The ruler himself, as man, is of course still a member of the community of men; as its ruler, he is the community's head (Soto, *De iustitia et iure*, I.6.7).

Soto in his *De iustitia et iure* approaches all constitutional questions and topics – such as: 'Is the ruler and are the subjects bound to the laws?' (I.6.7); 'Can costume derogate law?' (I.7.2); 'Can a ruler use the property of the subjects?' (IV.4.1); 'Does the ruler have *dominium* in the life of the subjects?' (IV.2.3); 'Can a ruler be resisted, removed or even killed?' (V.1.3); 'Can an innocent be killed (in order to preserve the community)?' (V.1.7) – by asking the same question: does it or does it not (presumably) help to preserve the community, can an affirmative answer to any of the questions mentioned above be founded upon the ruler's role as defender of the community? In other words: is the *bonum commune* (presumably) promoted by it?

If the answer to this key-question is in the affirmative, then often a subsequent question awaits answering, i.e. in situations that the infringement of the rights of some other natural entity is to be expected, as an infringement on the rights of a human being, or of another state (being a politically organized body, an entity), or of the Christian community as a whole. If this is the case, an additional and specific title is needed to legitimately impede on this other entity's right. Harm done to the community can function as the fundament of such an additional title, or some other culpable offence against the community, its head or (one of) its members.

Indeed, as Annabel Brett has shown, according to Soto, more unambiguously so than to Vitoria, every individual member of the community is still also to be treated as an entity in itself ('propter seipsum existens', V.1.7).⁵ It follows that the rights of an innocent individual may not just be infringed, not even in order to gain some obvious public good; a specific title is needed to make use of the state-competence to infringe on anybody's rights. Of course the same goes in situations that the rights of other states are at stake, or of individuals

5 Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Ideas in Context; Cambridge, 1997), 159. Brett adds that '(f)or Soto, this is the whole problem of the political'.

who are not subjected to the ruler. They too are entities in themselves, not to be used or prejudiced for the well-being of any other entity without a cause.

As for the most interesting and instructive question of the people's right to resist an otherwise legitimate ruler who has started to behave tyrannically, Soto is in fact rather reserved, more so than his own principles and basic ideas would have us expect. A publicly appointed executor could carry out a public verdict against a ruler who seriously misbehaved and who therefore must be taken for, and be treated as a tyrant. But, Soto adds, it is better for the people to turn to a ruler of higher rank, or else, ultimately, to God (v.1.3). Given Soto's own point of departure, one could well imagine the idea of a full revival of the community's right to resist and preserve itself as soon as the (otherwise legitimate) ruler begins to threaten to the community in its existence. And this is indeed what Vitoria had in mind, arguing that 'even if the commonwealth has given away its authority it keeps its natural right to defend itself'.⁶ Soto is very cautious on this point, probably for good reasons, but maybe too much so in the light of his own theory.

To summarize Soto's basic legal constitutional ideas: state power is natural and God-given, it is entrusted to the ruler by an act of the community, it is only to be used to preserve the community and to promote the *bonum commune*, the ruler is still a member of the community, the citizens are obliged to obedience – ultimately, because God says so. 'Qui resistit potestati, Dei ordinationi resistit'.⁷ Disobedience threatens the community.

All that is mentioned above makes clear that there is always a 'test', so to say, to determine whether the ruler uses the state power entrusted to him in a proper, legitimate way: is the *bonum commune* promoted by the ruler's acting? The question can also be framed by asking whether or not the use of power ultimately contributes to the community's defence. A weak spot in Soto's theory is that there is hardly a juridical remedy in case a ruler fails the test.

3 Fernando Vázquez de Menchaca, *Controversiae Illustres* (1564)

The main and profound deviation from this general outline of the thoughts of the late-scholastics in sixteenth-century Spain is Fernando Vázquez, who in his *Controversiae illustres* attacks the theory in its fundament by explicitly denying the community the status of an independent, natural entity created

⁶ Vitoria, *On Law* (this treatise can be found in the same volume edited by Pagden and Lawrence mentioned above), para. 137 (ed. 200).

⁷ Romans 13:2.

by God.⁸ In his theory the community lacks the status of a natural body and, consequently, the community is denied a natural right to defend itself against external and internal dangers. On the contrary, as Brett remarked on Vázquez's core idea of his legal-political theory: 'for Vázquez, the society of private citizens is all there is'.⁹ Men live together in a man-created and contracted society of good faith (*societas bonae fidei*, as in *Controversiae illustres* 1.13.2). They do so contract because by nature men are social beings. Yet it is a human contract that functions as society's fundament. Therefore, indeed, state power can never and by no means be taken for the exercise of a natural or God-given right.

As the society lacks the status of a natural being but is man-made, political power too must have been created by men. And it is invented and created for a specific goal; that is to enable men to live an agreeable and genuine social life in peace. Founding and creating a *societas bonae fidei* not necessarily entails setting up a political community, a community with coercive power, because *sub principe vivere* is not in itself precisely necessary for men to enable social life ('non est necessitas praecise', praef. 125, text and 'summa'). As Brett has said on Vázquez's ideas: 'men are fully men in civil society, without being subject to any power'.¹⁰ Still, political power is all around; so obviously it is something to deal with intellectually.

For Vázquez, political or state power in whatever form is unnatural in the sense of being man-made. The intellectual challenge, then, is to solve the contradiction that putting the very idea of political power into practice entails a deviation from the natural equal freedom between men; it even creates something similar to slavery (1.41.37 and elsewhere; see 1.50.3 for legislation creating a type of slavery). Given the natural equality of men, it is beyond doubt that no man can ever be subjected to any other human being other than by voluntary subjection (1.20.24 and 25). Men are only willing to do so out of enlightened self-interest, that is to prevent the weak from being oppressed by the strong (praef. 124: 'ne eorum imbecilliores a fortioribus opprimerentur'). But they never give up their free and equal nature entirely, they only voluntarily set certain limits to the use of their own natural freedom. Men in a political society indeed retain the right to defend themselves, even against the ruler of the state (1.18), notwithstanding the fact that, generally speaking, they must and will

8 Vázquez does so most explicitly (and with reference to and extensively quoting from Soto, *De iustitia et iure*, IV.4.1) in chapter 1.21 of his *Controversiae illustres* (1564). See also 1.13.2 and 16 and 1.47.8. I have used the bilingual (Latin–Spanish, translation by Fidel Rodríguez Alcalde) edition of the work (Valladolid, 1931–1934).

9 Brett, *Liberty, Right and Nature*, 202.

10 Brett, *Liberty, Right and Nature*, 173.

be aware that the well-being of the state might well serve their own interests (I.18.10, also I.16.13).

Key notion of Vázquez's constitutional theory is that whatever the form of political power in a specific society, it is invented and created by men, for the public sake of the citizens, not for the sake of the rulers of whatever rang or dignity.¹¹ On this basis, Vázquez's response to all sorts of constitutional controversies is to ask: can the ruler point out that he is indeed *explicitly* entitled to do whatever he is up to, that the competence is *nominatim* attributed to him; if not so, can he then prove that the people abdicated and transferred to him full political power ('omne imperium et potestatem'), as had been the case with the Roman emperors in Antiquity (thus in I.2.19 concerning a ruler's competence to change or abrogate the law without the people's approval). Next, if a specific power is not *nominatim*, or if general power is not in full attributed to the ruler, Vázquez would ask whether maybe the claimed competence can reasonably be *assumed* to be given to the ruler (the example given in I.2.19 is the competence to legislate in cases of little interest).

It is all together clear that the power and the competences of a specific ruler always depend on the commission and concession to him by the people: 'an princeps id possit, pendet a commissione et concessione sibi a populo facta' (I.2.18, a section on the competence to change the laws), whereas a complete transfer of (absolute) power is theoretically feasible and historically confirmed, but generally speaking not very likely, since it results in uncontrollable power. It can therefore by no means be assumed.

Moreover, the question whether or not a particular ruler has a certain competence is not to be answered in the affirmative too promptly, since Vázquez's point of departure is the natural and equal freedom of all men. Alleged restrictions of this natural freedom always call for legitimation. Without further proof, the ruler must be taken for a custodian, minister and executor of the law and for nothing more ('non legum Imperator sed custos, minister et executor', I.2.19). The idea of an absolute, sovereign ruler is an anomaly in Vázquez's theory, for, unless proven otherwise, the ruler is in fact no more than a mandatory; moreover, the people could probably at will revoke the mandate (I.47.12, concerning the right to legislate).¹²

11 Fernando Vázquez, *Controversiae illustres*, I.1.10: '[...] omnes omnino principatus, regna, imperia, potentatus, legitimos legum et hominum ob publicam ipsorum civium utilitatem, non etiam ob regentium commoda, inventos, creatos, receptos admissosque fuisse [...] non secus quam reliquos etiam magistratus'.

12 Vázquez is very cautious on this point, not taking position openly, for a reason, as he says, he has to keep silent about at the moment: 'quia modo neutram partem adfirmo ob causam nunc reticendam'.

For Vázquez power of one human being over another can only exist if it is beneficial to the ruled, as it is not meant to be beneficial to the ruler: 'Regnum non est propter regem, sed rex propter regnum'. His litmus test is always: is there proof that a specific competence is given to the ruler or that the ruler has been given unrestricted power; if neither of the two can be proven, one can ask whether the ruler may reasonably be assumed to act with the (general) approval of the ruled. Ultimately the last question comes to the point of asking whether the individual citizens do benefit from it (in the long run). There is in fact not much of sovereign power in his theory: the ruler is a mandatory, whereas the people is little more than a collection of individuals tight together contractually in a *societas bonae fidei*.

4 Hugo Grotius, *De Iure Belli ac Pacis* (1625)

As said above, I believe the theory of Hugo Grotius in his *De iure belli ac pacis* (1625) is the one most in need of clarification; it will therefore be discussed in greater detail than the theories of Soto and Vázquez.¹³ On another occasion I replied explicitly to some interpretations of his ideas that are in my view inaccurate.¹⁴ In this chapter, the basic legal structure of Grotius's constitutional ideas will be set out, notwithstanding the contention by some that such exertion would rather obscure than elucidate, a contention presumably based on the view that Grotius's book itself lacks 'intellectual coherence'.¹⁵ I disagree on the last statement. There may be incoherence between Grotius's early and his later works,¹⁶ his *De iure belli ac pacis* itself appears coherent enough to me. It is however true that Grotius in his magnum opus did not work out a full 'constitutional theory', as his focus was on the law of war and peace. Constitutional questions are preliminary dealt with since wars are waged by and against sovereign powers, so that in a more or less civilized world we will often, if not

13 For the English text I make use of Francis W. Kelsey's translation published in the series *Classics of International Law* (Oxford/London, 1925). For the Latin text one can best turn to the edition by Robert Feenstra and Caroline E. Persenaire (Aalen, 1993).

14 Gustaaf van Nifterik, 'A reply to Grotius's Critics. On Constitutional Law', *Grotiana*, 39 (2018) 77-95 (available at <https://doi.org/10.1163/18760759-03900004>).

15 Peter Borschberg, 'Grotius, the Social Contract and Political Resistance. A Study of the Unpublished *Thesis LVT, ILLJ Working Paper 2006/7. History and Theory of International Law Series*, especially 28 and 40 (available at SSRN: <https://ssrn.com/abstract=969250> or <http://dx.doi.org/10.2139/ssrn.969250>).

16 Which would, if I am right, refute the suggestion of Borschberg (see the footnote above) to look in Grotius's earlier works to get grip on his theory as set out in *De iure belli ac pacis*.

most of the time, be dealing with a state (or state officials) waging war against another state.¹⁷

In search for some grip, one has to turn to various questions on various matters. The most important question for my subject is the one of whether the subjects can rightfully make war against their legitimate ruler (chapter 1.4). I turn to that question first.

As a general rule Grotius lays down that rebellion is not permitted by the law of nature and he quotes the Roman historian Sallust to substantiate his claim in one of the most absolutistic formulations possible: 'To do whatever you wish with impunity, that is to be a king' (1.4.2). Neither is rebellion permissible, Grotius continues, by Hebraic law or the Gospel (1.4.3–5). Only the 'law of necessity' (1.4.7) might cast some doubts. Grotius is not sure, as it ultimately depends on the will of the very first persons who had associated themselves and had decided to institute a civil society, a *civitas*; I will return to this below. After having said that in any case the person of the king himself must be spared, Grotius comes to the general conclusion that resistance cannot rightfully be made against him who holds sovereign power (1.4.7, at the end of a long paragraph).

The key notion is here, as it was for Vázquez, the will of the persons who originally instituted the civil society. These persons created a *ius imperandi* or *regendi* (both terms are applied, seemingly as synonyms, in 1.3.8 and elsewhere), a power that falls to the *civitas*. In fact, sovereign power is the very first 'product' of the *civitas* ('cuius prima productio est summum imperium'), the element that binds the individual members together into one artificial body, the power that establishes 'the full and perfect union in civic life' (11.9.3.1). In 1.3.12.2 we read '*ius regendi, qua populus sunt*', and obviously the phrase '*qua populus sunt*' is hard to translate, i.e. to interpret, as the translations range from 'in their totality as a people',¹⁸ via 'as they are a people',¹⁹ to 'by which they are a people'.²⁰ Should the last interpretation be correct – and I do in fact think it is – the act of creation of political power is two-sided: the creation of

17 I discuss the same subject in more detail in my contribution 'Sovereignty' to Randall Lesaffer and Janne E. Nijman (eds.), *The Cambridge Companion to Hugo Grotius* (Cambridge, expected March/April 2021). Both texts are written in approximately the same period.

18 Kelsey in his translation of *De iure belli ac pacis*.

19 Thus the translation in the Liberty Fund edition, edited by Richard Tuck (Indianapolis, 2005).

20 Jan Frans Lindemans in his Dutch translation *Het recht van oorlog en vrede. Prolegomena & Boek I* (Baarn, 1993). In Dutch it reads: 'waardoor zij juist een volk zijn'.

the *ius regendi* by the gathered persons is in itself the act whereby also the people-as-a-whole is created; state power and state people are two sides of the same coin.

Two questions arise. How should we understand this right to govern? And how should we understand sovereign power being a 'product', something that is created or produced? I start with the first question; answering this question will also bring the solution to the second question to the fore.

Although Grotius in I.3.6 describes the moral faculty to govern, that is the *potestas civilis*, his exposé is not altogether satisfactory to answer the question of how to understand the right to govern. In I.3.6 Grotius defines the main competences and powers of the highest ruler (i.e. legislation; the making of peace, war and treatises; the right to levy taxes, and so on; and the branch called the judicial), and the ways to carry these out. We, however, want to move up to a more abstract level. We do not ask what civil power consists off, but what it essentially is. I think that in fact the *ius imperandi* or *regendi* is a composition of two main, interrelated faculties.

First, it is the right to make (public) war on behalf of the society, both external and internal, on all of the four natural titles (or *causae*) of war (see II.1.2: defence, the obtaining of that which belongs to us, or is our due, and the inflicting of punishments), a right that the individuals have in the state of nature. By instituting a civic society the members, i.e. the individuals, renounce their liberty (or 'right' in the first sense of the term *ius*: that what is not unjust) to make (private) wars to protect or reclaim their own or somebody else's natural rights (in the second sense of the word *ius*: subjective right).²¹ Once the civic society is instituted, disputes about rights are to be settled by the artificial body called *civitas*. I do not believe that Grotius meant to say that the persons when they institute a *civitas* renounce their natural rights (*ius*, as subjective right).²² Again, what the members of a society renounce is their liberty (*ius*, as what is not unjust) to make (private) wars to protect or reclaim their subjective rights, both natural and human or civil. In society the members have agreed to make use of society's judicial settlements and stately lawsuits to protect and reclaim their rights.

The second essential element of the *ius imperandi* is a (subjective) superior right (that is a *ius* – or *facultas* – *eminens*) over the persons over whom the *ius imperandi* is wielded and their property, an eminent *potestas* and *dominium*

21 See I.1.3–9 on the various meanings of the word *ius*.

22 Compare Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1978), esp. 77 ff.

(1.3.6.2 and 1.4.2.1).²³ Probably two lines could here be drawn backwards between Grotius and the Spanish authors as discussed above, one line between Grotius on the one hand and (Vitoria and) Soto on the other, the other between Grotius and Vázquez. The society is a body, a *corpus morale* (1.3.7), a *corpus artificiale* (11.9.3.1). If my contention that Grotius is here on a par with the Spanish authors as Vitoria and Soto is correct, this body as such is the bearer of natural rights, including, being an overarching body, an overriding right over its members and their goods. Indeed, Grotius too holds that civil power is ordained by God, as we read in Romans 13 (1.2.7.3; 1.4.4.1: 'quare potestates publicae [...] quasi ab ipso Deo essent constitutae'), or at least that God approved the institution (1.4.7.3: 'quia hominum salubre institutum Deus probavit'). On the other hand (here we come to the answer on the second question mentioned above): Grotius also holds that public tribunals are the creation not of nature (God), but of man (1.3.1.2). Moreover, as concerns the scope of this *ius eminens*, Grotius in 1.4.7.2 (on the question of resistance) looks at what the persons who had originally instituted the society presumably had consented to. Here Grotius is essentially on a par with Vázquez and his idea of society being man-made and its powers thus depending on what men originally wished to create for themselves.

To conclude: the civic society as a body is ordained by the approval of God's will (as we read in 1.2.7.3)²⁴ and, as an entity in itself, a body, it has the faculty to defend its rights; which rights of the society there are to be defended ultimately depends on what the persons originally setting up the society had decided. The very idea of a *ius eminens* of society is in fact an indication that society's members indeed do not lose their (natural) rights when they enter (institute) society; society is just equipped with a greater right. How far-reaching this *ius eminens* is, depends on the type of society the original founders had consented to and the rights they wanted to equip society with.

The next step in Grotius's constitutional theory is that society's right to govern is entrusted to a ruler, be it a king, the senate or the people (hence the *tres gubernandi formas* in 1.3.8.9, referring to Seneca). In most cases the ruler holds the *ius imperandi* as a usufructuary right; if the ruler is a king, as he often was in Grotius's days, he sometimes holds it in full right of ownership (1.3.11.1). The difference lies not in content, but in the transferability of the *ius*: only if the *summa potestas* is held *plene*, that is: with full proprietary right, that is in

23 Grotius, *De iure belli ac pacis*, 1.4.2.1: 'But as civil society was instituted in order to maintain public tranquility, the state forthwith acquires over us and our possessions a greater right, to the extent necessary to accomplish this end'.

24 In Grotius's words (*De iure belli ac pacis*, 1.2.7.3): 'Sequitur ergo ut ordinata haec potestas voluntate Dei approbante intelligatur'.

patrimony, can the king transfer this power to somebody else (I.3.12 and II.6.3). Indeed, according to both Roman law²⁵ and the law of Holland (in Grotius's own account of it),²⁶ a usufructuary right, or *ususfructus* ('lijftocht' in seventeenth-century Dutch) cannot be transferred (although the right to take some of the fruits or profits can). There is a third possible form of holding the *ius imperandi*, one that rests on sufferance (*ius precarium*), which is – as Grotius himself says – altogether different (I.3.11.3). In fact the holder of such a precarious right, revocable at any moment, cannot be said to bear sovereignty – only he or they who conferred the right on him, probably the people, can.

It will be clear by now that there is no lasting contractual relationship between the ruler and the people he rules over. The sovereign acquires a right over society's *ius imperandi*: he either holds this *ius* as a proprietary right, or as a usufructuary right. The right is transferred to him, evidently, indeed, on the basis of a contract, and conditions might be included in the contract. Said differently, the right of the ruler might well be conditional, the alienation might well have been a conditional one (Grotius in fact uses the words 'conditional alienation' – 'nam haec est conditionalis alienatio' – in II.6.9).

I return to the question of the people's right of resistance. Most likely the first persons to institute society had wanted the *civitas* to prohibit the unregulated (promiscuous, *promiscuum*, as Grotius says) right of resistance, as this prohibition of resistance was, presumably, the only way to effectively achieve public peace and order (I.4.2.1). And so, presumably, there is no right of resistance against a legitimate sovereign. Yet this conclusion is not without some important exceptions, exceptions indeed of significance in Grotius's days. For the people (or society) transferring the right to govern to the ruler they have chosen, can indeed by contract limit the right that is to be transferred, so that some 'natural freedom' resides in the people (I.4.14, whether Grotius thinks of society as a whole or its members is not all together clear); or the transference of the right to the ruler can be restricted by a condition, such as that he would lose his kingship should he violate his pledge (for instance his pledge to uphold the laws of the land, I.4.12). In other words, although there is no persistent contractual relationship between the ruler and the people, the right that is transferred to the ruler is not necessarily unlimited, not *per se* without restrictions or conditions.

Even if nothing of the sort has been established and the ruler is truly sovereign and in full possession (not necessarily ownership) of the *ius imperandi*,

25 Barry Nicholas, *An Introduction to Roman Law* (Clarendon Law Series; Oxford, 1975), 144.

26 Grotius, *Inleidinge tot de Hollandsche rechts-geleerdheid* (1631), II.39.4: 'Een lijftochter mag den lijftocht niemand overdoen, maer wel mag hy iemand gunnen eenige vruchten te trekken'.

there is the general exemption to the law of non-resistance, that is in case the ruler turns out to be an enemy of the whole people by showing an hostile intent (1.4.11). Grotius adds that he thinks this can hardly occur, unless maybe a king would rule over several peoples.²⁷ Grotius's justification to resist and make war on the ruler who is the enemy of his people is that the will to govern a people cannot logically coexist with the will to destroy it. And so, a king who turns against his people renounces his kingdom – he is therefore no longer considered a king. It is important to point out with some emphasis that in cases as this it is not the infringement by the ruler of the subjects's (natural) rights as such that gives rise to a right of resistance; neither is it a breach of contract or any of the sort. Although Grotius expressly says that the ruler is bound to observe the laws of nature, of nations and of God, and that orders contrary to these laws should not be carried out, an active right of resistance against a ruler, that is: rebellion, cannot be concluded from these sayings. Against a king-enemy of the people resistance is legitimate only because being a king simply cannot coexist with the wish to destroy the community. The king-enemy is no longer king and thus by nature equal to any of the persons he attacks. In such a situation the attacked may use his natural right to defend himself against an attacker, against him who threatens his very existence.

To sum up, firstly, Grotius's litmus test is the (presumed) will of the persons who originally had instituted the civil society and thereby produced the power deemed necessary to uphold this society; for it is this society's right, the *ius imperandi* or *regendi*, that is transferred to the king (or to another sovereign power). Without evidence to the contrary, the first persons to institute society presumably had wanted to produce all that is needed to sustain a well-ordered civil society, that is, to Grotius's mind: absolute rule without a right of resistance of the ruled, with some restrictions in case of extreme necessity only.

Secondly, the ruler in most cases holds his right to govern in usufruct, sometimes in full ownership; if he holds only a precarious right subject to revocation, the ruler is not sovereign while those who conferred this right upon him are. Next is to be considered whether or not the right, the *ius imperandi*, is transferred to the ruler in its totality, and whether or not this was done under certain conditions. These questions are not to be answered in general, since it all depends on the specific situation in a specific state.

The conclusion must therefore be that in Grotius's theory state-power is presumably absolute (although not necessarily so), while the power of the ruler

27 He might indeed have had the king of Spain and lord of the Netherlands Philip II in mind, as is often said.

often is not (although this is not excluded). The first depends on the persons who had originally instituted society, the second on the terms under which the society's right is transferred to the ruler. In any case, state-power can never legitimately be used with the evil intent to destroy the society.

5 Conclusion

Soto looks upon state power as something created by God. It is the community's right to defend itself as an independent entity against attacks and dangers both from the inside and from the outside. State power, God-given, is limited to what is necessary for effective protection of the community. Not so for Vázquez and Grotius: however much inspired by God and by nature, the persons who originally instituted a specific state (*civitas*, civil society) also decided on the scope of the state's powers.

An important and far reaching difference between Vázquez and Grotius is the burden of proof: whereas Vázquez would ask the ruler to prove that he is entitled to whatever specific competence he would want to make use of, Grotius takes state power for absolute and all-inclusive unless proven otherwise. Grotius here in fact comes close to Soto: absolute power is deemed necessary to ensure *stabile tranquillity*. In fact it turns out to be a lot more than just a shift in the burden of proof between Vázquez and Grotius: it is a different view on human beings and their capability or incapability to live communally in peace. It is also a different view on society, which is, according to Grotius (as to Soto), a body, an entity in itself, whereas it is little more than a conglomeration of individuals (a *societas bonae fidei*) for Vázquez.

Grotius's ruler may be resisted when he threatens the existence of the society as a whole, or – in case he holds a limited or conditional right to govern – when he transgresses the limit or the condition is met. For a clear picture of Grotius's constitutional theory it is essential to keep in mind that the power of the state, the power with which the first persons instituted their civil society (i.e. state), is presumably absolute, but that the *ius imperandi* or *regendi* of an actual ruler, be it the people, a king or the senate, often is not.

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