CUSTOM IN FRANCISCO SUÁREZ'S *DE LEGE NON SCRIPTA*. BETWEEN FACTUALITY AND THE LEGAL REALM

Dominique Bauer[a]

Fechas de recepción y aceptación: 17 de noviembre de 2014, 26 de febrero de 2015

Resumen: En este artículo se analizan algunos aspectos particulares del tratamiento de la costumbre en el séptimo libro, *De lege non scripta*, de *De legibus* de Francisco Suárez, más especialmente en los cap. I y IX. Llevando un paso más allá ciertas ideas de sus predecesores, Suárez desarrolla una dinámica y tensión muy interesante en un procedimiento privado-público. Suárez se pronuncia por un argumento ex contrario a una dimensión pre/extra-legal que se queda fuera del campo propio de la calificación jurídica. Por el primero se entienden las dimensiones privadas, factuales y singulares de individuos, agregados de personas, acciones jurídicas y derechos. La calificación jurídica es un procedimiento de abstracción en el que destacan las dimensiones racionales, no físicas y generales de gente, acciones, cosas y derechos. Estas características determinan el alcance de la costumbre calificada de legal. Los casos de *usus* y *consuetudo*, de la *communitas perfecta* en oposición a la *communitas imperfecta*, o del príncipe como instancia jurídica en oposición al príncipe como persona privada, ejemplifican dicha dinámica. En este contexto se presenta una tensión. La subjetividad jurídica, expresada en el entendimiento fundacional de "derecho" como *facultas moralis*, aparece

[a] Profesora Titular de Filosofía del Derecho Faculteit Rechtsgeleerdheid Katholieke Universiteit Leuven.

Correspondencia: Oude Markt 13 -bus 5005; 3000 Leuven. België.

E-mail: dominique.bauer@law.kuleuven.be

en *De lege non scripta* junto a un concepto de derecho que se funde en la fuerza de las varias leyes.

Palabras clave: Francisco Suárez, *De legibus,* costumbre, dinámica en plan privado/público, subjetividad jurídica.

Abstract: This contribution addresses distinctive aspects of Francisco Suárez's treatment of custom in the seventh book of his *De legibus*, *De lege non scripta*, in particular in cap. I and IX. Taking further some of the ideas of his predecessors, Suárez develops a very interesting public-private dynamics. Suárez ex contrario singles out a pre/extra-legal realm against the field of legal qualification. The former denotes the private, factual and singular dimensions of individuals, aggregates of people, legal actions and rights. The latter, on the contrary, concerns their abstraction, their rational, non-physical and general dimensions. These characteristics define the scope of a legally qualified custom. For example *usus* and *consuetudo*, the *communitas perfecta* versus the *communitas imperfecta* or *privata* and the prince as a legal instance versus the prince as a private person, exemplify these dynamics. Throughout the argument a tension arises between legal subjectivity, fundamentally expressed in the notion of "right" as a *facultas moralis*, and a concept of law that roots in the force of the various types of law and that also constitutes the overall structure of the *De legibus*.

Keywords: Francisco Suárez, *De legibus*, Custom, Private/public dynamics, Legal subjectivity.

1. Introduction. Posing the problem

In his *The Secret History of Domesticity*, Michael McKeon pictures the seventeenth century development in England of notions of privacy against an increasingly more abstract and impersonal *citizen* in the public realm, a public realm that peculiarly at the same time invades the private realm[1]. In the early modern

[1] Cf. McKeon, M., *The Secret History of Domesticity. Public, Private and the Division of Knowledge*. Baltimore 2005. McKeon's impressive theory develops a sophisticated criticism and further elaboration of Habermas' *Strukturwandel der* Öffentlichkeit. In the historiography on Habermas's *Strukturwandel*,

context of the state, the individual as a citizen and, in an exemplary way as a contractor, is ex contrario to be distinguished from the pre-legal and private person in his private sphere or space. The expansion and interiorisation of an impersonal public realm and a depersonalized citizen, thus seems to assert the presence of the citizen and the person as a private, empirical being[2].

In this contribution, an attempt will be made to show how such processes of negative demarcation of the private against the public hold a particularly legal dimension. This legal dimension is furthermore also embedded in early modern legal theory and doctrine that comes forward in late scholasticism. The process appears in this sense in a synthetic and partly systematic way in book VII on custom of Francisco Suárez's 1612 *De legibus*, entitled *De lege non scripta*[3]. In Suárez's work, these dynamics of demarcation are developed in terms of a process that precisely moves along the shifting boundaries between the pre/extra-legal and the legal realm, or, more precisely the realm of obligation that flows from rights and laws. In *De lege non scripta* they oppose one another as notions of private versus the domain of the public. The pre/extra-legal refers to the factual, the realm of the private and the singular. Legal qualification concerns abstraction, the rational, the general, all of which constitute the scope of legally qualified custom.

civil society and the concept of public order have often been used interchangeably: Mah, H. «Phantasies of the Public Sphere: Rethinking the Habermas' of Historians», in *Journal of Modern History* 72 (2000) pp. 153-182. It is a crucial element in McKeon's study that he does not treat these terms as synonyms, but on the contrary develops their tension as a long-term evolutive framework in which private aspects of individuals and society are singled out against their public dimension that both invades and engenders their privacy.

[2] Cf. McKeon, M., *The Secret History…*, *cit.* p. 127. Among others in his discussion of the creation of a "private space within a private space" (p. 218) in the case of the cabinet, or "*the withdrawal of public state into semipublicity*" (p. 221), it becomes clear how the invasion of the private by the public provokes an increasingly radical demarcation of the private: (p. 228) "The development of domestic architecture in the following two centuries [following the Tudor and early Stuart monarchy] may be imaginatively encapsulated in the transformation of the withdrawing room from a negative into a positive space, from a public absence to a private sort of presence, (...)".

[3] The standard edition used is: Suárez, F., «De Legibus, liber septimus. De Lege non scripta», in *Opera Omnia* 6, Parisiis Apud Ludovicum Vives 1856-1878, pp. 136-223 (= D. L. VII).

2. The broader context

Especially cap. I and IX constitute a case in point in this context. Throughout a comment and interpretation of Isidore of Sevilla's understanding of custom as "*a type of law established by the 'mores', the conventions of a community, that is accepted as law when the law fails*"[4], Suárez undertakes an elaborate analysis of custom *quid facti*, custom as fact and custom *quid iuris*, legally qualified custom. Unlike written law, customary law, that is first and foremost unwritten law, is something that prior to legal qualification, always in some way already existed as a fact, or, more precisely, introduced by a factual series of similar acts[5]. Suárez explicitly links the (prior) factual origin of legally conceived of custom with its unwritten nature. In cap. II, 2 Suárez argues against the opinion that custom may not always introduce unwritten law, based upon the fact that custom "*is introduced by use itself, that does not consist in writings or words, but in facts*"[6].

The fourth paragraph of cap. I is crucial in this respect. Considered as a fact, Suárez maintains, custom consists of a frequency of actions, which can be called formal custom. This frequency produces either a habit, *habitus*, which is physical

[4] D. L. VII, I, 1, p. 135: "Est jus quoddam moribus institutum, quod pro lege suscipitur cum deficit lex.

[5] The factual, empirical dimension of custom also comes to the fore in the traditional reference to its being older than written law, an assumption that Suárez does not endorse. Rochus Curtius's *Tractatus de consuetudine*, that is mentioned by Suárez in his introduction to the seventh book stresses this typical assumption about custom: D. L. VII, *Ordo procedendi in hoc libro septimo*, p. 135: "Many jurists, whom Rochus Curtus follows, take for granted that customary law is older (than written law)". ["(...) multi juristae, quos sequitur Rochus Curt (...), pro certo supponant jus consuetudinis esse antiquius"]. Without being able to go into this matter within the scope of this article, a tension comes forward between the assumption that custom is older than written law and therefore appears more noble, but actually derives its nobility from its virtue and dignity. A good example in this respect is Sebastian Medici's "Quaestionum omnium, quae in tractatu de legibus et statutis continentur, catalogus, Pars III, Quaestio XIII, Ius scriptum, an sit nobilius Iure non scripto; Nobilitas, non ex antiquitate, sed ex virtute et dignitate perpenditur" [cf. Sebastianus Medicis Florentini, *De legibus et statutis,* in Sebastianus Medicis Florentini - Rochus Curtius - Petrus Ravennatis, *De Legibus et statutis, et consuetudine*, Coloniae 1574, pp. 173-174. (In this book are also: cf. Rochus Curtius, *Enarrationes in cap. cum tanto. De consuetudine,* in in *Ibidem* pp. 381-778 & Petrus Ravenatis, *Enarrationes in titulo de Consuetudine,* in *Ibidem* pp. 779-884)].

[6] D. L. VII, II, 2, pp. 139-140: "Sic ergo verissime dicitur, consuetudinem esse jus non scriptum (...) usu ipso introducitur, usus enim non scripturis, aut verbis, sed in factibus consistit".

and is therefore only spuriously called a custom, because it denotes a factual situation. Against factual custom, Suárez brings forward the effect of the frequency of actions that is of a completely different order: "*Or, what follows from [factual] custom can be something moral, by way of a faculty or a right that binds to operate in this manner, which can be called customary law or introduced by custom*"[7]. Legally valid custom, *ius consuetudinis*, is thus defined as moral, or non-physical and rational, features that correspond with the power to oblige that inhere a *facultas seu ius*.

Precisely the duality between factual, or physical, and legal that is produced through the obliging character of *facultas sive ius* serves as a catalyst for the negative demarcation of the concrete, sensorial and contingent dimensions of *usus*, custom, the community and the prince. In order to understand how this mechanism works, Suárez's treatment of custom *quid iuris* and custom *quid facti*, the application of the *causa proxima* and the *causa primaria* to the community and the prince as the sources of custom need to be addressed.

The line of argument that Suárez thus develops at the beginning of book VII can subsequently be understood in the broader framework of distinctive parts of book I *Quid nomine legis significetur,* book III, *De lege positiva humana secundum se, et prout in pura hominis natura spectari potest, quae lex etiam civilis dicitur*, *De opere sex dierum*, *De bonitate et malitia humanorum actuum* and the *Quaestiones de iustitia et iure*, some of which will be considered into more detail in the course of this contribution.

Although this issue cannot be treated in full within the scope of this piece, it needs at least to be mentioned that Suarez's approach to the subject, the originality of which cannot be denied, in many respects also takes furthers aspects of legal doctrine and theory that appear with his predecessors and that underline the longevity and continuity of the tradition that led up to *De legibus*. Suarez's

[7] D. L. VII, I, 4: pp. 136-137: "Deinde consuetudo non est in singulis actibus, sed in eorum frequentia (...) Dixi autem hoc esse intelligendum de consuetudine sumpta ut est quid facti, quia oportet in consuetudine duo distinguere: unum est ipsa frequentia actuum, quam possumus vocare consuetudinem formalem, et hanc dicimus esse quid facti, sicut usum. Aliud vero est id quod ex tali frequencia relinquitur, quod potest esse vel quid physicum, ut est habitus, quod aliquando solet vocari consuetudo apud juristas, satis vero improprie, (...) et sub consuetudine facti illud computamus. Aliud ergo, quod ex consuetudine relinquitur, esse potest quid morale per modum facultatis vel juris obligantis ad sic operandum, (...), quod potest vocari jus consuetudinis, seu consuetudine introductum".

involvement in this respect with the *Liber Extra* (1234) decretals of Gregory IX on custom, Hostiensis (1190/1200- 1271), Giovanni d'Andrea (1270-1348), Antonius de Butrio (1338-1408), Panormitanus (1386-1445), Peter of Ravenna (after 1448-1508) and Rochus Curtius, Baldus and Bartolus and with Gregory Lopez's gloss and edition of the *Siete partidas*, to name a few prominent sources of Suarez's theory on custom[8].

One way to concisely contextualize and introduce Suárez on the *quid iuris*/ *quid facti* distinction, is by referring to Curtus Rochius's *De consuetudine*, which was one of Suárez's sources for *De lege non scripta*[9]. Also Curtius, apart from others, like Anthony de Butrio, takes up the distinction between the actual and the legal dimensions of custom, as well as the differentiation of *mos*, *usus* and *consuetudo*[10]. On the subject of what defines (legal) custom, Curtius concludes

[8] The commonplace issue of the rationality of a legally valid custom and the legal definition of the people that obviously also bears great importance to Suárez's doctrine, occurs prominently in canonical tradition. In his *Summa super titulis Decretalium compilata*, Venetiis 1498, Hostiensis, who devotes a lot of attention to the demand of rationality of custom, states that a custom is rational when it is approved of by the law and is irrational when it is disapproved of by law: "Ut tamen scias illam consuetudinem rationabilem fore quae a jure comprobatur (...) Et generaliter ubicumque per jus expressim reprobatur (...) Irrationabilis autem vel iniquia non praescribitur". In connection to this more general discourse on the rationality of custom, Panormitanus in his *Lectura sive apparatus* has, following Antony de Butrio, *public welfare* appear next to reason as a criterion for a legally valid custom, based upon the distinction between the different purposes of the divine/ecclesiastical and civil orders (that already appears in the *Collectio Canonum* of Abbo of Fleury: Gaudemet, J., «La coutume en droit canonique», en *La Coutume*. *Europe occidentale médiévale et modern* 2, Bruxelles 1990, p. 48).

In a reference to a number of authors, Giovanni d'Andrea points out the distinction between the collective of people and the people considered individually. Whereas custom refers to a collective of people, usage applies to the people considered individually, that may or may not relate as effect and cause. This discussion is of crucial importance in Suárez's *De lege non scripta*; for the references to Hostiensis, Panormitanus and d'Andrea, see: Wherlé, A., *De la coutume dans le droit canonique. Essay historique s'étendant des origines de l'Église au pontificat de Pie XI*, Paris 1928, pp. 156-157, pp. 199-200, pp. 262-263.

[9] Without being able to go into his issue within the scope of this contribution, it is also important to bear in mind that the distinction addressed does not restrict itself to the field of the law of custom. On a more general and theoretical level it also comes to the fore in Sebastian Medici's, *De legibus et statutis*, in Pars IV, *Quaestio* 25 (cf. Sebastianus Medicis Florentini, *De legibus et statutis, cit.* pp. 311- 320), that, following Bartolus, deals with fact, (legal) fiction and law and that was also influenced by Curtius's *De consuetudine*.

[10] On Rochus Curtius and the editions of *De consuedtudine*, see: Solla, H., *El Tratado de Rochus Curtius sobre la costumbre*, Roma 1990, pp. 30-44.

that "*factual custom refers to the mos or usus of the people. Legal custom however follows those mores and usus, mediated and unmediated through the consent of the people that flows from these mores*"... A (non-legally qualified) custom denotes the observance of a fact , like birds have the custom to fly or like the custom of the *pater familias*...[11] A similar opposition is addressed when Curtius goes into the difference between *consuetudo* and among other things *observantia* in a way that bears great relevance also in view of Suárez. "*Observance denotes a factual reality, it concerns the usus of one judge or tribunal, whereas consuetudo stems from the populus or the university (...) While consuetudo has the full power of law, observantia has that of fact*"[12].

The doctor eximius however understands the *quid facti/quid iuris* distinction, without going into the various other ways of conceiving off custom that Curtius piles up in his *De consuetudine*, in such way that it marks a very outspoken next step towards the further legal seizure of custom. He does so by subtly hollowing out the factual and contingent dimensions of custom. This seizure is revealing of the increasing demarcation of contingent aspects of custom that he, using the same mode of operation, will warily connect with the contingencies of the community and the prince as the source of custom in caput IX.

Suárez's understanding and definition of custom thus balances on the boundaries between assumed pre-legal, factual and subsequent legal qualification. Various aspects of *De lege non scripta* built an interesting case of how discussing and fine-tuning the relation between the factual and the legal definition of custom, the opposition between legally qualified custom introduced by a community on the one hand and *private use* on the other hand, the prince and the community as the cause of (legal) custom, and the opposition, finally, of the perfect community and the private person/community, build up an interesting hermeneutical frame. Suárez's theory of customary law presents a thought-provoking case-study of le-

[11] Rochus Curtius, *Enarrationes in cap. cum tanto. De consuetudine*, *cit*. p. 392: "Consuetudo facti es mos vel usum hominum. onsuetudo autem iuris est queas provenit ex ipsis moribus et usibus hominum mediate et immediate ex tacito consensu populi, qui resultat ex ipsis moribus. Referring to Giovanni D'Andrea, he furthermore adds that consuetudo quaedam est facti observantia sicut est in avibus consuetudo volandi et consuetudo patrisfamilias. Alia est iuris quae pro lege habetur".

[12] *Ibid.*, p. 395: "Observantian esse quid facti, quae concernit usum unius iudicis vel tribunalis, (...) et differt (...) a consuetudine, quae est populi vel universitatis; (...) Item differunt secundum eum, quia consuetudo vim omnem legis habet; observantia facti".

gal qualification and its criteria, caught between on the realm of the empirical-factual and the force, *vis* of obligation that defines the legal realm.

3. *Custom quid iuris* and *custom quid facti*: Suárez's line of argument

In order to explain this, especially the argument Suárez develops in cap. I [*Quid sit consuetudo, usus vel mos, forus et stylus, et quomodo a scriptione differat*] needs to be looked at more closely. The *quid iuris*/*quid facti* distinction concerns a first of three problems that Suárez sees emerging in Isidore's definition of custom. This first problem concerns the observation that custom seems to be rather a matter of fact than a matter of law: "*thus it is not law, but fact, or an often repeated action*"[13].

The second problem concerns the term *mos*. *Consuetudo* and *mos* at first sight seem to mean the same thing. However, Isidorus states that *mos* is a *consuetudo* drawn *de moribus*, "*as if a consuetudo could be introduced differently*"[14].

The third difficulty concerns the part of sentence "*quod pro lege suscipitur*", "*that is accepted as law*", which, as Suárez observes, does not pertain to custom itself, but to its effect. Also, these words suggest that the law of custom (*ius consuetudinis*) is not really law, but is held to be law, which is also erroneous[15].

In order to solve these problems, a number of terminological problems need to be solved first. Three terms in particular are to be noted in this respect. First, *usus* needs to be defined properly. Suárez starts from the various meanings of the term in theology, philosophy and legal science that he will try to reconcile. As a theological term, *usus* denotes an act(ion) that flows from free will[16]. Only beings endowed with reason are capable of acting upon free will. "*This means that*

[13] D. L. VII, I, 1, p. 135: "Nam consuetudo videtur potius esse quid facti quam juris; non est ergo jus, sed factum, vel actio saepius repetita".

[14] D. L. VII, I, 1, p. 135: "Et auget dificultatem, quod mos esse dicitur consuetudo tracta de moribus, ac si esse possit consutudo aliter introducta".

[15] D. L. VII, I, 1. p. 135: "Tertia dificultas est circa alteram partem, quod pro lege suscipitur, quia hoc non pertinet ad esse consuetudinis, sed ad effectum ejus, ut infra dicemus. Item videtur illis verbis significari jus consuetudinis non esse veram legem, sed pro lege reputari, quod falsum etiam est".

[16] Following Thomas of Aquinas and Augustine, Suárez maintains that "usus ergo, in theologica proprietate, significat actum quo voluntas libere exequitur quod eligit" (cf. D. L. VII, I, 2, p. 136).

usus, according to philosophical strictness, is said of whatever act of using considered as such, for it is whatever free application of the faculty to accomplish a means"[17].

The demand of free will both introduce a legal element in the interpretation of *usus* and will furnish Suárez with a crucial aspect of custom *quid iuris*, namely, that it results from a free community, as he will explain in cap. IX. The element of the free will of the subject and of community results from man's reasonability. As has been noted, reasonability allows for the possession of the self that is expressed in the very notion of subjective right as a moral faculty.

In common speech however, *usus* denotes the frequency of similar acts, and the conviction that *usus* results from those things one that are continuously repeated over a long period of time. According to this reasoning, *usus* is a factual reality (*esse quid facti*), namely, the frequency itself concerning something that is subject to free operation in the same or uniformous way[18]. In the context of law, *usus* is however conceived of as that which remains, or results from that frequency of acts[19].

This passage exemplifies one of those instances in which Suárez subtly shifts from empirical to legal, from contingency to faculty. Not only does he cut up *usus* in its empirical and legal dimensions. This shift moreover makes explicit Suárez's fundamental distinction between rights that can be exercised or held and right as a moral faculty that does not add anything to the subject, but rather defines it as being a legal subject. Working towards a similar integration of the requirement of free will in theology and philosophy and the commonly found statement in law that custom results from a frequency of acts, he is able to separate *quid facti* and *quid iuris* in terms of an actuality (the frequency of acts) and a faculty of the subject. He will further elaborate this distinction into the opposition between custom in a formal sense and the moral effect of custom, and when he deals with the community and the prince as the sources of custom.

[17] D. L. VII, I, 2, p. 136: "Unde fit ut usus, in philosophico rigore, dicatur de quolibet actu utendi per se spectato, quia quilibet est libera applicatio facultas ad medii executionem, (...)".

[18] D. L. VII, I, 2, p. 136: "Usus significat similium actuum frequentiam,..,usum nasci ex his rebus quas aliquis facit longo et continuo tempore..Ubi hac ratione dicit usum esse quid facti, scilicet, frequentiam ipsam libere operandi circa rem aliquam, eodem, seu uniformi modo".

[19] D. L. VII, I, 2, p. 136: "In lege autem illa dicitur, usum esse id quod relinquitur, seu nascitur ex illa frequentia actuum".

Consuetudo, taken as a fact, can be understood in almost the same way. Thomas states that *mos* and *consuetudo* are almost the same thing, as they both denote a frequency of moral acts. *Consuetudo* is only possible in free acts. Furthermore, *consuetudo* does not exist in single acts, but in their frequency, or as Thomas explicitly states: "*Custom introduces a certain frequency concerning those things, the realization of which pertains to us*"[20]. Suárez states that the latter definition applies to custom as a fact. Therefore, it is necessary to distinguish two types of custom. On the one hand, custom can refer to a frequency of actions, "*that we can call formal custom (consuetudo formalis) that is quid facti, like usus*"[21]. On the other hand, "*what is left by this frequency, can be either something physical like the habitus, or what was once spuriously called by the jurists consuetudo, and therefore we omit it and understand it as the custom of fact (consuetudo facti")*[22]. Or, as already mentioned above, "*it can be that something moral that results from custom, in terms of a power, «facultas», or law obliging to such action or lifting another obligation, that can be called law of custom or introduced by custom*"[23].

Elaborating further on this *facultas vel ius*, Suárez subsequently makes a distinction between inclination, "*inclinatio and the moral faculty, or bond that we call law*". "*Like custom introduces an inclination towards similar things and gives ease and pleasure to their operation, that is not something moral, but something physical that we call «habitus»*[24]*, thus factual custom introduces a moral faculty, or an*

[20] D. L. VII, I, 4, p. 137: "Consuetudinem importare quamdam frequentiam circa ea quae facere vel non facere in nobis est".

[21] D. L. VII, I, 4, p. 137: "Quam possumus vocare consuetudinem formalem, et hanc dicimus esse quid facti, sicut usum".

[22] D. L. VII, I, 4, p. 137: "Satis vero improprie, et ideo illud omittimus, et sub consuetudine facti illud computamus".

[23] D. L. VII, I, 4, p. 137: "Aliud ergo, quod ex consuetudine relinquitur, esse potest quid morali per modum facultatis vel juris obligantis ad sic operandum, vel tolentis aliam obligationem, quod potest vocari jus consuetudinis, seu consuetudine introductum".

[24] It is interesting to note that at this and other instances where he speaks of habitus, Suárez does not follow the line of development of Antony de Butrio, mentioned in Rochus Curtius *De consuetudine*, that leaves out "habitus" as a possible meaning of custom, as is the case with Bartolus: Rochus Curtius, *Enarrationes in cap. cum tanto. De consuetudine*, *cit*. p. 393: "Pro assuefactione unius hominis vel etiam animalis rationalis". As has been mentioned before, Antony reduces the scope of custom to factual and legal. It seems that by re-addressing *habitus*, Suárez both maintains the duality of factual and legal custom as brought forward by Antony de Butrio that he furthermore uses as the basis of his argument in cap.I, and at the same time underlines the moral, rational nature of the *facultas, vel ius*.

obligation, or changes that obligation, not by introducing something physical, but a moral faculty, or a bond, that we call law"[25]. Or, analogous to the case of *habitus* or inclination, "*consuetudo that primarily had a factual meaning, can be transferred to mean something legal, that results from the frequency of actions*"[26]. Thus, Suárez concludes that "*consuetudo may denote both the frequency of acts and the law that it introduces*"[27].

At this point, a number of elements can be singled out that emerge throughout the shifting boundaries between *quid iuris* and *quid factum* and that call for further consideration: the frequency of actions that is, as has been mentioned, custom in the formal sense of the word and that can be called factual and, second, the moral faculty, or right, on the other hand.

How does Suárez move from actuality to the legal realm? Suárez at first catches this leap in the aforementioned analogy between *habitus*/inclination and *consuetudo* and through stating that "*the name of the cause is usually transferred to the effect, and the other way around*"[28]. Suárez however develops an additional bridge between the factual and the legal in cap. I, 5 that draws the attention to the causal link between *quid facti* and *quid iuris*. The formal nature of the frequency of actions that expresses its actuality is first and foremost understood in terms of its opposition against the causal understanding of custom, custom namely as it effects law, an understanding that constitutes the next and final step in hollowing out the factuality of the frequency of acts. The latter dynamics comes explicitly forward in Suárez's statement that the frequency of actions does not by definition generate law. Not every actual *consuetudo* has the power to confer law. A vicious *consuetudo* for example cannot do so[29]. In order to introduce law, the actual cus-

[25] D. L, VII, I, 4, p. 137: "Sicut enim consuetudo inducit inclinationem ad similis actus, et consequenter dat facilitatem et delectationem in oepre, quae non non est tantum aliquid morale, sed etiam physicum, quod habitum appelamus; ita consuetudo facti inducit moralem facultatem, vel obligationem, vel mutat illam (...) non inducendo aliquid physicum, sed moralem facultatem, aut vinculum, quod jus appelamus".

[26] D. L. VII, I, 4, p. 137: "Ita consuetudo, licet aliquid facti primario significet, etiam transferri potuit ad significandum aliquid juris, quod ex frequentia actuum reliquitur, (...)".

[27] D. L VII, I, 4, p. 137: "Et ita vocatur consuetudo, et ipsa frequentia actuum, et jus per illam introductum".

[28] D. L. VII, I, 4, p. 137: "Quia nomen causa causae transferri solet ad effectum, et e converso".

[29] D. L. VII, I, 5, p. 137: "Est autem advertendum non quamcumue consuetudinem facti habere vim conferendi aliquod jus (...) : nam vitiosa consuetudo nullum jus confert (...)".

tom in the end "*must be a legitimate frequency of acts, it must be in accordance with some law, meet all the requirements to be a law, or similar things*"[30].

4. The *facultas moralis*

The separating out of the *actual* frequency of acts from a legally valid custom that is defined in terms of the capacity to introduce the strict obligation of law is taken further throughout the discussion of the sources of (legal) custom in cap. IX. The same dynamics present themselves in the distinction between the legislative power that defines the *communitas perfecta,* and that is distinguished from *actual* legislative power on the one hand and the power of the prince that gives force of law to custom and that is to be distinguished from his personal agency. The same process of hollowing out also applies to the relation, explained in cap. IX [*De causis consuetudinis, et praesertim quis illam introducere valeat*] between the prince and the community on the one hand and the custom *quid iuris* and *quid facti* on the other hand. Significantly, this application expands and conceptualizes the legal qualification of custom and the singling out of its concrete, empirical and contingent features. The beacons for this discussion are however already concisely set at the end of Cap. I, 8: legal custom can only result from the free and moral *mores* when these are the general and public mores of a community that is the only instance capable of introducing the obligation of law[31].

The crucial role of the force, the *vis*, to bind or take away obligations as the final touchstone for determining whether or not we are talking about "consuetudo quid iuris" is again underlined at the end of cap. I, 9, where, following Bartolus, custom "that can be conceived of as law" and "that conveys a right" is distinguished from "the right resulting from the use by one person" and that is "conveyed by law." "*Private use of one person can convey a right over a thing, a ius in re, the property, dominium, of a thing, or a servitude, all of which denote a right*

[30] D. L. VII, I, 5, p. 137: "Ad jus aliquod introducendum sufficiat (...) esse legitimam frequentiam actuum juri alicui consentaneam, vel habentem condiciones omnes jure requisitas, vel quid simple".

[31] D. L. VII, I, 8, p. 138: "Sic ergo dicitur mos trahi ex moribus, id est, ex actibus liberis et moralibus. Vel etiam considerari ptest non quemcumque morem, sed communem et publicum alicujus communitatis esse sufficientem ad inducendum jus consuetudinis".

that does not have the force of law, that does not prescribe, neither commands"[32]. While referring to his famous definition in book I, cap. 2, 5 of *ius* as "*a certain moral faculty that everyone has regarding a thing that is due to him*"[33], Suárez states that such right "*consists of the faculty to use, that is property or quasi-property and that refers to a situation of fact*". In that sense it opposes the right "*that has the force to oblige and to rule*"[34].

This opposition however seems to reveal a tension in Suárez's notion of *facultas moralis* that as such and by definition does not situate itself on the physical level of factuality. Suárez had in this sense deepened the understanding of *ius* as a *facultas* that had already embryonically appeared with Vitoria and Molina, following Gerson and Summenhart[35]. The use of *moralis* first and foremost underlines the non-physical nature of *ius*[36]. In the case of book VII, it was already mentioned how from the (material, factual) frequency of actions something *moral* resulted and how factual custom opposed the moral faculty.

[32] D. L. VII, I, 9, p. 138: "Privatus ergo usus unius personae potest conferre jus in re, vel dominium rei, aut jus servitutis (...) illud tamen jus non habet vim legis (...) non praecipit nec ordinat, (...)".

[33] The designation of *ius* as a faculty or a *potestas*, was very general in sixteenth century scholasticism since Francisco de Vitoria (1483 or 1492-1546) and it also appears with Domingo de Soto (1495-1560), Luis de Molina (1535-1600): Guzmán Brito, A., «Historia de la denominación del derecho-facultad como 'subjectivo'», en *Revista de estudios histórico-jurídicos* 25 (2003) pp. 407-443. On the appearance of ius as facultas/potestas prior to second scholasticism and on its twelfth century origins, see; Tierney, B., *The Idea of Natural Rights. Studies on Natural Rights, Natural Law, and Church Law 1150-1625*, Michigan-Cambridge 1997, pp. 13-77.

[34] D. L. VII, I, 9, p. 138: "De illo quod consistit in facultati utendi, quod est dominium, vel quasi dominium, (...) ita in rigore spectat ad factum: alio modo dicitur jus de illo, quod vim habet obligandi et imperandi, et dici potest jus legis, seu legale".

[35] It appears exemplary in Vitoria's *De iustitia*, *quaest*. 62, art. 1, 5: "*Ius est potestas vel facultas conveniens alicui secundum leges*" (cf. Francisco de Vitoria, *De Iustitia*, ed. Beltrán, V., Madrid 1934) and in Molina's *De Iustitia et iure*, trat. 1, disp. 1, 4: "*Nempe pro facultate potestateve quam ad aliquid homo habet, quo pacto dicimus aliquem uti iure suo*" (cf. R. P. Ludovicus Molina, *De justitia et jure opera omnia, tractatibus quinque*, *tomisque totidem comprehensa* 1, Coloniae Alobrogum 1733).

[36] On the various meanings of the term *moralis* in the Spanish seventeenth century, see: Folgado, A., *Evolución histórica del concepto del derecho subjetivo. Estudio especial en los teólogos-juristas españoles del siglo XVI*, San Lorenzo de El Escorial 1960, p. 217. Suárez preferred using *moralis* in the sense of non-physical which is also the case here: Guzmán Brito, A., *El derecho como facultad en la neoescolástica española del siglo XVI*, Madrid 2009, p. 204, in which sense it also comes forward in book VII.

In *De opere sex dierum*, Suárez explicitly states that "*the right to use (that enables one to exercise actual property, dominium) does not add an entity or quality to men, but only a moral faculty*"[37]. Although he does not mention the great Franciscan, Suárez seems to take further and systematize a similar understanding of *facultas* in a context of property and right, which was extensively treated in Petrus Olivi's quaestio *Quid ponat ius vel dominium* in his *Quaestiones in secundum librum sententiarum*, a comment on Peter Lombard's *Summa Sententiarum*[38]. In this *quaestio*, Olivi deals with the question whether rights and property, also mentioning *iurisdictio*, *auctoritas* and *potestas*, add something to the person who holds these rights or properties. Olivi more precisely asks what the ontological status is of these *signa voluntaria,* the *iurisdictio*, *auctoritas* and *potestas*, oral and written obligations, laws, contracts, testaments and similar things[39].

What is important from the point of view of legal philosophy is the fact that *ius* and *dominium* are not treated as things, but as moral capacities. *Potestas*, *ius* and *iurisdictio* have to be conceived of as realities that are however only *formally* to be distinguished from their bearers. Between them exists *a distinctio formalis*, a distinction that stands between a *distinctio secundum rationem*, a conceptual

[37] Suárez, F., «De opere six dierum», in *Opera omnia* 3, cap. 16, 9, p. 280: "Jus potestatem moralem merito appelamus, quia non addit homini aliquem entitatem, vel qualitatem, sed solam moralem facultatem (...)".

[38] Cf. Brother Petrus Iohannis Olivi OFM, *Quaestiones in secundum librum sententiarum*, ed. Jansen, B., Quarracchi 1992; Belmond, S., «Deux penseurs fransiscains: Pierre-Jean Olivi et Guillaume Occam», en Études *Franciscaines* 35 (1923) pp. 188-197; Hoeres, W., «Der Begrif der Intentionalität bei Olivi», en *Scholastik* 36 (1961) pp. 23-48; Id., «Der Unterschied von Wesenheit und Individuation bei Olivi», en *Scholastik* 38 (1963) pp. 54-61; Jansen, B., «Beiträge zur geschichtlichen Entwicklung der Distinctio formalis», en *Zeitschrift für katholische Theologie* 53 (1929) pp. 317-544; Id., «Die Definition des Konzils von Vienne: Substantia animae rationalis seu intellective vere ac per se humani corporis forma», en *Zeitschrift der katholische Theologie* 32 (1908) pp. 289-306 and pp. 471-487; Partee, C., «Peter John Olivi: historical and Doctrinal Study», en *Franciscan Studies* 20 (1960) pp. 215-260. In connection with the role of Olivi in the development of the notion of a subjective right, Tierney stated that well before Occam a voluntarist definition of *ius* and *dominium* was already presented by Peter of Olivi to whom jus evidently seemed to function as a capacity, thus as a subjective right, a meaning that had already emerged throughout the twelfth century legal practice: Tierney, B., *The Idea of Natural Rights, cit…,* p. 42.

[39] Jansen, B., «Beiträge zur geschichtlichen…» *cit.*, p. 518: "Et consimiliter habet locum in tota materia juris, an scilicet jurisdictio regalis vel sacerdotalis vel jurisdictio cujuscimque domini vel proprietatis addat aliquid ad personas, in quibus est hujusmodi jurisdictio, vel ad res, super quas habetur". Also see: Delorme, P. F. , «Question de P.J. Olivi: 'Quid ponat…» *cit.* p. 314.

distinction, and a real distinction[40]. They add something real to a person and yet they cannot be distinguished from them as separate substances.

When discussing the distinction between the two meanings of right, that he explicitly mentions in cap. I, 9, and *usus* in the framework of the vow of poverty in lib. VIII *De pauperitate* of *De virtute et statu religionis,* Suárez states that *ius* can mean law, *lex*, like in divine or human law. It can however also refer to "*a moral power to a certain act or use*"[41]. As Baciero Ruiz points out in his article on subjective right and the right of private property in Suárez and Locke, *ius* in terms of a *facultas* denotes the self-possession of the rational being[42]. Without being able to go extensively into this connection, this rational being's self-defining concept of right echoes the formulations, with Summenhart and in Gerson's *Tractatus de potestate ecclesiastica et de origine iuris et legum*, in which *ius* is described as a "*potestas, seu facultas propinqua*", a proximate faculty "*that befalls a person through the dictate of primary justice*"[43]. J. Vaarkeema notes that *proximate* denotes an "*active potency, a power to exercise actions*"[44], something that also comes forward with Suárez where he talks about *actus moralis* inhis *Quaestiones de iustitia et iure*[45].

[40] Jansen, B., «Beiträge zur geschichtlichen...» *cit.* p. 519: "Unde et videtur tenere locum medium inter rationes, quae solum sint in intellectu et inter rationes reales, quae dicunt aliquid positum reale".

[41] Suárez, F., «De virtute et statu religionis. Lib. VIII De pauperitate», in *Opera Omnia* 15, *cit*. p. 565: "Potest enim aut legem significare, quomodo distingui solet ius divinum vel humanum, etc. Alio autem modo sumitur pro morali quadam potestate ad aliquem actum vel usum".

[42] Baciero Ruiz, F. T., «El concepto de derecho subjetivo y el derecho a la propiedad privada en Suárez y Locke», en *Anuario Filosófico* 45 (2012) p. 396: "Precisamente porque el derecho en sentido subjetivo es algo moral, es algo exclusivo del hombre, en la medida en que, como veremos, el hombre se pertenece o es dueño de sí gracias a la razón, y puede tener por ello una verdadera relación de dominio sobre sí mismo y sobre sus facultades, (...)". For an extensive bibliographic reference on law as faculty and the facultas moralis, see: Guzmán Brito, A., *El derecho como facultad..., cit.* esp. p. 189-190.

[43] Gerson, J., «Tractatus de potestate ecclesiastica et de origine iuris et legum», in *Opera omnia*, ed. du Pin, L. E., Hildesheim 1987, p. 250: "Ius vero sic describitur, ius est potestas, sive facultas propinque conveniens alicui secundum dictamen primae justitiae".

[44] Cf. Varkemaa, J., «Justification through Being: Conrad Summenhart on Natural Rights», en *Moral Philosophy on the Treshold of Modernity*, ed. Kraye, J.- Saarinen, R., Dordrecht 2005, pp. 181-194, p. 186.

[45] Quoted in: Guzmán Brito, A., *El derecho como facultad*…, *cit*. p. 201. Suarez, F., *Quaestiones de iustitia et iure*, in *Die Gerechtigkeitslehre des jungen Suárez. Edition und Untersuchung seiner römischen Vorlesungen De iustitia et iure,* ed. Giers, J., Freiburg 1958, disp. 3, qu. 1 p. 87: "Actus exterior (…) censetur moralis unus actus cum illo".

Rights are thus held by legal subjects on the basis of the moral faculty that defines them as rational beings that as a consequence have the right to exercise rights[46]. In this context, *dominium* ambiguously denotes a subcategory of the "habitudines morales": "*It is necessary to point out the various respects or moral dispositions men can have and that are understood as rights in the broader sense of the words... In this regard, there are now ownership, or property, usufruct, possession with the right to possess, the right to use, and the actual use and the possession of a good or the administration of a good*"[47]. Simultaneously it however also defines, as the perfect type of right, or exemplifies in a paradigmatic, generic way, the very notion of *facultas moralis* itself[48]: *dominium* is "*the principal right to dispose of a thing for whatever non-forbidden use, that explains the moral faculty of the owner regarding his own good*"[49]. The active nature of the moral faculty that within a legal context plays a performative role in establishing the very right that allows for such performative act[50], thus conflict with the objective *vis* that had defined the legal realm in cap. I,9[51].

[46] On this implied notion in this sense of "subjective right", a term that Suárez does not however not use, see also: Guzmán Brito, A., «Los orígenes de la noción de sujeto de derecho», en *Revista de Estudios Histórico-Jurídicos* 24 (2002) pp. 151-247; Id., «Historia de la denominación del derecho-facultad como 'subjetivo'», en *Revista de estudios histórico-jurídicos* 25 (2003) pp. 407-443; Id, *El derecho como facultad*..., *cit.* p. 189-229; Id., «Historia de la atribución de categorías o predicamentos a "derecho" ("jus")», en *Revista de estudios Histórico-Jurídicos* 23 (2011) pp. 273-317.

[47] Suárez, F., «De virtute et statu religionis» *cit.* p. 562: "Necessarium est breviter exponere varios respectus, seu morales habitudines quas homo habere potest, et nomine juris late sumpto comprehenduntur (...) Hujusmodi autem sunt dominium, seu proprietas, usufructus, possessio cum iure possidendi, jus utendi, et usus vel possessio rei, facti tantum, ut vocant; item administratio rei, vel quoad jus, vel quoad factum tantum".

[48] *Ibid.*, p. 562: "Quia tamen non omne jus est dominium, (...), ideo illud ponitur loco generis, aliae particulae distinguunt dominium ab aliis juribus minus perfectis". As Guzmán Brito points out in this respect, law as a faculty is not defined in a general sense, but appears as a genus in particular definitions, which is also the case here: Guzmán Brito, A., *El derecho como facultad*…, *cit*. p. 193.

[49] Suárez, F., «De virtute et statu religionis» *cit.* p. 562: "Dominium (...) est principale jus disponendi de re aliqua in quemcumque usum non prohibitum.; his enim verbs recte explicatur moralis illa facultas, quam dominus habeere censeturd circa rem suam, (...)".

[50] In this respect Guzmán Brito remarks that "Suárez equipara la potestad moral de producir un acto con el derecho al ejercicio del mismo acto" (cf. Guzmán Brito, A., *El derecho como facultad*..., *cit.* p. 201).

[51] This opposition is also reinforced by the fact that Suárez does not elaborate a systematic theory on the *facultas moralis*, let alone legal subjectivity, but on the contrary constructs his legal theory around the various types of law and the legal obligation and force that goes with them.

5. The *communitas perfecta* and its legislative power

Within the same framework of opposition between the factual/private/concrete and the legal realm of obligation that transcends concrete notions of private use and a body of people as a group of individuals, Suárez deals with the causes of custom. The fact that "*a multitude of people*" can be considered as solely an aggregate as long as it lacks a head, or prince, as he brings forward in book III of *De legibus*, plays an equally important role in *De lege non scripta*[52].

Suárez distinguishes between two efficient causes of legal custom, the *causa proxima* and the *causa primaria*. The *causa proxima* refers to the individuals introducing a custom, as they start usage, continue it through action and in that sense produce it[53]. Against the concrete act of actually upholding a custom, stands "*a higher power, or the prince*" as custom's *causa primaria*, whose influence is necessary to give force to custom[54].

This distinction coincides with the distinction between factual and legal custom. From "*ipsi homines*" results the factual custom and from the prince results the legally qualified custom[55]. In other words, the power of the prince is a necessary condition for a factual custom to turn into a legal custom. Thus the distinction between a legal and factual custom is related to two separate instances that are respectively legally and, ex contrario, empirically qualified. In this sense, "*the individuals are a source of law in a direct and immediate way*", "*primo et immediate operantur*". The prince is a source of a legally qualified custom through his direct exercise of power, even though he may not be a proximate cause by himself. Suárez applies here the Thomistic distinction between "*immediato virtutis*" (direct exercise of power of an agent on a patient) and "*immediatio suppositi*" (a cause that does not make use of another cause to the difference between the

[52] D. L, III, 2, 4, 181: "Primum solum ut aggregatum sine illo ordine, (...) et ideo non sunt proprie unum corpus politicum, ac proinde non indigent uno capite, aut principe".

[53] D. L.,VII, 9, 2, 170: "Proximam voco, ipsos homines consuetudinem introducentes, illi enim inchoant usum, et illum continuant operando, ac subinde efficiendo. Primariam vero appello, superiorem potestatem, seu principem, si forte influxus ejus necessarius est ad vim consuetudinis".

[54] D. L. VII, 9, 2, 170: "Primariam vero appello, superiorem potestatem, seu principem, si forte influxus ejus necessarius est ad vim consuetudinis".

[55] D. L. VII, 9, 2, 170: "Unde prior causa vocatur proxima, praesertim quoad consuetudinem facti (...) Princeps vero erit praecipua causa juris consuetudinis, (...)".

prince in his capacity of exercising power and the prince as a personal agency, in which the latter sense the prince does no give force to custom). This distinction signals the further distinction that Suárez will make between the prince as an (empirical) individual and the prince as a sovereign[56].

This does however not imply that the level of the sovereign prince relates to the level of "*ipsi homines*" as a clear cut legal versus an extra-legal level. Again, the initial empirically singled out category of persons under the *causa proxima*, is being hollowed out towards legal qualification. When dealing with the people as *causa proxima*, it becomes clear that also this cause entails elements of legal abstraction, leading towards the distinction between genuine custom (in the sense of unwritten law) and the custom in terms of a privilege (which is a private law) acquired by a private person or a private community[57].

The people that are capable of introducing a custom, the *communitas perfecta*, is not a group of individuals, but is viewed as a community, a collective moreover that is able to exercise legislative power and is this able to introduce a custom (*introducere consuetudinem*)[58]. Especially the latter statement establishes a legal definition of the community: "*three things come forward in the causa proxima: the acting person, the external act or the frequency of acts, and the interior will or consensus*"[59].

Drawing on the Digest, a body of commentators and canonists and Thomas of Aquinas, Suárez underlines that when a community "*possesses legislative power over itself*", and in that sense constitutes a *communitas perfecta*, like "*as state or something similar*", it can properly introduce custom[60] . Significantly and again

[56] On the Thomistic distinction between *immediato virtutis* (direct exercise of power of an agent on a patient) and *immediatio suppositi,* see: Lonegan, B., «The supernatural order», en Id. *Collected Works of Bernard Lonergan*, Toronto 1997, p. 183.

[57] D. L. VII, 9, 4, p. 171: "Interdum privata persona, vel communitas, consuetudine acquirit privilegium, (...), privilegium autem est jus quoddam, et privata lex (...)". Suárez subsequently underlines that because such private custom is a privilige and not custom in its proper sense of an unwritten law, it should at present be ignored: "Hic non esse serminem de privilegio, quos est lex privata, sed de jure non scripto, quod habeat propriam rationem legis".

[58] D. L. VII, 9, 3, p. 171: "Communitas perfecta requiritur, ut consuetudo inducatur".

[59] D. L. VII, 9, 2, p. 170: "In causa vero proxima tria occurrunt consideranda, scilicet: persona operans, exterior operatio seu operandi frequentia, et interior voluntas, seu consensus".

[60] D. L. VII, 9, 6, p. 171: "Dicendum est consuetudinem juris non a quacumque communitate introduci posse, sed ab illa quae sit capax potestatis legislativae pro seipsa (...) Haec assertio communis

underlining the similar nature of the self-possessing legal subject and the self-legislating *communitas perfecta*, "*this power should not be understood as an «actual power» («actu illam»* [*«potestatem legislativam»*]*), but as a capacity to such active power («potestas activa») that is necessary to have a communitas perfecta; every communitas perfecta however is inherently capable of such power, «in short, it defines it»*"[61]. The initial *causa proxima* of custom, the people that introduce custom, that had already been subdivided in a *communitas perfecta* and a *communitas privata* is in turn again defined in terms of a capacity that needs to be distinguished from an actual power.

6. Epilogue

Suárez further develops and systematizes canon law doctrine on custom into a theory on custom. *De Lege non scripta* reveals interesting ideas about legal abstraction and the ex contrario establishment of a pre-legal or extra-legal realm that is concrete or private. The confrontation of theological, philosophical and legal formulations of *usus* and custom, scholastic applications like that of *causa proxima*/ *causa primaria* and of *immeditio virtutis*/ *immediatio suppositi* and tension between the performative nature of legal subjectivity and the *vis,* force of law, not only open up of a field proper to legal philosophy and the gradual explicitation of the private and the public. They also seem to do this in a way that may point out distinctive aspects of the epistemological of rationalism for which Descartes is paradigmatic. It may suffice here to mention a few possible routes for further research from this angle.

estm quoad hoc, ut ad consuetudinem introductam requiratur communitas perfecta, qualis est civitas, vel alia similis".

[61] D. L. VII, 9, p. 172: "Quia non et necessarium ut actu illam [potestatem legislativam] habeat,.. Capacitas autem talis potestatis activae necessaria est, quia debet esse communitas perfecta; omnis autem communitas perfecta est, de se, capax hujus potestatis, (...)". The similarity between the legal subject and the communitas perfecta is also enhanced by the fact that, following Thomas of Aquinas, Suárez underlines the fact that this community must be a free republic: "*Debe essere aut rempublicam liberam*". *Ius* in the sense of a moral capacity is also rooted in the self-possession of man through reason, which defines him as a free being: Baciero Ruiz, F .T., «*El concepto de derecho subjetivo…*» *cit.* p. 396.

In an exemplary way, the self-possession of the legal subject may show a striking similarity with the Cartesian ego. This self-possession is moreover carried further through in the legislative power of the *communitas perfecta* that is of an equally performative nature. As D. Schwarz showed in this context, the city is characterised by natural resultancy ("*a mode of causation by which a substance produces its own accident or property*"), that effects the "*city's original but alienable right to be its own master*"[62].

It might furthermore be interesting to consider the performative act of the *facultas moralis* as matching another performative ego, more precisely a *je sens* that is implied in the *je pense* and that is also a performative act. The latter also constitutes an *actus* in which subjectivity establishes the very form of objective knowledge that coincides with that very act[63] .

Also the relation between *je sense* and the *je pense* functions in terms of *immediacy*, and therefore inscribes itself in the scholastic variety of forms of immediacy that have passed in revue in the course of this contribution, from Gerson's *facultas propinque conveniens* and Suárez's use of the *causa proximal causa primaria* and of *immeditio virtutis| immediatio suppositi* to the application of the concept of natural resultancy to the city.

[62] Cf. Schwarz, D., «Francisco Suárez on Consent and Political Obligation», en *Vivarium* 46 (2008) p. 61 y 73.

[63] One can refer in this instance to Descartes's "*certe videre videor*" that expresses the certainty of the act of thinking in terms of its auto-revelation: Descartes, R., [*Méditation seconde*], AT VII, p. 28-29: "Il est très certain qu'il me semble que je vois [Et certe videre videor], que je vois, et que je m'échauffe; et c'est proprement ce qui en moi s'appelle entir, et cela, pris ainsi précisement, n'est rien d'autre chose que penser". See also, Henry, M., *Généalogie de la psychanalyse*, Paris 2003, p. 27: "The reduplication of the je sens and je pense in videre videor allows for la possibilité de constituer (...) la possibilité de s'auto-fonder dans la certitude de soi de son auto-révélation".