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Marsilius of Padua

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The Context: Christianity as a Unitary Structure

While during Christian antiquity earthly and spiritual powers were two autonomous spheres, in the Middle Ages, such a situation evolves: on the basis of Saint Augustine's theory of the two cities, the concept of *christianitas* ends up becoming a unitary idea involving both. Indeed, in his political theory, Saint Augustine conceives a bipartite structure, even though he does not consider the *civitas terrena* to have the same value as *civitas Dei*. The features of the former, which is characterized by sin and instability, can be overridden only by their being integrated into Christian schemes. The political society is successful in that it is structured in a way consistent with the Christian order. Such required integration of the political into the religious is destined to prevail during the Middle Ages, giving shape to a doctrine, political Augustinianism, which in place of integration supports the absorption and submission of the

earthly to the religious. This results in a society "oriented toward salvation" (García Pelayo 1981: 223), whereby no official secular structure is possible.

Since Charlemagne's age, the Church has been the "only guardian of intellectual and cultural values in the Western world, the only organized power maintaining a notion of public affairs, *res publica*, and of political knowledge" (Lecler 1994: 94). The Church-State dualism disappears, replaced by a unitary structure within "Christian civility." As J. N. Figgis stated, "in the Middle Ages the Church was not a State, it was *the* State" (Figgis 1916: 5).

The concept of Christianity as a unitary structure within which the two powers come to be blended constitutes a differentiating feature between Christian antiquity and the modern world. The predominant political theory in the Middle Ages is based on the *Doctrine of the Two Swords*, according to which, albeit the Church and the Empire were to be identified as two separate, autonomous, and independent powers, actually, owing to the fact that human beings have a predominant supernatural ultimate end of their own, "the Church must be considered superior to the State in point of value and dignity" (Copleston 1963: 168; Ullmann 1961: 9–26). Pope Gelasius I (492–496) was the first supporter of such a thesis, whereupon the Papacy was to be attributed political functions. Although each of the powers has a field of its own, the authority of the Church rises up over

civil authority, since what is the competence of the Church (the salvation of mankind) implies a greater responsibility. In 1302, Pope Boniface VIII issues his Bull *Unam Sanctam*, maintaining that every authority wielded on Earth in the end has its origin in the Church itself. Two swords exist in the world, yet both the spiritual sword and the material one are in the hands of the Church, which is a *corpus mysticum*.

Therefore, in the Middle Ages, the Church does not restrain itself to being just a part of the political structure, but rather it identifies with it. Civil power is subordinated to the papal *plenitudo potestatis* (Passerin d'Entreves 1969: 97; Carlyle 1971: 374–393). All the institutions have the same point of reference. The Church “had assumed in its spiritual hierarchy the powers which might be called otherwise political, even though it delegated them, or a part of them, to temporal agencies” (Dumont 1986: 67). It follows that the political organization of power is destined to achieve the goals and the interests of the Church. This, in a dual sense, on the one hand, taking into consideration the negative and sinful conception of the purely earthly life, the activity of political power is to be aimed at the creation of structures facilitating and ensuring the salvation of mankind; on the other hand, it has to be aimed to fulfil the religious model of peace and justice, so that all those manifestations which question such a conception are to be repressed. Needless to say, filling this framework with the new individualist and rationalist ideas will be controversial.

The *Defensor Pacis*

Over the first half of the thirteenth century, new issues emerge, among which stands out the independence of the Empire from the Papacy. Indeed, the two come to be addressed in a different way, above all a greater density of argument, which makes it possible to overcome the classical descriptions set forth in the *specula principum*. This creates a whole new conception of political theory, which comes to be thought of as “a reflection on the natural aims of men in the community

and on the determination of the powers responsible of conducting mankind to those natural goals” (Bertelloni 2013: 241).

Marsilius of Padua's (1274–1343) *Defensor Pacis* (DP, 1324 see Marsilius of Padua 2005) represents a break with the tradition by means of a series of treatises – one of the most significant is Thomas Aquinas' *De Regno* (1267) – whereby a dualism of powers, temporal and spiritual, is set forth. As opposed to this, Marsilius builds his work on the assumption that sovereignty is unique and indivisible and resides in the people. Marsilius of Padua's political treatise has been deemed to be the most important and original of the Middle Ages (Figgis 1916: 33) and possibly the greatest display of the reaction against the theocentric medieval structures, albeit still within this framework.

The setting in which political (and legal) science unfolds up until Marsilius of Padua's theories is predominantly theocentric and has at its forefront the aspirations of several Popes such as Gregory VII, Innocent III, or Boniface VIII. The activity of ecclesiastical power is mainly aimed at achieving and strengthening a universal order, on the basis of the establishment of papal primacy over the Empire. In this context, Marsilius of Padua's relevance stems from his critique of medieval structures, being able to distinguish between various aspects that had not ever been set apart, as well as laying the foundations upon which modern structures will come to be based. Therefore, Marsilius can be described as a “transit” figure, above all in respect of the transition from a theological to a secular conception of law. G. Capograssi, referring to Marsilius, points to his “typical originality of the rebel, refuter and pioneer,” so that “it seems that all the following denials of the tradition have been anticipated by him” (Capograssi 1930: 578).

Defensor Pacis is Marsilius' most important work and cannot be understood in its widest significance without taking into consideration the historical-political context in which it was written. The author is immersed in all the philosophical-political disputes of his era, of which his work is a direct outcome, since he writes it in the context of the struggle between Ludwig the Bavarian and

Frederick of Habsburg (who counted on the Pope's support), in the succession of Henry VII of Luxembourg, 1313. Marsilius' theses support Ludwig the Bavarian denial of the Pope's *plenitudo potestatis*.

The theses in *Defensor Pacis* were continued in *Defensor Minor* (1341, see Marsilius of Padua 1993), in which Marsilius replies to Ockham's criticism of the denial of the Pope's judicial power proposed in *Defensor Pacis*. In 1341, he wrote the *Tractatus de iurisdictione imperatoris in causis matrimonialibus*, whereby he defended Ludwig the Bavarian stance in requesting Pope Benedict XII the annulment of Margaret Maultasch's marriage, which would permit the following wedding with her son. His work was completed with the *Tractatus de traslatione imperii* (1343).

Defensor Pacis is structured around three parts (each named "Dictio"), each one of different importance. The first constitutes the first step toward a theory of law (Tierney 1991; Bobbio 1979: 162–163) and of the State. The second "Dictio" shifts to other issues (albeit resting on conclusions derived from the third), in as much as it analyzes ecclesiastical power. Lastly, the third, divided into three chapters, is a collection of all the foregoing, and it ends with a brief explanation of the meaning of the title of the work. Without a doubt, it is a new claim for its time. Marsilius interprets political events in terms of cause and effect relations, on the one hand, and on the other, politics is deemed to be rationally analyzed. In parallel, it attempts to give an answer to the basic question of political philosophy: that of the legitimacy of government and the coercive force of power (Bayona 2007: 202).

The *Communitas Perfecta*

In his work, Marsilius tries to carry out a secular justification of political power, which finds its rationale in its constituents own will and in their need to meet the basics of survival in community. This is a good example of a rising explanation of power with all that this implies, namely, the acknowledgment of the self-sustaining capability

of individuals to conduct their lives on their own. Political power in Marsilius' model is an end in itself. It is set up so that it can constitute a framework in which all the tools required to achieve self-sufficiency are laid down. Only then will emerge the account of *civitas*, the State, as a *communitas perfecta*, understood as a community able to include all that one needs for a good life, which is not in need of a transcendent foundation. This implies reconsideration of ecclesiastical power in favor of self-sufficiency and autarchy of civil power. Indeed, Marsilius aims to claim the autonomy of political power from the Church, with supremacy and self-sufficiency. From this point of view, Marsilius contributes to the secularization of philosophy in general and, in particular, of philosophy of law and the State.

In *Defensor Pacis*, he analyzes the cause of the breakdown of civil peace, namely, the struggle between spiritual and political powers. Peace is the necessary condition for the good life, the *bene vivere*, to be implemented. Such peace is possible only through the right *dispositio* between the parties that form the society, which work as a body, whose health is strictly dependent on the correct relationships between the parts. The origin of contention, the breakdown of civil peace, is to be found in the doctrine of *plenitudo potestatis*, which affirms the plenitude of power and the universal jurisdiction of the Pope.

For Marsilius, once a model of self-sufficient society is established, any departure from it contributes to its breakdown. Traditional explanations, on canonical grounds, precisely lead to this consequence. The arguments based on them, which attribute power to the ecclesiastical part, and its materializations, disrupt the normal development of social life. Therefore, what Marsilius searches for is a theoretical solution to halt the interference of the Church in the structures of power, which are to hold only a civil status. Hence in all that concerns temporal issues, the Church has to be subordinated to civil power.

The achievement of peace, or the framing of legal-political components of the city in such a way as to ensure its peace and tranquility, is the main point in Marsilius' work. His proposal consists in the materialization of what he deems

to be the ideal structure of the city. Highly influenced by Aristotle, Marsilius believes the right configuration of the city to be a whole divided into parts or components: of these, each has a particular function or role. Such partitioning of the city is not something whimsical, but rather it is motivated on the grounds of the insufficiency of the isolated consideration of the different parts as regards their livelihood: "For since people who want to live the sufficient life have needs of different kinds, which cannot be supplied through men of one order or office alone, it was necessary that this community contain different orders or offices, practising or providing the different things that men need for the sufficiency of life. These different orders or offices of men are nothing other than the several and distinct parts of the city" (DP I, IV, 5). As the health of an animal is identified with the right functioning of all its parts or organs in accordance with its nature, the city will find its peace and tranquility when each of its parts fulfils its task without interfering with that of the others: "[T]he city which is in a good condition and established in accordance with reason is made up of certain such parts. [...] [T]ranquillity will then be that good condition of a city or realm, in which each of its parts is enabled perfectly to perform the operations appropriate to it according to reason and the way it has been established" (DP I, II 3). Taking this into account, "intranquillity will thus be that bad condition of a city or realm (just like the sickness of an animal) in which all or some of its parts are prevented from performing the operations appropriate to them, either in absolute terms or at least to their full extent" (DP, I, II, 3). Only such a city will be deemed to be a *communitas perfecta*, i.e., a human aggregation able to provide for all the needs of human beings and create the necessary conditions in order to achieve a fortunate and peaceful human existence.

According to Marsilius, several are the parts of the city: agriculture, manufacture, the military, the financial, the priesthood, and the judicial or counsellor. The priesthood is the only one "concerning which there has been no such general agreement among men as upon the necessity of the other parts of the city," since "its true and

primary necessity could not be understood through demonstration" (DP, II, V, 10). To his mind, the final cause of the priesthood "is the tempering of those human acts that result from an imperative of cognition or desire, both immanent and transitive, inasmuch as it is on the basis of them that the human race is ordered toward the best life of the world to come" (DP, I, VI, 1).

Taking into account such setting of *civitas* or *regnum*, Marsilius studies the origin of power in the city. While in Chapter XI of *Dictio I* he demonstrates the necessity and goodness of the existence of laws in the city, it logically follows that the next step shall be to enquire about the origin of the legislator's competence to issue such laws, in what can be demonstrated through reason, all this in the framework of a voluntarist conception of law. For Marsilius, the authority and competence to issue laws can only arise from all of the citizens, or their prevailing part: "because that practical matter in the correct institution of which the common sufficiency of citizens in this life primarily consists – and in the incorrect institution of which the common detriment threatens – ought to be laid down solely by the universal body of the citizens; but that thing is law; therefore its institution belongs to the universal body of the citizens" (DP, I, XII, 7); so that the authority to issue law "belongs, therefore, to the universal body of the citizens or its prevailing part [...]. For because all the citizens must be measured by law in due proportion, and no one willingly harms or wants what is unjust for himself, therefore all or most of them want a law that is adapted to the common advantage of the citizens" (DP, I, XII, 8). The legislator, that is, all of the citizens or the majority, will designate the governor through elections: "Therefore since it belongs to the universal body of the citizens to generate the form according to which all civil acts must be regulated, sc. the law, it will be evident that it belongs to the same body to determine the matter or subject of this form, to which it belongs to settle the civil actions of men in accordance with this form: viz., the princely part" (DP, I, XV, 3).

The governor must distribute and allocate the various tasks to citizens within the city,

since he is the executive arm of the legislator "in accordance with the form given him by the same legislator, viz. the law (according to which the prince ought always to act and to settle civil actions insofar as he can" (DP, I, XV, 4). Disobedience to orders of the governor implies infringement of the various functions that the citizen has to carry out in the city, what contributes to provoking unease and a lack of peace. Thus, at the same time, that would constitute a breach of the law: "Since, then, it is the due action of the prince which is the efficient and preservative cause of all the said civil benefits [...], that action will itself be the productive cause of tranquillity. And if there is anything that of itself impedes the action of this part, intranquillity and discord will arise from it as from their productive cause viewed in a generic sense" (DP, I, XIX, 3).

Classification of Human Acts: Natural Law and Human Law

Therefore, the generic causes of unease are identifiable with disobedience to the governor in relation to the distribution of tasks and functions. Yet, there is a fundamental cause of contention which is in itself the core of *Defensor Pacis*. Broadly speaking, it is the self-attribution of an excess of authority by the priesthood. For Marsilius, this is the greatest problem, so that the second "Dictio" is aimed to explain and demonstrate the theoretical arguments of the Church in defense of its position. The authority of the ecclesiastical hierarchy, whose initial explanation Marsilius traces back to Christianity, is to be exerted in a specific field, otherwise the organization of the city is disrupted and the law is breached. The *plenitudo potestatis* assumed by the Church "is the singular cause that we have said is productive of intranquillity or discord in a city or realm [...], since "the office of coercive principate over any individual person, of whatever rank, or any community or collective body, does not belong to the Roman or to any other bishop, priest or spiritual minister in his capacity as such" (DP, I, XIX, 12).

Marsilius takes as a starting point the classification of human acts in order to establish a delimitation of the various jurisdictions over them. In Chapter VIII of *Dictio II* (*On the division of human acts and their relation to human law and the judge of this world*), Marsilius draws a first distinction between commanded acts and non-commanded acts. The former are those which can be determined by the subject who carries them out: the individual acts by use of his freedom. As for the latter, there is no free decision-making concerning their being done or not. Taking into consideration this first split, Marsilius distinguishes, within commanded acts, between immanent acts and transitive acts. While the former do not transcend the active subject, in the latter there exists a reflection and a consequence: "Of these commanded acts, some are and are called 'immanent', others 'transitive'. Commanded thoughts and affections, together with the dispositions for them that are produced by the human mind, and are called 'immanent' insofar as they do not cross over into a subject other than the one producing them. All pursuits of things we desire, on the other hand, and all omissions of these (as their privations), and all movements produced by some exterior organ of the body (especially if it is moved in respect of place), are and are called 'transitive'" (DP, II, VIII, 3).

Human actions are regulated by given norms. Some of them do not involve coercive power in themselves, yet some others imply penalties or rewards as a result of their realization or omission. In turn, the penalties resulting from such coercive rules can be twofold: the ones for present life and the ones for future life. Thus, on the one hand, "for the life or sufficient living of this world [...] a rule has been laid down for those transitive and commanded human acts which can take place to the convenience or inconvenience, right or injury of someone other than the doer: a rule which commands and coerces its transgressors with punishment or penalty for the status of the present world alone. And this is what we called by the common name of 'human law'" (DP, II, VIII, 5; DM, I, 4). Hence human law will be the expression of the will of the people as regards the self-

direction of their life. Moreover, "[n]ow for the life or living of this world, but for the status of the world to come, a law was handed down and set in place by Christ. This law is a rule of commanded human acts which are in the active power of our mind, both immanent and transitive, insofar as they can be done or omitted in due or undue fashion in this world; but it nevertheless coerces and metes out penalty or reward for the status or end of the future world. And it will impose these penalties or rewards in the future world, not in this one, according to the merits or demerits of those who observe or transgress it in the present life" (DP, II, VIII, 5; DM, I, 4). Such is the *divine law*.

However, both types of law (human and divine) have no executive capacity of their own; therefore someone is needed to hold executive and coercive power in order to enforce them. That being will be in charge of observing human actions in the light of such rules, so as to apply the consequences arising from their non-compliance. This person will be considered to be a *judge*, as in one of the most common definitions of the word which means the authority whose power "is just and beneficial in accordance with the laws or customs and to command and execute the sentences he has passed with coercive power" (DP, II, II, 8). The coercive authority of the judge will extend to all citizens. It can be assumed that the clergy is also to be placed under the authority of the judge who applies human law (see DP, II, VIII, 7).

With regard to divine law, Marsilius distinguishes between two types of authority. One of them, the supreme one, is that of Christ, and it is not exerted in this world. The other one, which in turn is exerted in the human world, is that of the clergyman. Yet, when the latter is seen as the "judge," this term shall not be understood as meaning the same as in the case of the judge on human law. The judge here is a counsellor, deprived of coercive power. Marsilius offers a comparison with the doctor, whose authority lies in his knowledge, in accordance to which he advises and suggests measures to preserve health and prevent illnesses. The clergyman, as a counsellor-judge, will apply evangelical law,

which can be looked at from two points of view: both what regards the individual over the course of his life on Earth and his future life. In his future life, men will be judged in accordance with the evangelical or divine law, which only then will acquire a coercive character. But the same does not hold true over the course of earthly life, since the clergyman "has not been granted to him by the immediate legislator of this law, viz. Christ, to constrain anyone in this world in accordance with it; therefore he is not properly called a judge [...] with coercive power, and he neither can nor should constrain anyone by such judgement in this world with a penalty in goods or in person" (DP, II, IX, 3). Here the *evangelic law* is to be considered under one of the meanings of the term, i.e., as a "rule containing admonitions for those human acts that result from an imperative, insofar as they are ordered towards glory or punishment in the world to come" (DP, I, X, 3). From this point of view, it should also be taken into consideration that such conception of law is not given coerciveness, which pertains only to human law and the judge who applies it, so that the *evangelic law*, in the aforementioned sense, would equate to a piece of advice, or a doctrine. Furthermore, Marsilius undermines the idea of the earthly jurisdiction of the Church, denouncing mistaken interpretations of the Bible.

The right social order implies an adequate distinction of competences between the clergyman and the judge. The first exerts his jurisdiction over immanent and transitive acts, with a view to guaranteeing the *bene vivere* and the eternal life, whereas the second is competent to judge transitive acts, with great impact on the *bene vivere* in the earthly world. Without such power, civil society cannot survive. For this reason, it is the main part, the *pars principans* (I, XV, 5-7). The function of the judge is that of regulating transitive acts in accordance with the law. Thus, Marsilius develops a theory on the nature and origin of law.

Marsilius draws a distinction between divine law and human law, on which it does not seem too daring to claim a certain resemblance with the more classical theories of the XVI and XVII centuries on the separation between law and morality: "For a person is not punished by the prince just

because he sins against divine law. For there are many mortal sins and sins against divine law, like fornication, which the human legislator permits even knowingly, and which a bishop or priest neither can nor should forbid by coercive power. But if a person, sc. a heretic, sins against divine law and that sin is also prohibited by human law, then he is punished in this world as a sinner against human law" (DP, II, X, 7). This is a clear distinction between the legal and the religious. Human law is not to regulate spiritual and religious offenses, which are specific to divine law. Moreover, a relation is established between the nature of the offense and the corresponding punishment. Only acts in breach of human law will deserve earthly penalties.

In conclusion, by means of his theory of law, Marsilius contributes to defining the fields of civil and ecclesiastical power (see Bayona 2005). The characterization of the law is a prerequisite for extinguishing civil contention, which emerges as a result of a confusion between the two powers. Only through coercive law, public and enacted, as an expression of the will of all the citizens standing as the legislator, suppressing all the parts of the city, it is possible to achieve peace.

On Marsilius of Padua's Contribution

Marsilius' importance ultimately lies in his establishing a structural model whose main features are to arouse the development of what much later in time will be specific to modernity. Albeit despite how modern and advanced some of his contributions are, his thoughts still come from and develop within medieval structures. In his work, men are still members of communities (the Church and the State), although the former has already lost all authority but the supernatural. According to G. Sabine, "no other writer in the Middle Ages went so far as Marsilius in thus setting apart the spiritual and religious from the legal" (Sabine 1958: 299), and this allows to deem

him as a "bridge" figure between the Middle Ages and modernity. Just as medieval traces can be found in Marsilius, yet there are features which allow us to consider him as a prelude to the Renaissance or as a forerunner to the Reform. The rational origins of the State, the distinction between jurisdictions, the critique of the papal *plenitudo potestatis*, the claim of consent as a legitimacy criterion, or the distinction between natural and human law, whereby a coercive character is to be assigned only to the latter, confirm the previous considerations. Perhaps it was this innovating and controversial character that sparked acrimonious opposition to Marsilius in his own era.

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