Notes on Marsilius of Padua

I. ‘Basic Themes’ from Marilìus’ Defensor pacis, according to Alan Gewirth (from his ‘Introduction’ to his English translation of Defensor pacis [University of Toronto Press, 1980], p. x xx):
   A. The state is a product of reason and exists for the end of men’s living well.
   B. Political authority is primarily concerned with the resolution of conflicts and is defined by the possession and structure of coercive power.
   C. The sole source of legitimate political power is the will or consent of the people.

   Summarizing, we might say that Marsilius moves in the direction of a voluntarist (‘will-based’) account of law and political authority.

II. There are many examples of Marsilius’ ‘creative use’ of Aristotle—that is, of his taking what he represents as an Aristotelian doctrine and, subtly or unsubtly, ‘adapting’ it. One such example occurs in ch. iv: as footnote 8 indicates, Marsilius hints at a distinction between society and the state. His account of the former is unimpeachably Aristotelian. But the latter is necessary for adjudicating the “disputes and quarrel” that arise among humans when they gather in large groups. The “establishment or differentiation of civil offices” is necessary only as a result of the fall and the corruption of human nature that it represents.

III. The (quasi)technical distinction between ‘immanent’ and ‘transient’ actions and passions, and the need to regulate the latter in order to prevent “fighting and the separation of the citizens” (p. 17) is used to justify the ‘judicial’/’ruling’/’deliberative’ element of the state in ch. v.

   In section 10 of this same chapter v, Marsilius develops a purely secular account of the function of the ‘priestly’ element of the state—the purpose of which is promote “quiet or tranquility” by the regulation of ‘immanent’ actions/passions of the citizens.

IV. In Ch. viii, Marsilius appeals to Aristotle’s Politics for his classification of “well tempered” and “diseased” regimes, or types of polity/government. But his account of the former “in which the ruler governs for the common benefit, in accordance with the will of the subjects” represents, in its second condition, a typically ‘Marsilian adaption’ of Aristotle.

V. In ch. ix, Marsilius distinguishes between two methods, one ‘preternatural’ and the other ‘natural,’ in which government is established. He is concerned, almost exclusively, with the latter. In section 6 of this chapter he states the two criteria of “temperate government”: “the consent of the subjects and law established for their common benefit.” But note the emphasis he gives to the first “which is the distinguishing criterion.”
VI. The account of law in ch. x.

A. The four different meanings of the term ‘law’:

1. “A natural sensitive inclination toward some action or passion.” (Cf. Thomas Aquinas’ conception of natural law [lex naturalis] and the Roman jurists’ conception of ius naturale.)
2. “Any productive habit and in general every form, existing in the mind, of a producible thing, from which as from an exemplar or measure there emerge the forms of things made by art.”
3. “The standard containing admonitions for voluntary acts according as these are ordered toward glory or punishment in the future world.”
4. “The science or doctrine or universal judgment of matters of civil justice and benefit, and of their opposites.”

B. Marsilius takes the 4th sense to be the most “familiar” and also the sense in which he is concerned. This obviously is law in the sense of human, ‘positive’, or civil law. He proceeds to identify two ways of considering law. As “considered in itself, as it only shows what is just or unjust, beneficial or harmful,” it is the “science or doctrine of right (juris [genitive form of ‘ius’]).” But it can also be considered as “a command coercive through punishment or reward to be distributed in the present world, or according as it handed down by ways of such a command; and considered in this way it most properly is called, and is, a law.” Marsilius here moves away from the prominent classical and earlier medieval scholastic conception of law as essentially principles of practical rationality to a much more modern-seeming voluntaristic (and ‘positivistic’) conception of law as essentially a matter of commands backed by ‘real-world’ sanctions.

C. A corollary is that, in the 4th and most proper sense of ‘law’, laws may be unjust. But compare the account of “the end or necessity of law” from ch. xi: “the ‘principal end is civil justice and common benefit; the secondary end is the security of rulers, especially those with hereditary succession, and the long duration of government.” There follows an ‘ideal’ characterization of law “that without which civil judgments cannot be made with complete rightness, and through which these judgments are properly made and preserved from defect so far as it is humanly possible.”

D. In this same ch. xi, Marsilius sets forth his very strong preference for ‘inanimate’ over ‘animate’ justice: “no judgment, so far as possible, should be entrusted to the discretion of the judge, but rather it should be determined by law and pronounced in accordance with it” (p. 38).

VII. Remembering that “the true knowledge or discovery of the just and the beneficial, and of their opposites, is not law taken it its last and most proper sense, whereby it is the measure of human civil acts, unless there is given a coercive command as to its observance, or it is made by way of such a command, by someone through whose authority its transgressors must and can be punished,” Marsilius proceeds to assert (in ch. xii) “that the legislator, or the primary and efficient cause of the law, is the people or the whole body of citizens, or the weightier part thereof, through its election or will expressed by words in the general assembly of the citizens, commanding or determining that something be done or omitted with regard to human civil acts, under a temporal pain or punishment” (p. 45). There is certainly a strong ‘democratic’ emphasis here despite Marsilius’ qualification that by “weightier part,” he means to take “into consideration the quantity and quality of the persons in that community over which law is made.”
VIII. Marsilius’ arguments for the preceding claim about the (proper) authorship of law

A. He accepts the proposition that “the absolutely primary authority to make or establish human laws belongs only to those men from whom alone the best laws can emerge” (p. 46) as “very close to self-evident.”

B. What is not at all self-evident is his claim that the “whole body of the citizens, or the weightier part thereof,” are, in fact, “those men from whom alone the best laws can emerge.” He proceeds to argue that “that at which the entire body of the citizens aims intellectually and emotionally is more certainly judged as to its truth and more diligently noted as to its common utility” (p. 46). The reasons for this claim seems to be (a) a version of the adage that “more heads are better than one [or fewer]” and (b) “no one knowingly harms himself.” (a) is certainly disputable. And (b) seems most relevant (only relevant?) if the end of law (justice and common benefit) is interpreted as the equitable maximal satisfaction of the preferences of citizens. If, however—as in the more classical conceptions of law—the end of law is the equitable promotion of some conception of the objective human good (ergon, telos) (which may not be reflected by preference-satisfaction), (b) does not seem a particularly relevant consideration.

C. Marsilius does consider yet another argument (in section 6 of ch. xii) to the effect that “the authority to make the law belongs only to those men whose making of it will cause the law to be better observed or observed by all. Only the whole body of the citizens are such men. To them, therefore, belongs the authority to make the law” (p. 47).

IX. In ch. xiii, Marsilius responds to various objections of his claim (with supporting arguments) that the proper civil legislative authority rests with “the whole body of citizens.” These objections include the adage from Ecclesiastes, “The number of the stupid is infinite,” and the claim that “it is very difficult or impossible to harmonize the views of many vicious and unintelligent persons” (pp. 49-50). He concedes that it is “appropriate and highly useful that whole body of citizens entrust to those who are prudent and experienced the investigation, discovery, and examination of the standards, the future laws or statutes, concerning civil justice and benefit, common difficulties or burdens, and other similar matters” (p. 54). But, “after such standards, the future laws, have been discovered and diligently examined, they must be laid before the assembled whole body of citizens for their approval or disapproval” (p. 55).