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QUESTION 90: THE ESSENCE OF LAW

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By Thomas Aquinas

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THE ESSENCE OF LAW

1. Is law something pertaining to reason?
2. The end of law
3. Its cause
4. The promulgation of law

ARTICLE 1. WHETHER LAW IS SOMETHING PERTAINING TO REASON?

Objection 1. It would seem that law is not something pertaining to reason. For the Apostle [Paul] says (Romans 7:23): "I see another law in my members," etc. But nothing pertaining to reason is in the members; since the reason does not make use of a bodily organ. Therefore law is not something pertaining to reason.

Objection 2. Further, in the reason there is nothing else but power, habit, and act. But law is not the power itself of reason. In like manner, neither is it a habit of reason: because the habits of reason are the intellectual virtues of which we have spoken above (Part I-II, Question 57). Nor again is it an act of reason: because then law would cease, when the act of reason ceases, for instance, while we are asleep. Therefore law is nothing pertaining to reason.

Objection 3. Further, the law moves those who are subject to it to act aright. But it belongs properly to the will to move to act, as is evident from what has been said above (Part I-II, Question 9, Article 1). Therefore law pertains, not to the reason, but to the will; according to the words of the Jurist [Ulpian] (Pandectarum Justiniani *[Pandects of Justinian]*, 1.4, De Constitutionibus Principum, preface):

"Whatsoever pleaseth the sovereign, has force of law."

On the contrary, It belongs to the law to command and to forbid. But it belongs to reason to command, as stated above (Part I-II, Question 17, Article 1). Therefore law is something pertaining to reason.

I answer that, Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for "lex" [law] is derived from "ligare" [to bind], because it binds one to act. Now the rule and measure of human acts is the reason, which is the first principle of human acts, as is evident from what has been stated above (Part I-II, Question 1, Article 1, Reply 3); since it belongs to the reason to direct to the end, which is the first principle in all matters of action, according to the Philosopher [Aristotle] (*Physics*, Book 2). Now that which is the principle in any genus, is the rule and measure of that genus: for instance, unity in the genus of numbers, and the first movement in the genus of movements. Consequently it follows that law is something pertaining to reason.

Reply to Objection 1. Since law is a kind of rule and measure, it may be in something in two ways. First, as in that which measures and rules: and since this is proper to reason, it follows that, in this way, law is in the reason alone. Secondly, as in that which is measured and ruled. In this way, law is in all those things that are inclined to something by reason of some law: so that any inclination arising from a law, may be called a law, not essentially but by participation as it were. And thus the inclination of the members to concupiscence is called "the law of the members."

Reply to Objection 2. Just as, in external action, we may consider the work and the work done, for instance the work of building and the house built; so in the acts of reason, we may consider the act itself of reason, i.e. to understand and to reason, and something produced by this act. With regard to the speculative reason, this is first of all the definition; secondly, the proposition; thirdly, the syllogism or argument. And since also the practical reason makes use of a syllogism in respect of the work to be done, as stated above (Part I-II, Question 13, Article 3; Question 76, Article 1), according to what(1) the Philosopher [Aristotle] teaches (*Nicomachean Ethics*, 7.3); hence we find in the practical reason something that holds the same position in regard to operations, as, in the speculative intellect, the proposition holds in regard to conclusions. Such like universal propositions of the practical intellect that are directed to actions have the nature of law. And these propositions are sometimes under our actual consideration, while sometimes they are retained in the reason by means of a habit.

Reply to Objection 3. Reason has its power of moving from the will, as stated above (Part I-II, Question 17, Article 1): for it is due to the fact that one wills the end, that the reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law; otherwise the sovereign's will would savor of lawlessness rather than of law.

ARTICLE 2. WHETHER THE LAW IS ALWAYS SOMETHING DIRECTED TO THE COMMON GOOD?

Objection 1. It would seem that the law is not always directed to the common good as to its end. For it belongs to law to command and to forbid. But commands are directed to certain individual goods. Therefore the end of the law is not always the common good.

Objection 2. Further, the law directs man in his actions. But human actions are concerned with particular matters. Therefore the law is directed to some particular good.

Objection 3. Further, Isidore [of Seville] says (*Etymologies*, 5.3): "If the law is based on reason, whatever is based on reason will be a law." But reason is the foundation not only of what is ordained to

the common good, but also of that which is directed to private good. Therefore the law is not only directed to the good of all, but also to the private good of an individual.

On the contrary, Isidore [of Seville] says (*Etymologies*, 5.21) that "laws are enacted for no private profit, but for the common benefit of the citizens."

I answer that, As stated above (Article 1), the law belongs to that which is a principle of human acts, because it is their rule and measure. Now as reason is a principle of human acts, so in reason itself there is something which is the principle in respect of all the rest: wherefore to this principle chiefly and mainly law must needs be referred. Now the first principle in practical matters, which are the object of the practical reason, is the last end: and the last end of human life is bliss or happiness, as stated above (Part I-II, Question 1, Article 7 [On the contrary](2); Question 3, Article 1). Consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness. Wherefore the Philosopher [Aristotle], in the above definition of legal matters mentions both happiness and the body politic: for he says (*Nicomachean Ethics*, 5.1) that we call those legal matters "just, which are adapted to produce and preserve happiness and its parts for the body politic": since the state is a perfect community, as he says in *Politics,* 1.1.

Now in every genus, that which belongs to it chiefly is the principle of the others, and the others belong to that genus in subordination to that thing: thus fire, which is chief among hot things, is the cause of heat in mixed bodies, and these are said to be hot in so far as they have a share of fire. Consequently, since the law is chiefly ordained to the common good, any other precept in regard to some individual work, must needs be devoid of the nature of a law, save in so far as it regards the common good. Therefore every law is ordained to the common good.

Reply to Objection 1. A command denotes an application of a law to matters regulated by the law. Now the order to the common good, at which the law aims, is applicable to particular ends. And in this way commands are given even concerning particular matters.

Reply to Objection 2. Actions are indeed concerned with particular matters: but those particular matters are referable to the common good, not as to a common genus or species, but as to a common final cause, according as the common good is said to be the common end.

Reply to Objection 3. Just as nothing stands firm with regard to the speculative reason except that which is traced back to the first indemonstrable principles, so nothing stands firm with regard to the practical reason, unless it be directed to the last end which is the common good: and whatever stands to reason in this sense, has the nature of a law.

ARTICLE 3. WHETHER THE REASON OF ANY MAN IS COMPETENT TO MAKE LAWS?

Objection 1. It would seem that the reason of any man is competent to make laws. For the Apostle [Paul] says (Romans 2:14) that "when the Gentiles, who have not the law, do by nature those things that are of the law, . . . they are a law to themselves." Now he says this of all in general. Therefore anyone can make a law for himself.

Objection 2. Further, as the Philosopher [Aristotle] says (Nicomachean Ethics, 2.1), "the intention of the lawgiver is to lead men to virtue." But every man can lead another to virtue. Therefore the reason of any man is competent to make laws.

Objection 3. Further, just as the sovereign of a state governs the state, so every father of a family governs his household. But the sovereign of a state can make laws for the state. Therefore every father

of a family can make laws for his household.

On the contrary, Isidore [of Seville] says (*Etymologies*, 5.10): "A law is an ordinance of the people, whereby something is sanctioned by the Elders together with the Commonalty."

I answer that, A law, properly speaking, regards first and foremost the order to the common good. Now to order anything to the common good, belongs either to the whole people, or to someone who is the viceregent of the whole people. And therefore the making of a law belongs either to the whole people or to a public personage who has care of the whole people: since in all other matters the directing of anything to the end concerns him to whom the end belongs.

Reply to Objection 1. As stated above (Article 1, Reply 1), a law is in a person not only as in one that rules, but also by participation as in one that is ruled. In the latter way each one is a law to himself, in so far as he shares the direction that he receives from one who rules him. Hence the same text goes on: "Who shows the work of the law written in their hearts."

Reply to Objection 2. A private person cannot lead another to virtue efficaciously: for he can only advise, and if his advice be not taken, it has no coercive power, such as the law should have, in order to prove an efficacious inducement to virtue, as the Philosopher [Aristotle] says (*Nicomachean* Ethics, 10.9). But this coercive power is vested in the whole people or in some public personage, to whom it belongs to inflict penalties, as we shall state further on (Question 92, Article 2, Reply 3; Part II-II, Question 64, Article 3). Wherefore the framing of laws belongs to him alone.

Reply to Objection 3. As one man is a part of the household, so a household is a part of the state: and the state is a perfect community, according to [Aristotle's] *Politics*, 1.1. And therefore, as the good of one man is not the last end, but is ordained to the common good; so too the good of one household is ordained to the good of a single state, which is a perfect community. Consequently he that governs a family, can indeed make certain commands or ordinances, but not such as to have properly the force of law.

ARTICLE 4. WHETHER PROMULGATION IS ESSENTIAL TO A LAW?

Objection 1. It would seem that promulgation is not essential to a law. For the natural law above all has the character of law. But the natural law needs no promulgation. Therefore it is not essential to a law that it be promulgated.

Objection 2. Further, it belongs properly to a law to bind one to do or not to do something. But the obligation of fulfilling a law touches not only those in whose presence it is promulgated, but also others. Therefore promulgation is not essential to a law.

Objection 3. Further, the binding force of a law extends even to the future, since "laws are binding in matters of the future," as the jurists say (*Codex Justinianus*, 1.14.7). But promulgation concerns those who are present. Therefore it is not essential to a law.

On the contrary, It is laid down in the *Decretals* [of Pseudo-Isidore], dist. 4, that "laws are established when they are promulgated."

I answer that, As stated above (Article 1), a law is imposed on others by way of a rule and measure. Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by

promulgation. Wherefore promulgation is necessary for the law to obtain its force.

Thus from the four preceding articles, the definition of law may be gathered; and it is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.

Reply to Objection 1. The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally.

Reply to Objection 2. Those who are not present when a law is promulgated, are bound to observe the law, in so far as it is notified or can be notified to them by others, after it has been promulgated.

Reply to Objection 3. The promulgation that takes place now, extends to future time by reason of the durability of written characters, by which means it is continually promulgated. Hence Isidore [of Seville] says (*Etymologies,* 5.3, 2.10) that "*lex* [law] is derived from *legere* [to read] because it is written."

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NOTES:

(1) *secundum quod*. The English tranlation provided here is a correction to the original edition.

(2) The translation of the English Dominican Fathers here cites Part I-II, *Question 2*, Article 7, which seems to be a typographical error.

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