primarysourcedocument

Question 95: Human Law

Question 95: Human Law

Question 95: Human Law

By Thomas Aquinas

[Aquinas, Thomas. "Human Law." *The Summa Theologica*. Translated by the Fathers of the English Dominican Province. Second and Revised Edition. 1920. First Part of the Second Part, Question 95. http://www.newadvent.org/summa/2095.htm. Used with the permission of Kevin Knight and New Advent .]

HUMAN LAW

1. Its utility
2. Its origin
3. Its quality
4. Its division

ARTICLE 1. WHETHER IT WAS USEFUL FOR LAWS TO BE FRAMED BY MEN?

Objection 1. It would seem that it was not useful for laws to be framed by men. Because the purpose of every law is that man be made good thereby, as stated above (Question 92, Article 1). But men are more to be induced to be good willingly by means of admonitions, than against their will, by means of laws. Therefore there was no need to frame laws.

Objection 2. Further, As the Philosopher [Aristotle] says (*Nicomachean Ethics*, 5.4), "men have recourse to a judge as to animate justice." But animate justice is better than inanimate justice, which contained in laws. Therefore it would have been better for the execution of justice to be entrusted to the decision of judges, than to frame laws in addition.

Objection 3. Further, every law is framed for the direction of human actions, as is evident from what has been stated above (Question 90, Articles 1 and 2). But since human actions are about singulars, which are infinite in number, matter pertaining to the direction of human actions cannot be taken into sufficient consideration except by a wise man, who looks into each one of them. Therefore it would have been better for human acts to be directed by the judgment of wise men, than by the framing of laws. Therefore there was no need of human laws.

On the contrary, Isidore [of Seville] says (*Etymologies*, 5.20): “Laws were made that in fear thereof human audacity might be held in check, that innocence might be safeguarded in the midst of wickedness, and that the dread of punishment might prevent the wicked from doing harm.” But these things are most necessary to mankind. Therefore it was necessary that human laws should be made.

I answer that, As stated above (Part I-II, Question 63, Article 1; Question 94, Article 3), man has a natural aptitude for virtue; but the perfection of virtue must be acquired by man by means of some kind of training. Thus we observe that man is helped by industry in his necessities, for instance, in food and clothing. Certain beginnings of these he has from nature, viz. his reason and his hands; but he has not the full complement, as other animals have, to whom nature has given sufficiency of clothing and food. Now it is difficult to see how man could suffice for himself in the matter of this training: since the perfection of virtue consists chiefly in withdrawing man from undue pleasures, to which above all man is inclined, and especially the young, who are more capable of being trained. Consequently a man needs to receive this training from another, whereby to arrive at the perfection of virtue. And as to those young people who are inclined to acts of virtue, by their good natural disposition, or by custom, or rather by the gift of God, paternal training suffices, which is by admonitions. But since some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of training, which compels through fear of punishment, is the discipline of laws. Therefore in order that man might have peace and virtue, it was necessary for laws to be framed: for, as the Philosopher [Aristotle] says (*Politics*, 1.2), “as man is the most noble of animals if he be perfect in virtue, so is he the lowest of all, if he be severed from law and righteousness”; because man can use his reason to devise means of satisfying his lusts and evil passions, which other animals are unable to do.

Reply to Objection 1. Men who are well disposed are led willingly to virtue by being admonished better than by coercion: but men who are evilly disposed are not led to virtue unless they are compelled.

Reply to Objection 2. As the Philosopher [Aristotle] says (*Rhetoric*, 1.1), “it is better that all things be regulated by law, than left to be decided by judges”: and this for three reasons. First, because it is easier to find a few wise men competent to frame right laws, than to find the many who would be necessary to judge aright of each single case. Secondly, because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact. Thirdly, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted.

Since then the animated justice of the judge is not found in every man, and since it can be deflected, therefore it was necessary, whenever possible, for the law to determine how to judge, and for very few matters to be left to the decision of men.

Reply to Objection 3. Certain individual facts which cannot be covered by the law “have necessarily to be committed to judges,” as the Philosopher [Aristotle] says in the same passage: for instance, “concerning something that has happened or not happened,” and the like.

ARTICLE 2. WHETHER EVERY HUMAN LAW IS DERIVED FROM THE NATURAL LAW?

Objection 1. It would seem that not every human law is derived from the natural law. For the Philosopher [Aristotle] says (*Nicomachean Ethics*, 5.7) that “the legal just is that which originally was a

matter of indifference." But those things which arise from the natural law are not matters of indifference. Therefore the enactments of human laws are not derived from the natural law.

Objection 2. Further, positive law is contrasted with natural law, as stated by Isidore [of Seville] (*Etymologies* , *5*.4) and the Philosopher [Aristotle] (*Nicomachean Ethics*, 5.7). But those things which flow as conclusions from the general principles of the natural law belong to the natural law, as stated above (Question 94, Article 4). Therefore that which is established by human law does not belong to the natural law.

Objection 3. Further, the law of nature is the same for all; since the Philosopher [Aristotle] says (*Nicomachean Ethics*, 5.7) that "the natural just is that which is equally valid everywhere." If therefore human laws were derived from the natural law, it would follow that they too are the same for all: which is clearly false.

Objection 4. Further, it is possible to give a reason for things which are derived from the natural law. But "it is not possible to give the reason for all the legal enactments of the lawgivers," as the jurist says [Pandectarum Justiniani, *Pandects of Justinian*, 1.3.20–21]. Therefore not all human laws are derived from the natural law.

On the contrary, Tully [Cicero] says (*De Inventione*, 2.160): "Things which emanated from nature and were approved by custom, were sanctioned by fear and reverence for the laws."

I answer that, As Augustine says (*De Libero Arbitrio [On the Free Choice of the Will]*, 1.5) "that which is not just seems to be no law at all": wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above (Question 91, Article 2, Reply 2). Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.

But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape. Some things are therefore derived from the general principles of the natural law, by way of conclusions; e.g. that "one must not kill" may be derived as a conclusion from the principle that "one should do harm to no man": while some are derived therefrom by way of determination; e.g. the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature.

Accordingly both modes of derivation are found in the human law. But those things which are derived in the first way, are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things which are derived in the second way, have no other force than that of human law.

Reply to Objection 1. The Philosopher [Aristotle] is speaking of those enactments which are by way of determination or specification of the precepts of the natural law.

Reply to Objection 2. This argument avails for those things that are derived from the natural law, by way of conclusions.

Reply to Objection 3. The general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people.

Reply to Objection 4. These words of the Jurist are to be understood as referring to decisions of rulers in determining particular points of the natural law: on which determinations the judgment of expert and prudent men is based as on its principles; in so far, to wit, as they see at once what is the best thing to decide.

Hence the Philosopher [Aristotle] says (*Nicomachean Ethics*, 6.11) that in such matters, "we ought to pay as much attention to the undemonstrated sayings and opinions of persons who surpass us in experience, age and prudence, as to their demonstrations."

ARTICLE 3. WHETHER ISIDORE [OF SEVILLE]'S DESCRIPTION OF THE QUALITY OF POSITIVE LAW IS APPROPRIATE?

Objection 1. It would seem that Isidore [of Seville]'s description of the quality of positive law is not appropriate, when he says (*Etymologies*, 5.21): "Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit, but for the common good." Because he had previously expressed the quality of law in three conditions, saying that "law is anything founded on reason, provided that it foster religion, be helpful to discipline, and further the common weal." Therefore it was needless to add any further conditions to these.

[Objections 2 through 4 and On the contrary *omitted]*

I answer that, Whenever a thing is for an end, its form must be determined proportionately to that end; as the form of a saw is such as to be suitable for cutting (*Physics,* 2.9). Again, everything that is ruled and measured must have a form proportionate to its rule and measure. Now both these conditions are verified of human law: since it is both something ordained to an end; and is a rule or measure ruled or measured by a higher measure. And this higher measure is twofold, viz. the Divine law and the natural law, as explained above (Article 2; Question 93, Article 3). Now the end of human law is to be useful to man, as the jurist states [*Pandectarum Justiniani*, *Pandects of Justinian*, 1.1.11]. Wherefore Isidore [of Seville] in determining the nature of law, lays down, at first, three conditions; viz. that it "foster religion," inasmuch as it is proportionate to the Divine law; that it be "helpful to discipline," inasmuch as it is proportionate to the nature law; and that it "further the common weal," inasmuch as it is proportionate to the utility of mankind [Isidore of Seville, *Etymologies*, 5.3].

All the other conditions mentioned by him are reduced to these three. For it is called virtuous because it fosters religion. And when he goes on to say that it should be "just, possible to nature, according to the customs of the country, adapted to place and time," [Isidore of Seville, Etymologies, 5.21] he implies that it should be helpful to discipline. For human discipline depends first on the order of reason, to which he refers by saying "just": secondly, it depends on the ability of the agent; because discipline should be adapted to each one according to his ability, taking also into account the ability of nature (for the same burdens should be not laid on children as adults); and should be according to human customs; since man cannot live alone in society, paying no heed to others: thirdly, it depends on certain circumstances, in respect of which he says, "adapted to place and time." The remaining words, "necessary, useful," etc. mean that law should further the common weal: so that "necessity" refers to the removal of evils; "usefulness" to the attainment of good; "clearness of expression," to the need of preventing any harm ensuing from the law itself. And since, as stated above (Question 90, Article 2), law is ordained to the common good, this is expressed in the last part of the description.

This suffices for the Replies to the Objections.

ARTICLE 4. WHETHER ISIDORE [OF SEVILLE]'S DIVISION OF HUMAN LAWS IS APPROPRIATE?

Objection 1. It would seem that Isidore [of Seville] wrongly divided human statutes or human law (*Etymologies*, 5.4ff). For under this law he includes the "law of nations," so called, because, as he says, "nearly all nations use it." But as he says, "natural law is that which is common to all nations." Therefore the law of nations is not contained under positive human law, but rather under natural law.

[Objections 2 through 4 and On the contrary *omitted]*

I answer that, A thing can of itself be divided in respect of something contained in the notion of that thing. Thus a soul either rational or irrational is contained in the notion of animal: and therefore animal is divided properly and of itself in respect of its being rational or irrational; but not in the point of its being white or black, which are entirely beside the notion of animal. Now, in the notion of human law, many things are contained, in respect of any of which human law can be divided properly and of itself. For in the first place it belongs to the notion of human law, to be derived from the law of nature, as explained above (Article 2). In this respect positive law is divided into the "law of nations" and "civil law", according to the two ways in which something may be derived from the law of nature, as stated above (Article 2). Because, to the law of nations belong those things which are derived from the law of nature, as conclusions from premises, e.g. just buyings and sellings, and the like, without which men cannot live together, which is a point of the law of nature, since man is by nature a social animal, as is proved in [Aristotle's] *Politics*, 1.2. But those things which are derived from the law of nature by way of particular determination, belong to the civil law, according as each state decides on what is best for itself.

. . .

Reply to Objection 1. The law of nations is indeed, in some way, natural to man, in so far as he is a reasonable being, because it is derived from the natural law by way of a conclusion that is not very remote from its premises. Wherefore men easily agreed thereto. Nevertheless it is distinct from the natural law, especially it is distinct from the natural law which is common to all animals.

[Reply to 2 through 4 omitted]
Original Author Sort: Aquinas, Thomas
Publication Date: 11265.00.00.06
Topic: Classical & Medieval Sources of Natural Law
Subtopic: Thomas Aquinas
Publication Date Range: 1265-1274

Source URL: http://www.nlnrac.org/node/225