

Phi 213 F04: handout for 9/1

Thomas Aquinas, *Summa Theologiae*, I-II, q. 96, aa. 2, 3, 6, q. 97

Question 96: OF THE POWER OF HUMAN LAW (SIX ARTICLES)

We must now consider the power of human law. Under this head there are six points of inquiry:

- (1) Whether human law should be framed for the community?
- (2) Whether human law should repress all vices?
- (3) Whether human law is competent to direct all acts of virtue?
- (4) Whether it binds man in conscience?
- (5) Whether all men are subject to human law?
- (6) Whether those who are under the law may act beside the letter of the law?

...

Article 2: Whether it belongs to the human law to repress all vices?

Objection 1: It would seem that it belongs to human law to repress all vices. For Isidore says (*Etym.* v, 20) that *laws were made in order that, in fear thereof, man's audacity might be held in check*. But it would not be held in check sufficiently, unless all evils were repressed by law. Therefore human laws should repress all evils.

Objection 2: Further, the intention of the lawgiver is to make the citizens virtuous. But a man cannot be virtuous unless he forbear from all kinds of vice. Therefore it belongs to human law to repress all vices.

Objection 3: Further, human law is derived from the natural law, as stated above (*ST I-II.q95.a2*). But all vices are contrary to the law of nature. Therefore human law should repress all vices.

On the contrary, We read in *De Lib. Arb.* i, 5: *It seems to me that the law which is written for the governing of the people rightly permits these things, and that Divine providence punishes them*. But Divine providence punishes nothing but vices. Therefore human law rightly allows some vices, by not repressing them.

I answer that, As stated above (*ST I-II.q90.a1-2*), law is framed as a rule or measure of human acts. Now a measure should be homogeneous with that which it measures, as stated in *Metaph.* x, text. 3,4, since different things are measured by different measures. Wherefore laws imposed on men should also be in keeping with their condition, for, as Isidore says (*Etym.* v, 21), law should be *possible both according to nature, and according to the customs of the country*. Now possibility or faculty of action is due to an interior habit or disposition: since the same thing is not possible to one who has not a virtuous habit, as is possible to one who has. Thus the same is not possible to a child as to a full-grown man: for which reason the law for children is not the same as for adults, since many things are permitted to children, which in

an adult are punished by law or at any rate are open to blame. In like manner many things are permissible to men not perfect in virtue, which would be intolerable in a virtuous man.

Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like.

Reply to Objection 1: Audacity seems to refer to the assailing of others. Consequently it belongs to those sins chiefly whereby one's neighbor is injured: and these sins are forbidden by human law, as stated.

Reply to Objection 2: The purpose of human law is to lead men to virtue, not suddenly, but gradually. Wherefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, viz. that they should abstain from all evil. Otherwise these imperfect ones, being unable to bear such precepts, would break out into yet greater evils: thus it is written (Ps. 30:33): *He that violently bloweth his nose, bringeth out blood*; and (Mat. 9:17) that if *new wine, i.e. precepts of a perfect life, is put into old bottles, i.e. into imperfect men, the bottles break, and the wine runneth out, i.e. the precepts are despised, and those men, from contempt, break into evils worse still*.

Reply to Objection 3: The natural law is a participation in us of the eternal law: while human law falls short of the eternal law. Now Augustine says (*De Lib. Arb.* i, 5): *The law which is framed for the government of states, allows and leaves unpunished many things that are punished by Divine providence. Nor, if this law does not attempt to do everything, is this a reason why it should be blamed for what it does*. Wherefore, too, human law does not prohibit everything that is forbidden by the natural law.

Article 3: Whether human law prescribes acts of all the virtues?

Objection 1: It would seem that human law does not prescribe acts of all the virtues. For vicious acts are contrary to acts of virtue. But human law does not prohibit all vices, as stated above (*ST I-II.q96.a2*). Therefore neither does it prescribe all acts of virtue.

Objection 2: Further, a virtuous act proceeds from a virtue. But virtue is the end of law; so that whatever is from a virtue, cannot come under a precept of law. Therefore human law does not prescribe all acts of virtue.

Objection 3: Further, law is ordained to the common good, as stated above (*ST I-II.q90.a2*). But some acts of virtue are ordained, not to the common good, but to private good. Therefore the law does not prescribe all acts of virtue.

On the contrary, The Philosopher says (*Ethic.* v, 1) that the law *prescribes the performance of the acts of a brave man . . . and the acts of the temperate*

man . . . and the acts of the meek man: and in like manner as regards the other virtues and vices, prescribing the former, forbidding the latter.

I answer that, The species of virtues are distinguished by their objects, as explained above (ST I-II.q54.a2; ST I-II.q60.a1; ST I-II.q62.a2). Now all the objects of virtues can be referred either to the private good of an individual, or to the common good of the multitude: thus matters of fortitude may be achieved either for the safety of the state, or for upholding the rights of a friend, and in like manner with the other virtues. But law, as stated above (ST I-II.q90.a2) is ordained to the common good. Wherefore there is no virtue whose acts cannot be prescribed by the law. Nevertheless human law does not prescribe concerning all the acts of every virtue: but only in regard to those that are ordainable to the common good---either immediately, as when certain things are done directly for the common good---or mediately, as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace.

Reply to Objection 1: Human law does not forbid all vicious acts, by the obligation of a precept, as neither does it prescribe all acts of virtue. But it forbids certain acts of each vice, just as it prescribes some acts of each virtue.

Reply to Objection 2: An act is said to be an act of virtue in two ways. First, from the fact that a man does something virtuous; thus the act of justice is to do what is right, and an act of fortitude is to do brave things: and in this way law prescribes certain acts of virtue. Secondly an act of virtue is when a man does a virtuous thing in a way in which a virtuous man does it. Such an act always proceeds from virtue: and it does not come under a precept of law, but is the end at which every lawgiver aims.

Reply to Objection 3: There is no virtue whose act is not ordainable to the common good, as stated above, either mediately or immediately.

...

Article 6: Whether he who is under a law may act beside the letter of the law?

Objection 1: It seems that he who is subject to a law may not act beside the letter of the law. For Augustine says (*De Vera Relig.* 31): *Although men judge about temporal laws when they make them, yet when once they are made they must pass judgment not on them, but according to them.* But if anyone disregard the letter of the law, saying that he observes the intention of the lawgiver, he seems to pass judgment on the law. Therefore it is not right for one who is under the law to disregard the letter of the law, in order to observe the intention of the lawgiver.

Objection 2: Further, he alone is competent to interpret the law who can make the law. But those who are subject to the law cannot make the law.

Therefore they have no right to interpret the intention of the lawgiver, but should always act according to the letter of the law.

Objection 3: Further, every wise man knows how to explain his intention by words. But those who framed the laws should be reckoned wise: for Wisdom says (Prov. 8:15): *By Me kings reign, and lawgivers decree just things.* Therefore we should not judge of the intention of the lawgiver otherwise than by the words of the law.

On the contrary, Hilary says (*De Trin.* iv): *The meaning of what is said is according to the motive for saying it: because things are not subject to speech, but speech to things.* Therefore we should take account of the motive of the lawgiver, rather than of his very words.

I answer that, As stated above (ST I-II.q96.a4), every law is directed to the common weal of men, and derives the force and nature of law accordingly. Hence the jurist says:¹ *By no reason of law, or favor of equity, is it allowable for us to interpret harshly, and render burdensome, those useful measures which have been enacted for the welfare of man.* Now it happens often that the observance of some point of law conduces to the common weal in the majority of instances, and yet, in some cases, is very hurtful. Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed. For instance, suppose that in a besieged city it be an established law that the gates of the city are to be kept closed, this is good for public welfare as a general rule: but, it were to happen that the enemy are in pursuit of certain citizens, who are defenders of the city, it would be a great loss to the city, if the gates were not opened to them: and so in that case the gates ought to be opened, contrary to the letter of the law, in order to maintain the common weal, which the lawgiver had in view.

Nevertheless it must be noted, that if the observance of the law according to the letter does not involve any sudden risk needing instant remedy, it is not competent for everyone to expound what is useful and what is not useful to the state: those alone can do this who are in authority, and who, on account of such like cases, have the power to dispense from the laws. If, however, the peril be so sudden as not to allow of the delay involved by referring the matter to authority, the mere necessity brings with it a dispensation, since necessity knows no law.

Reply to Objection 1: He who in a case of necessity acts beside the letter of the law, does not judge the law; but of a particular case in which he sees that the letter of the law is not to be observed.

Reply to Objection 2: He who follows the intention of the lawgiver, does not interpret the law simply; but in a case in which it is evident, by reason of the manifest harm, that the lawgiver intended otherwise. For if it be a matter

¹ *Pandect. Justin.* lib. i, ff., tit. 3, *De Leg. et Senat.*

of doubt, he must either act according to the letter of the law, or consult those in power.

Reply to Objection 3: No man is so wise as to be able to take account of every single case; wherefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view. And even if a lawgiver were able to take all the cases into consideration, he ought not to mention them all, in order to avoid confusion: but should frame the law according to that which is of most common occurrence.

Question 97: OF CHANGE IN LAWS (FOUR ARTICLES)

We must now consider change in laws: under which head there are four points of inquiry:

- (1) Whether human law is changeable?
- (2) Whether it should be always changed, whenever anything better occurs?
- (3) Whether it is abolished by custom, and whether custom obtains the force of law?
- (4) Whether the application of human law should be changed by dispensation of those in authority?

Article 1: Whether human law should be changed in any way?

Objection 1: It would seem that human law should not be changed in any way at all. Because human law is derived from the natural law, as stated above (ST I-II.q95.a2). But the natural law endures unchangeably. Therefore human law should also remain without any change.

Objection 2: Further, as the Philosopher says (*Ethic.* v, 5), a measure should be absolutely stable. But human law is the measure of human acts, as stated above (ST I-II.q90.a1-2). Therefore it should remain without change.

Objection 3: Further, it is of the essence of law to be just and right, as stated above (ST I-II.q95.a2). But that which is right once is right always. Therefore that which is law once, should be always law.

On the contrary, Augustine says (*De Lib. Arb.* i, 6): *A temporal law, however just, may be justly changed in course of time.*

I answer that, As stated above (ST I-II.q91.a3), human law is a dictate of reason, whereby human acts are directed. Thus there may be two causes for the just change of human law: one on the part of reason; the other on the part of man whose acts are regulated by law. The cause on the part of reason is that it seems natural to human reason to advance gradually from the imperfect to the perfect. Hence, in speculative sciences, we see that the teaching of the early philosophers was imperfect, and that it was afterwards perfected by those who succeeded them. So also in practical matters: for those who first endeavored to discover something useful for the human community, not being able by themselves to take everything into consideration, set up certain institutions which were deficient in many ways;

and these were changed by subsequent lawgivers who made institutions that might prove less frequently deficient in respect of the common weal.

On the part of man, whose acts are regulated by law, the law can be rightly changed on account of the changed condition of man, to whom different things are expedient according to the difference of his condition. An example is proposed by Augustine (*De Lib. Arb.* i, 6): *If the people have a sense of moderation and responsibility, and are most careful guardians of the common weal, it is right to enact a law allowing such a people to choose their own magistrates for the government of the commonwealth. But if, as time goes on, the same people become so corrupt as to sell their votes, and entrust the government to scoundrels and criminals; then the right of appointing their public officials is rightly forfeit to such a people, and the choice devolves to a few good men.*

Reply to Objection 1: The natural law is a participation of the eternal law, as stated above (ST I-II.q91.a2), and therefore endures without change, owing to the unchangeableness and perfection of the Divine Reason, the Author of nature. But the reason of man is changeable and imperfect: wherefore his law is subject to change. Moreover the natural law contains certain universal precepts, which are everlasting; whereas human law contains certain particular precepts, according to various emergencies.

Reply to Objection 2: A measure should be as enduring as possible. But nothing can be absolutely unchangeable in things that are subject to change. And therefore human law cannot be altogether unchangeable.

Reply to Objection 3: In corporal things, right is predicated absolutely: and therefore, as far as itself is concerned, always remains right. But right is predicated of law with reference to the common weal, to which one and the same thing is not always adapted, as stated above: wherefore rectitude of this kind is subject to change.

Article 2: Whether human law should always be changed, whenever something better occurs?

Objection 1: It would seem that human law should be changed, whenever something better occurs. Because human laws are devised by human reason, like other arts. But in the other arts, the tenets of former times give place to others, if something better occurs. Therefore the same should apply to human laws.

Objection 2: Further, by taking note of the past we can provide for the future. Now unless human laws had been changed when it was found possible to improve them, considerable inconvenience would have ensued; because the laws of old were crude in many points. Therefore it seems that laws should be changed, whenever anything better occurs to be enacted.

Objection 3: Further, human laws are enacted about single acts of man. But we cannot acquire perfect knowledge in singular matters, except by experience, which *requires time*, as stated in *Ethic.* ii. Therefore it seems that as time goes on it is possible for something better to occur for legislation.

On the contrary, It is stated in the Decretals (*Dist. xii, 5*): *It is absurd, and a detestable shame, that we should suffer those traditions to be changed which we have received from the fathers of old.*

I answer that, As stated above (*ST I-II.q97.a1*), human law is rightly changed, in so far as such change is conducive to the common weal. But, to a certain extent, the mere change of law is of itself prejudicial to the common good: because custom avails much for the observance of laws, seeing that what is done contrary to general custom, even in slight matters, is looked upon as grave. Consequently, when a law is changed, the binding power of the law is diminished, in so far as custom is abolished. Wherefore human law should never be changed, unless, in some way or other, the common weal be compensated according to the extent of the harm done in this respect. Such compensation may arise either from some very great and every evident benefit conferred by the new enactment; or from the extreme urgency of the case, due to the fact that either the existing law is clearly unjust, or its observance extremely harmful. Wherefore the jurist says² that *in establishing new laws, there should be evidence of the benefit to be derived, before departing from a law which has long been considered just.*

Reply to Objection 1: Rules of art derive their force from reason alone: and therefore whenever something better occurs, the rule followed hitherto should be changed. But *laws derive very great force from custom*, as the Philosopher states (*Polit. ii, 5*): consequently they should not be quickly changed.

Reply to Objection 2: This argument proves that laws ought to be changed: not in view of any improvement, but for the sake of a great benefit or in a case of great urgency, as stated above. This answer applies also to the Third Objection.

Article 3: Whether custom can obtain force of law?

Objection 1: It would seem that custom cannot obtain force of law, nor abolish a law. Because human law is derived from the natural law and from the Divine law, as stated above (*ST I-II.q93.a3; ST I-II.q95.a2*). But human custom cannot change either the law of nature or the Divine law. Therefore neither can it change human law.

Objection 2: Further, many evils cannot make one good. But he who first acted against the law, did evil. Therefore by multiplying such acts, nothing good is the result. Now a law is something good; since it is a rule of human acts. Therefore law is not abolished by custom, so that the mere custom should obtain force of law.

Objection 3: Further, the framing of laws belongs to those public men whose business it is to govern the community; wherefore private individuals cannot make laws. But custom grows by the acts of private individuals. Therefore custom cannot obtain force of law, so as to abolish the law.

² *Pandect. Justin. lib. i, ff., tit. 4, De Constit. Princip.*

On the contrary, Augustine says (*Ep. ad Casulan. xxxvi*): *The customs of God's people and the institutions of our ancestors are to be considered as laws. And those who throw contempt on the customs of the Church ought to be punished as those who disobey the law of God.*

I answer that, All law proceeds from the reason and will of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason. Now just as human reason and will, in practical matters, may be made manifest by speech, so may they be made known by deeds: since seemingly a man chooses as good that which he carries into execution. But it is evident that by human speech, law can be both changed and expounded, in so far as it manifests the interior movement and thought of human reason. Wherefore by actions also, especially if they be repeated, so as to make a custom, law can be changed and expounded; and also something can be established which obtains force of law, in so far as by repeated external actions, the inward movement of the will, and concepts of reason are most effectually declared; for when a thing is done again and again, it seems to proceed from a deliberate judgment of reason. Accordingly, custom has the force of a law, abolishes law, and is the interpreter of law.

Reply to Objection 1: The natural and Divine laws proceed from the Divine will, as stated above. Wherefore they cannot be changed by a custom proceeding from the will of man, but only by Divine authority. Hence it is that no custom can prevail over the Divine or natural laws: for Isidore says (*Synon. ii, 16*): *Let custom yield to authority: evil customs should be eradicated by law and reason.*

Reply to Objection 2: As stated above (*ST I-II.q96.a6*), human laws fail in some cases: wherefore it is possible sometimes to act beside the law; namely, in a case where the law fails; yet the act will not be evil. And when such cases are multiplied, by reason of some change in man, then custom shows that the law is no longer useful: just as it might be declared by the verbal promulgation of a law to the contrary. If, however, the same reason remains, for which the law was useful hitherto, then it is not the custom that prevails against the law, but the law that overcomes the custom: unless perhaps the sole reason for the law seeming useless, be that it is not *possible according to the custom of the country*,³ which has been stated to be one of the conditions of law. For it is not easy to set aside the custom of a whole people.

Reply to Objection 3: The people among whom a custom is introduced may be of two conditions. For if they are free, and able to make their own laws, the consent of the whole people expressed by a custom counts far more in favor of a particular observance, that does the authority of the sovereign, who has not the power to frame laws, except as representing the people. Wherefore although each individual cannot make laws, yet the whole people

³ *ST I-II.q95.a3*

can. If however the people have not the free power to make their own laws, or to abolish a law made by a higher authority; nevertheless with such a people a prevailing custom obtains force of law, in so far as it is tolerated by those to whom it belongs to make laws for that people: because by the very fact that they tolerate it they seem to approve of that which is introduced by custom.

Article 4: Whether the rulers of the people can dispense from human laws?

Objection 1: It would seem that the rulers of the people cannot dispense from human laws. For the law is established for the *common weal*, as Isidore says (*Etym.* v, 21). But the common good should not be set aside for the private convenience of an individual: because, as the Philosopher says (*Ethic.* i, 2), *the good of the nation is more godlike than the good of one man*. Therefore it seems that a man should not be dispensed from acting in compliance with the general law.

Objection 2: Further, those who are placed over others are commanded as follows (Dt. 1:17): *You shall hear the little as well as the great; neither shall you respect any man's person, because it is the judgment of God*. But to allow one man to do that which is equally forbidden to all, seems to be respect of persons. Therefore the rulers of a community cannot grant such dispensations, since this is against a precept of the Divine law.

Objection 3: Further, human law, in order to be just, should accord with the natural and Divine laws: else it would not *foster religion*, nor be *helpful to discipline*, which is requisite to the nature of law, as laid down by Isidore (*Etym.* v, 3). But no man can dispense from the Divine and natural laws. Neither, therefore, can he dispense from the human law.

On the contrary, The Apostle says (1 Cor. 9:17): *A dispensation is committed to me*.

I answer that, Dispensation, properly speaking, denotes a measuring out to individuals of some common goods: thus the head of a household is called a dispenser, because to each member of the household he distributes work and necessities of life in due weight and measure. Accordingly in every community a man is said to dispense, from the very fact that he directs how some general precept is to be fulfilled by each individual. Now it happens at times that a precept, which is conducive to the common weal as a general rule, is not good for a particular individual, or in some particular case, either because it would hinder some greater good, or because it would be the occasion of some evil, as explained above (*ST I-II.q96.a6*). But it would be dangerous to leave this to the discretion of each individual, except perhaps by reason of an evident and sudden emergency, as stated above (*ST I-II.q96.a6*). Consequently he who is placed over a community is empowered to dispense in a human law that rests upon his authority, so that, when the law fails in its application to persons or circumstances, he may allow the precept of the law not to be observed. If however he grant this permission without any such reason, and of his mere will, he will be an unfaithful or an

imprudent dispenser: unfaithful, if he has not the common good in view; imprudent, if he ignores the reasons for granting dispensations. Hence Our Lord says (Lk. 12:42): *Who, thinkest thou, is the faithful and wise dispenser [Douay: steward], whom his lord setteth over his family?*

Reply to Objection 1: When a person is dispensed from observing the general law, this should not be done to the prejudice of, but with the intention of benefiting, the common good.

Reply to Objection 2: It is not respect of persons if unequal measures are served out to those who are themselves unequal. Wherefore when the condition of any person requires that he should reasonably receive special treatment, it is not respect of persons if he be the object of special favor.

Reply to Objection 3: Natural law, so far as it contains general precepts, which never fail, does not allow of dispensations. In other precepts, however, which are as conclusions of the general precepts, man sometimes grants a dispensation: for instance, that a loan should not be paid back to the betrayer of his country, or something similar. But to the Divine law each man stands as a private person to the public law to which he is subject. Wherefore just as none can dispense from public human law, except the man from whom the law derives its authority, or his delegate; so, in the precepts of the Divine law, which are from God, none can dispense but God, or the man to whom He may give special power for that purpose.