

QUESTION 95

Human Law

We next have to consider human law: first, human law in itself (question 95); second, its force (question 96); and, third, its mutability (question 97).

On the first topic there are four questions: (1) Is human law useful? (2) What are its origins? (3) What are the characteristics of human law? (4) How is human law divided?

Article 1

Was it useful for laws to be made by men?

It seems not to have been useful for laws to be made by men:

Objection 1: As was explained above (q. 92, a. 1), the intention behind every law is that men should become good through it. But men are better led toward the good willingly through admonitions than by being coerced through laws. Therefore, it was unnecessary to make laws.

Objection 2: As the Philosopher says in *Ethics* 5, men have recourse to a judge as one who embodies ‘living justice’ (*justum animatum*). But living justice is better than the non-living justice contained in laws. Therefore, it would have been better to entrust the administration of justice to the decisions of judges rather than to issue laws over and beyond this.

Objection 3: As is clear from what was said above (q. 90, a. 1-2), every law directs human acts. But since human acts comprise individual cases that are infinite in number, not everything that is relevant to directing human acts can be adequately taken into account except by some wise man who investigates the individual cases. Therefore, it would have been better for human acts to be directed by the decisions of wise men rather than by any law that might be made. Therefore, it was unnecessary to make human laws.

But contrary to this: In *Etymologia* Isidore says, “Laws have been made in order that human boldness might be held in check by fear of them, and in order that the innocent might be safe among the wicked, and in order that the ability of the wicked themselves to do harm might be curbed by their fear of punishment.” But these things are especially necessary for the human race. Therefore, it was necessary to make human laws.

I respond: As is clear from what was said above (q. 63, a. 1 and q. 94, a. 3), man has a natural aptitude for virtue. It is through discipline, however, that he arrives at the *perfection* of virtue—just as we likewise see that it is man’s industriousness that helps him acquire his necessities, e.g., food and clothing, with respect to which nature gives him certain initial resources, viz., his faculty of reason and his hands, but not full satisfaction—unlike the other animals, to whom nature has given adequate food and outer protection. But it is not easy for a man to be self-sufficient with respect to the discipline required for virtue. For perfecting a virtue is mainly a matter of restraining a man from inappropriate pleasures of the sort to which men are especially drawn—and, above all, young people, with whom discipline is more effective. And so men have to receive from others the sort of training through which virtue is acquired.

Now, to be sure, paternal discipline, which makes use of admonitions, is sufficient for those young people who are inclined toward acts of virtue by a good natural temperament, or by upbringing (*consuetudo*), or, better, by a gift of God. However, because there are some who are impudent and prone to the vices and who cannot be easily moved by words, it was necessary to restrain them from evil through force and fear, so that (a) ceasing to do evil, they might at least leave others to a peaceful life, and so that (b) in the end they might be led by this sort of habituation to the point of doing willingly what

they were previously doing out of fear and so becoming virtuous.

Now the sort of discipline in question, which coerces by the fear of punishment, is the discipline of laws. Hence, it was for the sake of virtue and of peace among men that laws had to be established. For as the Philosopher says in *Politics* 1, “Just as man, if he is perfected in virtue, is the best of the animals, so, too, if he is cut off from the law and from justice, he is the worst of all animals.” For unlike the other animals, man has the weapons of reason to satisfy his lustful desires and his taste for savage violence.

Reply to objection 1: Well-disposed men are best led to virtue by willingly heeded admonitions rather than by coercion, but ill-disposed men are not led to virtue unless they are coerced.

Reply to objection 2: As the Philosopher says in *Rhetoric* 1, “It is better for all things to be regulated by law than left to the decision of judges.” There are three reasons for this:

First, a few wise men—which is all it takes to make good laws—are easier to find than a large number of wise men—which is what it would take to judge cases correctly one by one.

Second, lawmakers spend a long time considering what should be imposed by law, whereas judgments about individual cases are made quickly as the cases arise. Moreover, a man can more easily see what is right if he considers many instances than if he considers just a single instance.

Third, lawmakers make judgments that apply to all cases (*in universali*) and are future-oriented, whereas the men who render judgments are judging about present matters, concerning which they are affected by love or hate or some kind of excessive desire, and in this way their judgments become perverted.

Therefore, since there are not many cases of a judge’s ‘living justice’, and since such justice can be skewed (*est flexibile*), it was necessary for the law to determine which judgments should be made in as many cases as possible and to leave very few cases to the decisions of men.

Reply to objection 3: As the Philosopher says in the same place, certain particular matters that cannot be included in a law—e.g., “those concerning what has or has not been done” and other things of this sort—“must be entrusted to judges.”

Article 2

Does every humanly made law stem from the natural law?

It seems that not every humanly made law stems from the natural law (*a lege naturali derivetur*):

Objection 1: In *Ethics* 5 the Philosopher says, “What is legally just is such that at the beginning it did not matter whether it was done this way or some other way.” But in things that arise from the natural law it does matter whether they are done this way or some other way. Therefore, not everything established by human laws stems from the law of nature.

Objection 2: As is clear both from Isidore in *Etymologia* and from the Philosopher in *Ethics* 5, positive law (*ius positivum*) is opposed to natural law (*ius naturale*). But as was explained above (q. 94, a. 4), what stems in the manner of a conclusion from the principles of the law of nature belongs to the law of nature. Therefore, what belongs to human law does not stem from the law of nature.

Objection 3: The law of nature is the same for everyone; for the Philosopher says in *Ethics* 5, “What is naturally just is such that it has the same force everywhere.” Therefore, if human laws stemmed from the natural law, it would follow that these human laws are likewise the same for everyone. But this is clearly false.

Objection 4: A reason can be given for things that stem from the natural law. But as the Legal Expert points out, it is not the case that a reason can be given for everything that those in charge

(*maiores*) have established as law. Therefore, not every human law stems from the natural law.

But contrary to this: In his *Rhetorica* Tully says, “Fear and reverence sanctioned both what had come from nature and what had been approved by custom.”

I respond: As Augustine says in *De Libero Arbitrio* 1, “A law that is not just does not seem to be a law at all.” Hence, something has the force of law to the extent that it shares in justice.

Now in human affairs something is called just by virtue of its being right (*rectum*) according to the rule of reason. But as is clear from what was said above (q. 91, a. 2), the first rule of reason is the law of nature. Hence, every humanly made law has the character of law to the extent that it stems from the law of nature. On the other hand, if a humanly made law conflicts with the natural law, then it is no longer a law, but a corruption of law.

Note, however, that there are two possible modes in which things can stem from (*derivari*) the natural law: first, as *conclusions* from principles, and, second, (b) as *specifications (determinationes)* of what is general. The first mode is similar to the way in which demonstrative conclusions are produced from principles in the sciences. By contrast, in the second mode there is a similarity to the way in which general forms are narrowed down to something more specific in the arts—for instance, a craftsman must narrow down the general form *house* to this or that specific shape for a house.

Thus, some things stem from the universal principles of the law of nature in the manner of a *conclusion*; for instance, *One should not kill* can be derived as a conclusion from *One should not do evil to anyone*. On the other hand, some things are derived in the manner of a *specification*; for instance, the law of nature says *Let him who does evil be punished*, but it is a specification of the law of nature that an evildoer should be punished by *this specific* punishment.

Thus, both sorts of things are found posited in human law. However, what stems from the natural law in the first mode is not contained in human law in such a way that it is posited by that law alone; rather, it also has some of its force from the natural law. By contrast, what stems from the natural law in the second mode has its force from human law alone.

Reply to objection 1: In this passage the Philosopher is talking about what is posited by the law through a determination or specification of the precepts of the law of nature.

Reply to objection 2: This argument goes through for the case of those things that stem from the law of nature as conclusions.

Reply to objection 3: Because of the great variety in human affairs, the general principles of the law of nature cannot be applied in the same way to everyone. This is the source of the diversity of positive law for different people.

Reply to objection 4: This passage from the Legal Expert should be understood as applying to what is introduced by those in charge concerning particular specifications of the natural law. The judgment of men who are experienced and prudent bears the same relation to these specifications as it does to the principles—viz., that they directly see just which particular specifications are appropriate. Hence, the Philosopher says in *Ethics* 6 that in such matters “one should give no less respect to the indemonstrable pronouncements and opinions of experienced and older and prudent men than to demonstrations.”

Article 3

Does Isidore appropriately describe the characteristics of positive law?

It seems that Isidore does not appropriately describe the characteristics (*qualitatem*) of positive law

when he says, “The law will be (a) morally upright (*honesta*), (b) just (*justa*), (c) possible according to nature, (d) in keeping with the customs of the country, (e) appropriate for the time and place, (f) necessary, (g) useful, (h) clear as well, lest it contain anything deceptive because of its obscurity, (i) written for no one’s private advantage, but for the common advantage of the citizens.”

Objection 1: He had previously explained the characteristics of law by listing [only] three conditions: “The law will be everything that builds upon reason, as long as it (a) agrees with religion, (b) contributes to discipline, and (c) promotes welfare (*salus*).” Therefore, it was unnecessary for him to multiply the conditions later on.

Objection 2: As Tully explains in *De Officiis*, justice (*iustitia*) is a part of moral uprightness (*honestas*). Therefore, once Isidore had said “morally upright,” it was unnecessary to add “just.”

Objection 3: According to Isidore, the written law is opposed to custom. Therefore, he should not have put “in keeping with the customs of the country” into the definition of law.

Objection 4: There are two types of necessary things. The first is what is necessary absolutely speaking, i.e., such that it is impossible for it to be otherwise; this type of necessary thing is not subject to human judgment and so this sort of necessity is irrelevant to human law. Something can also be necessary for the sake of an end, and this sort of necessity is the same as usefulness. Therefore, it is superfluous to posit both “necessary” and “useful.”

But contrary to this is the authority of Isidore himself.

I respond: As *Physics 2* makes clear, everything that exists for the sake of an end must be such that its form is proportioned to that end—in the way that the form of a saw is appropriate for cutting. In addition, everything that is rectified and measured must have a form proportioned to its rule and measure.

Now human law has both these features, since (a) it is something ordered toward an end and (b) it is a rule or measure that is itself ruled or measured by a higher measure—where, as is clear from what was said above (q. 93, a. 3), this higher measure is twofold, viz., divine law and the law of nature. Moreover, the end of human law is its usefulness for men, as the Legal Expert likewise points out.

And this is why, in giving the conditions for law, Isidore first lays down these three: that (a) law agrees with religion, viz., insofar as it is proportioned to the divine law, that (b) it contributes to discipline, insofar as it is proportioned to the law of nature, and that (c) it promotes welfare, insofar as it is proportioned to human usefulness. All the other characteristics that he posits later on are traced back to these three.

For the law’s being morally upright is traced back to its being in agreement with religion.

And what he then adds—viz., “just, possible according to nature, in keeping with the customs of the country, appropriate for the time and place”—is added because it contributes to discipline. For human discipline is concerned in the first place with the order of reason, which is implied by his saying “just.” Second, it has to do with the ability of the agents, since discipline should be appropriate for each one in accord with what is possible for him, likewise keeping in mind what is possible for nature (for the same discipline imposed on grown men should not be imposed on children), and in accord with human custom, since a man cannot live by himself in society and fail to defer to others. Third, as far as fitting circumstances are concerned, he says, “appropriate to the time and place.”

Now what he then adds, viz., “necessary, useful, etc.,” is traced back to the fact that law expedites human welfare, so that “necessity” refers to the removal of evils, “usefulness” to the pursuit of goods, and “clear” to the prevention of harm that could come from the law itself.

And since, as was explained above (q. 90, a. 2), law is ordered toward the common good, this point itself is made clear in the last part of the definition.

Reply to objection 1 and objection 2 and objection 3 and objection 4: The replies to the objections are clear from what has been said.

Article 4

Is Isidore's division of human laws appropriate?

It seems that Isidore proposes an inappropriate division of human statutes or human law:

Objection 1: Under human law (*ius*) he includes the law of nations (*ius gentium*), which, as he explains, is so-called because nearly all the nations make use of it. But as he himself says, the natural law is common to all nations. Therefore, the law of nations is contained under natural law rather than under positive human law.

Objection 2: Things that have the same force seem to differ from one another only materially and not formally. But statutes (*leges*), popular ordinances (*plebiscita*), senate decrees (*senatusconsulta*), etc., all seem to have the same force. Therefore, it seems that they differ from one another only materially. But a theory (*ars*) should not bother with this sort of distinction, since it could go on *ad infinitum*. Therefore, it is inappropriate to make this sort of division of human laws.

Objection 3: Just as a city has rulers and priests and soldiers, so too there are other roles men play as well. Therefore, it seems that just as one posits military law (*ius militare*) along with public law (*ius publicum*), which covers priests and magistrates, so too one should posit other types of law that correspond to other roles in the community.

Objection 4: What is incidental (*per accidens*) should be left out of consideration. But it is incidental to law that it is made by this or that man. Therefore, it is inappropriate to posit a division of human laws by reference to the names of lawmakers—as, for example, to call one sort of law Cornelian law and another sort Falcidian law, etc.

But contrary to this: The authority of Isidore is sufficient here.

I respond: Each thing is divisible *per se* on the basis of what is contained in its definition (*ratio*). For instance, *soul*, which is either *rational* or *non-rational*, is contained in the definition of *animal*, and so *animal* is divided properly and *per se* by *rational* and *non-rational*. By contrast, *animal* is not properly and *per se* divided by *white* and *black*, which lie completely outside of the definition of *animal*.

Now there are many elements in the definition of *human law*, and human law can be properly and *per se* divided in accordance with each of them.

First of all, as was explained above (a. 2), it is part of the definition of *human law* that human law stems from the law of nature. Accordingly, *positive law* (*ius positivum*) is divided into the law of nations (*ius gentium*) and civil law (*ius civile*), in keeping with the two modes, explained above (a. 2), in which something stems from the law of nature. For things that belong to the law of nations stem from the law of nature as *conclusions* from principles—e.g., justice in buying and selling, etc., in the absence of which men would be unable to live together with one another. This belongs to the natural law, since as *Politics* 1 shows, man is by nature a social animal. On the other hand, things that stem from the law of nature in the manner of particular *specifications* belong to civil law, according to which each community determines what is fitting for itself.

Second, it is part of the definition of *human law* that human law is ordered toward the common good of the community. Accordingly, human law can be divided by the diversity of roles played by those who work specifically for the common good—e.g., *priests*, who pray to God on behalf of the people; *rulers*, who govern the people; and *soldiers*, who fight for the safety of the people. And so special laws are adapted to these men as such.

Third, as was explained above (q. 90, a. 3), it is part of the definition of *human law* that human law is instituted by one who governs the civil community. Accordingly, human laws are divided by the

diverse forms of civil government (*regimina*). One of these forms, according to the Philosopher in *Politics* 3, is the *kingdom* (*regnum*), viz., when the community is governed by one man, and, accordingly, this regime gives rise to the *Princely Constitutions*. Another form of government is *aristocracy*, i.e., rule by the best or by the party of the best (*optimates*), and, accordingly, this regime gives rise to the Counsels of the Wise (*Responsa Prudentum*) and also to the Senate Decrees (*Senatusconsulta*). The next form of government is *oligarchy*, i.e., rule by a few rich and powerful men, and, accordingly, this regime gives rise to the Praetorian Law (*Ius Praetorium*), which is also called the Law of Honor (*Ius Honararium*). Another form of government is government by the people, which goes by the name *democracy*, and, accordingly, this regime gives rise to Popular Ordinances (*plebiscita*). The last form of government is *tyranny*, which is altogether corrupt and hence does not give rise to any sort of law. There is also a mixed form of government—the best form—and, accordingly, this regime gives rise to a type of law which, as Isidore puts it, has been sanctioned by the elders along with the common people.

Fourth, it is part of the definition of *human law* that it directs human acts. Accordingly, laws are divided by the diverse acts about which laws are made. Sometimes these laws are named by their authors—in the way that Julian law concerns acts of adultery, Cornelian law assassination, and so on. They are named in this way not because of their authors, but because of the deeds they are concerned with.

Reply to objection 1: The law of nations is, to be sure, in some sense natural to man insofar as he is rational, since it stems from the natural law in the manner of a conclusion that is not very far removed from its principles. Hence, it was easy for men to agree to a law of this sort. However, the law of nations is nonetheless distinct from the natural law, especially from what is common to all animals.

Reply to objection 2 and objection 3 and objection 4: The replies to the other objections are clear from what has been said.