

QUESTION 96

The Force of Human Law

We next have to consider the force (*potestas*) of human law. On this topic there are six questions: (1) Should human law be formulated in a general way? (2) Should human law restrain vices? (3) Should human law prescribe acts of all the virtues? (4) Does human law impose necessity on man with respect to his conscience? (5) Are all men subject to human law? (6) Is it permissible for those subject to the law to go beyond the letter (*praeter verba legis*) of the law in their actions?

Article 1

Should human law be made in a general way or for particular cases instead?

It seems that human law should not be made in a general way (*non debeat poni in communi*), but should instead be made for particular cases (*sed magis in particulari*):

Objection 1: In *Ethics* 5 the Philosopher says, “Legal justice consists in everything that is posited by law for individual cases, as well as decrees,” which are likewise particular, since decrees are issued for particular actions. Therefore, law is made not only in a general way, but also for particular cases.

Objection 2: As was explained above (q. 90, a. 1-2), the law directs human acts. But human acts are particulars. Therefore, human laws should not be made in a general way, but should be made for particular cases instead.

Objection 3: As was explained above (q. 90, a. 1-2), law is a rule and measure of human acts. But as *Metaphysics* 10 puts it, a measure should be fixed with certitude (*certissima*). Therefore, since in human acts there is nothing general that is fixed to such an extent that it does not fail in some particular instances, it seems necessary for laws to be made for particular instances instead of being formulated in a general way.

But contrary to this: The Legal Expert says, “Laws have to be made for situations that come up very frequently, but laws are not made for situations that can come up perhaps only once.”

I respond: If something exists for the sake of an end, then it must be proportioned to that end. Now the end of law is the common good, since, as Isidore says in *Etymologia*, “Law must be written for no one’s private advantage, but for the common advantage of the citizens.” But the common good is built up out of many things. And so the law must take into consideration a multiplicity of persons, actions, and times. For a civil community is composed of many persons, and its good is procured through a multiplicity of actions, and it is instituted not just to endure for a brief time, but to last for all time through a succession of citizens, as Augustine puts it in *De Civitate Dei* 12.

Reply to objection 1: In *Ethics* 5 the Philosopher posits three parts of legal justice, i.e., positive law.

Some laws are made in an absolutely general way, and these are the *general laws* (*leges communes*). It is with respect to laws of this sort that he says that what is legally just is such that at the beginning it does not matter whether it is this way or some other way, but that it does matter once the law is made—e.g., that captives are to be ransomed for such-and-such a mandated price.

On the other hand, there are certain laws that are general in one respect and particular in another respect. Laws of this sort are called *privileges* (*privilegia*)—private laws (*privatae leges*), as it were—since they have to do with particular persons; and yet they are such that their force extends to many actions. It is in this connection that he adds, “..... everything that is posited by law for particular cases.”

Again, certain things are called legal not because they are laws but because they involve the

application of general laws to particular cases—for instance, *decrees (sententiae)*, which are treated as laws. It is in this connection that he adds, “and also decrees.”

Reply to objection 2: That which directs must direct a plurality of things. This is why in *Metaphysics* 10 the Philosopher says that everything belonging to a given genus is measured by some one thing that is first in that genus. For if there were as many rules and measures as there are things ruled and measured, then rules and measures would cease to be useful, since their usefulness consists in making it possible for many things to be understood on the basis of some one thing. Likewise, a law would not be useful if it did not extend beyond some one particular act. For as was explained above (q. 92, a. 2), it is the particular precepts of *prudent* men that are given for the purpose of directing *particular* acts, whereas a *law* is a *general* precept.

Reply to objection 3: As *Ethics* 1 says, we should not seek the same sort of certitude in all things. Hence, in contingent matters such as natural and human affairs, the certitude that something is true in most cases is sufficient, even if a few exceptions occur now and then.

Article 2

Should human law suppress all vices?

It seems that human law should suppress (*cohibere*) all vices:

Objection 1: In *Etymologia* Isidore says, “Laws have been made in order that boldness might be held in check by fear of them.” But boldness would not be adequately held in check if not every evil were prohibited by the law. Therefore, human law should suppress every evil.

Objection 2: The lawmaker’s intention is to make the citizens virtuous. But no one can be virtuous unless he is held back (*compescatur*) from all vices. Therefore, human law should suppress all vices.

Objection 3: As was explained above (q. 95, a. 2), human law stems from the natural law. But all vices are opposed to the law of nature. Therefore, human law should suppress all vices.

But contrary to this: *De Libero Arbitrio* 1 says, “It seems to me that the law written for ruling the people rightly permits those things and that God’s providence punishes them.” But God’s providence does not punish anything except vices. Therefore, human law rightly permits certain vices by not suppressing them.

I respond: As has already been explained (q. 90, a. 1-2), law is posited as a certain rule or measure of human acts. Now as *Metaphysics* 10 says, a measure must be homogenous with what it measures, since diverse things are measured by diverse measures. Hence, it must also be the case that laws are imposed on men according to their condition. For as Isidore says, “The law must be possible both according to nature and also according to the customs of the country.”

Now the power or ability to act proceeds from an interior habit or disposition, and it is not the case that the same thing is possible both for someone who is virtuous and for someone who lacks the habit of the virtue, just as it is not the case that the same thing is possible both for a boy and for a grown man. It is for this reason that the law made for children is not the same as the law made for adults; for there are many things permitted to children that are punished by law or even vilified in adults. Similarly, there are many things permitted to men who are not perfected in virtue that would not be tolerable in virtuous men.

Now human law is made for the multitude of men, and the greater part of this multitude consists of men who are not perfected in virtue. And so not all the vices from which virtuous men abstain are prohibited by human law. Instead, the only vices prohibited are the more serious ones, which it is

possible for the greater part of the multitude to abstain from—especially those vices which are harmful to others and without the prohibition of which human society could not be conserved. For instance, homicide and theft and other vices of this sort are prohibited by human law.

Reply to objection 1: ‘Boldness’ here has to do, it seems, with attacks against others. Hence, it mainly concerns those sins by which injury is inflicted on one’s neighbors. As has been explained, these are the sins prohibited by human law.

Reply to objection 2: Human law has the intention of leading men to virtue, but of leading them gradually and not all at once. And so it does not immediately impose upon the multitude of imperfect men what is already characteristic of the virtuous, viz., that they abstain from every evil. Otherwise, those who are imperfect, unable to bear precepts of the sort in question, would erupt into worse evils—this according to Proverbs 30:33 (“He who violently blows his nose brings forth blood”) and Matthew 9:17 (“If new wine (*read:* the precepts of the perfect life) is put into old wineskins (*read:* into imperfect men), then the wineskins burst and the wine runs out (*read:* the precepts are despised and out of contempt the men erupt into worse evils).”)

Reply to objection 3: The natural law exists in us as a certain participation in the eternal law, but human law falls short of the eternal law. For in *De Libero Arbitrio* 1 Augustine says, “This law which is imposed to rule the civil communities allows and leaves unpunished many things that will be punished by God’s providence. Nor is it the case that because this law does not do all things, one should disapprove of what it does do.” Hence, human law likewise cannot prohibit everything that the law of nature prohibits.

Article 3

Does human law command the acts of all the virtues?

It seems that human law does not command the acts of all the virtues:

Objection 1: The acts of the vices are opposed to the acts of the virtues. But as has been explained (a. 2), human law does not prohibit all the vices. Therefore, human law does not command the acts of all the virtues.

Objection 2: An act of a virtue proceeds from that virtue. But virtue is the *end* of law, and so what *proceeds from* a virtue cannot fall under a precept of the law. Therefore, human law does not command the acts of all the virtues.

Objection 3: As has been explained (q. 90, a. 2), law is ordered toward the common good. But certain acts of the virtues are ordered not toward the common good, but instead toward [the agent’s] private good. Therefore, the law does not command the acts of all the virtues.

But contrary to this: In *Ethics* 5 the Philosopher says, “The law commands the acts of the brave man and the acts of the temperate man and the acts of the mild-mannered man—and so on for the other virtues and vices, commanding the former and prohibiting the latter.”

I respond: As is clear from what was said above (q. 54, a. 2), the species of virtue are distinguished by their objects. But all the objects of the virtues can be traced back either to the private good of an individual or to the common good of a multitude. For instance, one can execute acts of fortitude either for the sake of conserving the community or for the sake of preserving a friend’s rights (*ius amici sui*).

Now as has been explained (q. 90, a. 2), law is ordered toward the common good. And so there is no virtue such that the law cannot command acts of that virtue. However, human law does not issue

commands concerning all the acts of all the virtues; instead, it commands only those acts which can be ordered toward the common good either (a) *immediately*, as when certain acts are done directly because of the common good, or (b) *mediately*, as when the lawmaker commands certain acts pertaining to good discipline through which citizens are formed in such a way that they might conserve the good of justice and peace.

Reply to objection 1: Human law does not prohibit all vicious acts by an obligatory precept, just as it does not command all virtuous acts, either. Yet it prohibits certain acts of individual vices, just as it likewise commands certain acts of individual virtues.

Reply to objection 2: There are two ways in which an act is said to be an act of a virtue:

First, because the man *is doing something virtuous*. For instance, it is an act of justice to do something right and an act of fortitude to do something brave. In this sense the law commands some acts of the virtues.

Second, because the man is doing something virtuous *in the way that a virtuous man does it*. An act of this sort always proceeds from the virtue and never falls under a precept of the law, but is instead the end which the lawmaker intends to lead [the citizens] to.

Reply to objection 3: As has been explained, there is no virtue whose acts cannot be ordered toward the common good, either mediately or immediately.

Article 4

Does human law impose an obligation in conscience on a man?

It seems that human law does not impose an obligation in conscience on a man (*non imponat homini necessitatem in foro conscientiae*):

Objection 1: A lower authority (*potestas*) cannot impose a law on the judgment of a higher authority. But the authority of a man who makes human law is lower than God's authority. Therefore, human law cannot impose a law with respect to God's judgment, i.e., the judgment of conscience.

Objection 2: The judgment of conscience depends especially on God's commands. But sometimes God's commands are voided by human laws—this according to Matthew 15:6 (“You have made void the commandment of God on behalf of your traditions”). Therefore, human law does not impose an obligation in conscience on a man.

Objection 3: Human laws often inflict fraud and harm on men—this according to Isaiah 10:1-2 (“Woe to them who make wicked laws, and when they write, write injustice in order to oppress the poor in judgment, and do violence to the cause of the humble of my people”). But everyone is permitted to avoid oppression and violence. Therefore, human laws do not impose an obligation in conscience on a man.

But contrary to this: 1 Peter 2:19 says, “It is worthy of thanks if, because of his conscience, someone endure sorrows, suffering wrongfully.”

I respond: Laws that are humanly made are either just or unjust.

If they are just, then they have their power to oblige in conscience from the eternal law, from which they stem—this according to Proverbs 8:15 (“By me kings reign, and lawgivers make just decrees”). Now laws are called just on the basis of (a) their *end*, viz., when they ordered toward the common good, and (b) their *author*, viz., when a law that is made does not exceed in its scope the power of the lawmaker, and (c) their *form*, viz., when they impose on those subject to them proportionately equal burdens in relation to the common good. For since a man is part of a multitude, each man is such that

what he is and what he has belongs to the multitude, in the same way that any part is such that what it is belongs to the whole. This is why nature likewise inflicts a loss on a part in order to save the whole. Accordingly, laws of this sort, which impose proportionate burdens, are just, and they bind in conscience, and they are legal laws (*leges legales*).

On the other hand, there are two ways in which laws are unjust.

First, in counterpoint to what was said above, they are unjust when they are contrary to the *human* good either (a) because of their *end*, as when the lawmaker imposes burdens on his subjects that contribute not to the common welfare but to his own greed or glory, or (b) because of their *author*, as when someone makes laws that go beyond the authority entrusted to him, or (c) because of their *form*, as when burdens are distributed unequally over the multitude, even if those burdens are ordered toward the common good. Laws of this sort are outrages (*violentiae*) rather than laws, since, as Augustine puts it in *De Libero Arbitrio*, “What is not just does not seem to be a law.” Hence, laws of this sort do not bind in conscience (*non obligant in foro conscientiae*)—except perhaps for the sake of preventing scandal or social unrest (*turbatio*), in which case a man should cede his right, in accord with Matthew 5:40-41 (“If someone forces you to go one mile, go with him another two and if someone takes away your coat, give him your cloak as well”).

The second way in which laws can be unjust is by being contrary to the *divine* good, as are tyrannical laws that induce men to idolatry or to doing anything else that is contrary to divine law. It is not permissible to obey such laws in any way at all, since as Acts 5:29 says, “We must obey God rather than men.”

Reply to objection 1: As the Apostle says in Romans 13:1-2, “Every human authority is from God, and so whoever resists that authority (*read*: in the things that pertain to the scope of that authority) is resisting God’s ordinance.” And, accordingly, such a man is accused by his conscience (*efficitur reus quantum ad conscientiam*).

Reply to objection 2: This argument goes through in the case of human laws that are directed against a command of God’s. The scope of the authority [of human law] does not extend this far. Hence, in such cases one must not obey the human law.

Reply to objection 3: This argument goes through in the case of a law that imposes an unjust burden on those subject to it. Again, the scope of the authority given by God does not extend this far, and so in such cases a man is not obligated to obey the law if he can resist it without giving scandal or causing some greater damage.

Article 5

Is everyone subject to human law?

It seems that not everyone is subject to human law:

Objection 1: The only ones subject to the law are those for whom the law is made. But in 1 Timothy 1:9 the Apostle says, “The law is not made for the just man.” Therefore, the just are not subject to human law.

Objection 2: Pope Urban says (and one finds the same thing in *Decretals* 19, q. 2), “If someone is led by a private law, then he in no way needs to be bound by a public law.” But all men who are sons of God are led by the private law of the Holy Spirit—this according to Romans 8:14 (“Those who are led by the Spirit of God are the sons of God”). Therefore, not every man is subject to human law.

Objection 3: The Legal Expert says, “The ruler is exempt from the law (*solutus a lege*).” But one

who is exempt from the law is not subject to the law. Therefore, not everyone is subject to the law.

But contrary to this: In Romans 13:1 the Apostle says, “Let every soul be subject to the higher authorities.” But one who is not subject to a law laid down by a given authority does not seem to be subject to that authority. Therefore, all men have to be subject to human law.

I respond: As is clear from what was said above (q. 90, a. 1-3), law by its nature has two characteristics: first, it is a rule with respect to human acts; second, it has coercive force. It follows that there are two senses in which a man can be subject to the law.

In the first sense, he is subject to the law in the way that what is ruled is subject to what is doing the ruling. And everyone who is subject to an authority is in this sense subject to the law which that authority gives.

Now it can happen in two ways that someone is not subject to a given authority: (a) first, *because he is absolutely free of subjection to it*, and, hence, those who belong to one city or kingdom are not subject to the laws of the ruler of some other city or kingdom, just as they are not subject to his dominion; and (b) second, *insofar as he is ruled by a higher law*. For instance, someone subject to a proconsul should be ruled by his command—and yet not in those matters in which he receives a dispensation from the emperor. For with respect to those matters, since he is being directed by the command of someone higher, he is not bound by the command of someone lower. Accordingly, it is possible for someone who is subject to the law absolutely speaking not to be bound by the law in certain matters with respect to which he is under the rule of a higher law.

On the other hand, in the second sense, someone is said to be subject to the law in the way that what is coerced is subject to what is doing the coercing. In this sense it is only bad men, and not virtuous and just men, who are subject to the law. For what is coerced and violent is contrary to one’s will. And the will of good men is consonant with the law, whereas the will of bad men disagrees with the law. Hence, in this respect only bad men, and not good men, are under the law.

Reply to objection 1: This argument goes through for the type of subjection that exists in the mode of coercion. For in this sense the law is not given for the just men, since, as the Apostle puts it in Romans 2:14-15, “they are a law unto themselves when they show the work of the law written in their hearts.” Hence, the law does not exercise coercive power over them in the way it does over on the unjust.

Reply to objection 2: The law of the Holy Spirit is higher than any law that is humanly given. And so insofar as spiritual men are led by the law of the Holy Spirit, they are not subject to the law with respect to those things that are incompatible with the guidance of the Holy Spirit. However, part of the Holy Spirit’s guidance is that spiritual men should be subject to human laws—this according to 1 Peter 2:13 (“Be subject to every human creature for the sake of God”).

Reply to objection 3: The ruler is said to be exempt from the law as far as the law’s *coercive force* is concerned, since no one properly coerces himself and the law has its coercive force only from the ruler’s authority. Thus, the ruler is said to be exempt from the law in the sense that no one can bring a judgment of condemnation against him if he acts against the law. Hence, a Gloss on Psalm 50:6 (“Against you alone have I sinned”) says, “There is no man who is the judge of the king’s deeds.”

However, as far as the *directive force* of the law is concerned, the ruler is subject to the law by his own will. Accordingly, *Extra, De Constitutionibus*, chapter beginning “Since everyone”, says, “If anyone establishes a law for another, then he himself should keep that same law.” And the authority of a wise man says, “Obey yourself the law that you have given.” Again, Our Lord rebukes those who “prescribe and do not do it” and who “impose grave burdens on others and do not themselves want to lift a finger to move them” (Matthew 23:3-4). Hence, as far as God’s judgment is concerned, the ruler is not exempt from the directive force of the law, but instead should fulfill the law willingly and not under

coercion.

In addition, the ruler is above the law in the sense that if it is expedient, he can change the law and give dispensations from it for given times and places.

Article 6

Is one who is subject to the law permitted to act outside the letter of the law?

It seems that one who is subject to the law is not permitted to act outside the letter of the law (*praeter verba legis agere*):

Objection 1: In *De Vera Religione* Augustine says, “In the case of temporal laws, even though men pass judgment on them before they institute them, still, once they have been instituted and confirmed, one is not permitted to pass judgment *on* them, but is permitted [only] to pass judgment *in accordance with* them.” But if someone neglects the letter of the law, claiming that he is preserving the lawmaker’s intention, then he seems to be passing judgment on the law. Therefore, one who is subject to the law is not permitted to neglect the letter of the law in order to preserve the lawmaker’s intention.

Objection 2: Interpreting the laws is the role of the one who makes the laws. But it is not the role of the men who are subject to the law to make the laws. Therefore, it is not their role to interpret the lawmaker’s intention; instead, they should always act in accord with the letter of the law.

Objection 3: Every wise man knows how to explain his own intention in words. But those who have made the laws should be considered wise, since in Proverbs 8:15 God’s wisdom says, “By me kings reign, and lawgivers decree just things.” Therefore, one should pass judgment about a lawmaker’s intention only by reference to the letter of the law.

But contrary to this: In *De Trinitate* 4 Hilary says, “The meaning of what is said should be taken from the reasons for saying it, since the words should be subject to the things and not the things to the words.” Therefore, one should pay more attention to the reasons that move the lawmaker than to the very words of the law.

I respond: As was explained above (a. 4), every law is ordered toward the common welfare of men, and this is how it gets its force and character as law; on the other hand, to the extent that it fails in this, it does not have the power to bind. Hence, the Legal Expert says, “Neither a reason in law nor kind fairness permits us to induce severity by means of a stricter interpretation, contrary to the welfare of men, of what had been beneficially introduced to be useful to them.”

Now it often happens that even though the observance of a certain practice is useful for the common welfare in the greater number of cases, there are nonetheless some cases in which it is especially harmful. Therefore, since a lawmaker cannot foresee all the individual cases, he makes the law with an eye toward what happens in the greater number of cases, while directing his intention to the common advantage. Hence, if a case arises in which the observance of such a law is harmful to the common welfare, it should not be obeyed. For instance, if in a city under siege it is mandated by law that the city gates should remain closed, this is useful to the common welfare in the greater number of cases. However, if a situation arose in which the enemy were pursuing certain citizens who had important roles in preserving the city, then it would be extremely damaging to the city if the gates were not opened to them, and so in such a case the gates should be opened—in opposition to the letter of the law—in order to preserve the common welfare, which is what the lawgiver intends.

Notice, however, that if the observance of the letter of the law does not entail a sudden danger that has to be dealt with immediately, then not just anyone has the role of interpreting what is advantageous

or disadvantageous; rather, this is the role only of the ruler, who has the authority to grant dispensations from the laws in light of cases of the sort in question. On the other hand, if there is a sudden danger that does not permit enough time to have recourse to someone in charge, then the necessity itself has a dispensation attached to it, since necessity is not subject to the law.

Reply to objection 1: Someone who acts outside the letter of the law in a case of necessity is not passing judgment on the law itself, but is rather passing judgment on a particular case, in which he sees that the letter of the law should not be obeyed.

Reply to objection 2: One who follows the lawmaker's intention is not interpreting the law absolutely speaking; rather, he is interpreting the law with respect to a case in which it is obvious, because of the evidentness of the harm, that the lawmaker had intended something else. For if there is a doubt, then he should either act in accord with the letter of the law or consult those in charge.

Reply to objection 3: No man has wisdom to such a degree that he is able to think of all the individual cases, and so no one can adequately express by his words what is in keeping with his intended end. Even if a lawmaker were able to take all the cases into consideration, he should not express them all—and this for the sake of avoiding confusion. Instead, he should issue a law in keeping with what happens in the greater number of cases.