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Miriam T. Rooney

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THE NATURAL LAW AND LEGAL JUSTICE

MIRIAM T. ROONEY†

It is gratifying to note the widespread favorable reader reaction occasioned by our decision to print the papers presented last December at the Third Annual Natural Law Conference of the Catholic Lawyers Guild of New York. The papers printed in the January issue pertained to Commutative and Distributive Justice and included a general summary of the natural law philosophy of St. Thomas Aquinas. This issue presents the concluding papers, which deal with Legal and Social Justice.

JEROME FRANK, a federal court judge of the 2nd Circuit, once said at the end of one of his books, that he had asked some of his natural law friends, how different his decisions might be if they had been based on the natural law philosophy, but he received little enlightenment. It is a good question. As a matter of fact, it does make a difference, not in every case perhaps, but certainly in those which are concerned with basic human problems.

That justice demands a sound juridical philosophy as the basis for human or positive law is emphasized by the fact that it is in the particular determinations of individual cases that man does not participate naturally in the eternal law even though the determinations are themselves contained in eternal law.

While it is in its application to individual cases that law displays its force, since "the force of a law depends on the extent of its justice,"¹ every human law has just so much of the nature of law as is derived from the law of nature, for justice comes from being right according to the rule of reason.² The paragraph where St. Thomas himself discusses the relation of the legal just, or positive law, to particular applications of law is as follows:

†Dean and Professor of Law, Seton Hall University School of Law.

¹ *SUMMA THEOLOGICA*, I-II, q. 95, art. 2.

² *Ibid.*

The Philosopher [*i.e.* Aristotle] (*Ethic.* v. 7) divides the legal just, *i.e.*, positive law, into three parts. For some things are laid down simply in a general way: and these are general laws. Of these he says that the legal is that which originally was a matter of indifference, but which, when enacted, is so no longer: as the fixing of the ransom of a captive. Some things affect the community in one respect, and individuals in another. These are called privileges, *i.e.*, private laws, as it were, because they regard private persons, although their power extends to many matters; and in regard to these, he adds, and further, all particular acts of legislation. — Other matters are legal, not through being laws, but through being applications of general laws to particular cases: such are decrees which have the force of law; and in regard to these, he adds, all matters subject to decrees.³

St. Thomas refers to the indifferent in another place where he classifies human acts into three kinds:

Some acts are good generically, viz., acts of virtue; and in respect of these the act of the law is a precept or command, for the law commands all acts of virtue [as Aristotle says in *Ethic.* v. 1]. Some acts are evil generically, viz., acts of vice, and in respect of these the law forbids; some acts are generically indifferent, and in respect of these the law permits; and all acts that are either not distinctly good or not distinctly bad may be called indifferent.⁴

The fact that human law permits some things does not always imply approval of them but may indicate that it is unable to direct them, since many things are directed by Divine law. A different situation would exist if human law were to sanction what the eternal law condemns.⁵ Hence, adds St.

Thomas, it does not follow that human law is not derived from eternal law, but that it is not on a perfect equality with it.⁶ Human law not only may permit virtuous acts which it does not direct, but it may give force to virtuous acts not specifically prescribed by natural law, for, says St. Thomas "...many things are done virtuously, to which nature does not incline at first; but which, through the inquiry of reason, has been found by men to be conducive to well-being."⁷

From all that has been said so far it appears that this process St. Thomas speaks of as the inquiry of reason seems to be the one that is of greatest importance in the formulation and application of human law. Now the inquiry of reason may be either along scientific lines leading to conclusions about necessary matters, or along practical lines leading to determinations concerning contingent matters. It follows that rational inquiry about law may be part science and part art. Insofar as it is art, there is no question but that human law can be changed, since rules of art derive their force from reason alone,⁸ although if the law has acquired some stability through custom or repeated acts, it would be imprudent to change the law too quickly says St. Thomas.⁹

The next question would seem to be, how is the inquiry of reason to be carried out so that what results is identifiable as human law rather than as science, art, or advice, merely? There are four essentials in the definition of law which St. Thomas gives us: it is nothing else than 1) an ordinance of reason 2) for the common good 3) made

⁶ *Ibid.*

⁷ *Id.*, q. 94, art. 3.

⁸ *Id.*, q. 97, art. 2, ad 1.

⁹ *Ibid.*

³ *Id.*, q. 96, art. 1, ad 1.

⁴ *Id.*, q. 92, art. 2.

⁵ *Id.*, q. 93, art. 3, ad 3.

by him who has the care of the community, and 4) promulgated.¹⁰ The use of the word "ordinance" implies that the direction given will be obeyed. It is therefore something more than mere counsel, although counsel is a kind of inquiry.¹¹ It is more than advice, since advice has no coercive power¹² and can be given by a private person who cannot make a law.¹³ It shares the function of training¹⁴ for virtuous conduct with education, but operates by compulsion and punishment usually instead of rewards. For the use of the word "reason" in this definition, the quotations already made above must suffice.

With respect to the second element,—the common good—a modern analysis of St. Thomas' meaning is greatly needed. For the purposes of this paper, it can be pointed out that St. Thomas says that man has a natural inclination to live in society;¹⁵ that he cannot live alone in society, paying no heed to others,¹⁶ and that human laws forbid chiefly those vices that hurt others and without the prohibition of which society could not be maintained.¹⁷ Elsewhere he states that the law extends only to rational creatures subject to man and, properly speaking, none imposes a law on his own actions.¹⁸

The third point concerns the official who may authorize a law. St. Thomas describes in detail the various forms of government

that may issue¹⁹ including government of the people, or democracy. He states his preference for representative government in which Lords and Commons, or elder statesmen and popular delegates, join in sanctioning the laws.²⁰ He is specific in looking to the consent of the whole people, or to him who represents the whole people,²¹ stating that a sovereign has not the power to frame laws except as representing the whole people.²² It is the whole people, not any individual, who can make laws.²³

The fourth point, concerning promulgation has already been touched upon earlier²⁴ in discussing how human beings know law, whether by way of conclusions, of determinations, or by application. It is primarily through application that law is promulgated to each person.²⁵ Those who are not present when a law is promulgated are bound to observe it, insofar as it is notified or can be notified to them by others, after it has been promulgated, says St. Thomas.²⁶

There is another essential for human law which is implied in the four elements listed, but which should perhaps be spelled out a bit more fully, and that is the matter of jurisdiction.²⁷ Jurisdiction pertains chiefly to a judge, but no less so, to a legislator, since both apply the law in promulgating it, the one by decrees, the other by ordinances. The most important limitation on jurisdiction is that man is not competent to judge

¹⁰ *Id.*, q. 90, art. 4.

¹¹ *Id.*, q. 91, art. 4, ad 2.

¹² *Id.*, q. 90, art. 3, ad 2.

¹³ *Id.*, q. 92, art. 2, ad 2.

¹⁴ *Id.*, q. 95, art. 1.

¹⁵ *Id.*, q. 94, art. 2.

¹⁶ *Id.*, q. 95, art. 3.

¹⁷ *Id.*, q. 96, art. 2.

¹⁸ *Id.*, q. 93, art. 5.

¹⁹ *Id.*, q. 95, art. 4.

²⁰ *Ibid.*

²¹ *Id.*, q. 90, art. 3.

²² *Id.*, q. 97, art. 3, ad 3.

²³ *Ibid.*

²⁴ See 2 CATHOLIC LAWYER 28-30 (January 1956).

²⁵ SUMMA THEOLOGICA, I-II, q. 90, art. 4.

²⁶ *Id.*, q. 90, art. 4, ad 2.

²⁷ *Id.*, q. 96, art. 5.

of interior movements that are hidden, but only of exterior acts which appear.²⁸ Another limitation is that human reason is not the measure of things that are from nature.²⁹ Those things only are subject to human government which can be done by man, says St. Thomas, but what pertains to the nature of man is not subject to human government.³⁰ Neither can a human being judge of eternal law.³¹ The sovereign himself is subject to the law, not in respect to the coercive power, since no man properly speaking is coerced by himself, but rather in its directive force, which he should observe of his own free-will.³²

With the enumeration of these essentials of human law, the way is now open to consideration of the application of law in individual cases and the degree of obedience required. In general, St. Thomas advocates the rule by laws rather than by men. Quoting Aristotle (*Rhetoric*, i, 1) he says:

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 a right 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 a 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 of future events: whereas those who sit in judgment judge of things present, towards which they are affected by

love, hatred, or some kind of cupidity; wherefore their judgment is perverted. Since 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.³³

Notwithstanding his reluctance to rely on the judgments in individual cases, he does indicate in many places where the circumstances in individual cases may require that the letter of the law be not applied.³⁴ For instance, he says, that certain individual facts which cannot be covered by the law have necessarily to be committed to judges, . . . as whether something has happened or has not happened.³⁵ Another reason for relying upon a judge is that a proper conclusion about some human act may be true for the majority of cases, although in a particular case it would be injurious.³⁶ Furthermore, discipline should be adapted to each one according to his ability and to his circumstances with respect to time and place.³⁷ The observance of a law may be hurtful not only to an individual but to the general welfare, since a lawgiver has only a majority of situations in view without being mindful of every single case.³⁸ In fact, even if a lawgiver were able to take all the cases into consideration, says St. Thomas, 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.³⁹

²⁸ *Id.*, q. 91, art. 4.

²⁹ *Id.*, q. 91, art. 3, ad 2.

³⁰ *Id.*, q. 93, art. 4.

³¹ *Id.*, q. 93, art. 2, ad 3.

³² *Id.*, q. 96, art. 5, ad 3.

³³ *Id.*, q. 95, art. 1, ad 2.

³⁴ *Id.*, q. 96, art. 6.

³⁵ *Id.*, q. 95, art. 1, ad 3.

³⁶ *Id.*, q. 94, art. 4.

³⁷ *Id.*, q. 95, art. 3.

³⁸ *Id.*, q. 96, art. 6.

³⁹ *Id.*, q. 96, art. 6, ad 3.

Now since there are so many occasions when a judgment about the applicability or observance of a law may be required, it may be asked how far St. Thomas would go in failing to obey the letter. In general he indicates that the law should not be violated. If a matter be doubtful for instance, the letter should be observed if it be not possible to consult those who authorized it.⁴⁰ Again it may be possible to act beside the law, as when there are many cases where the law fails by reason of some change in man and custom shows the law to be no longer useful.⁴¹ In case of necessity, the mere necessity brings with it a dispensation, since necessity knows no law, says St. Thomas,⁴² adding that he who in case of necessity acts beside the letter of the law does not judge of the law but of a particular case in which he sees that the letter of the law is not to be observed.⁴³ With all his concern about the importance of human reason, St. Thomas nevertheless says that it would be dangerous to allow dispensation from a law to the discretion of each individual unless in a great emergency.⁴⁴ He does, however, say that an official lawgiver may grant a dispensation for good reason, but not merely out of arbitrariness.⁴⁵ The most important exception of all is his statement that it is not in respect of persons if unequal measures are served out to those who are themselves unequal, because if the condition of any person requires that he should reasonably receive special treatment, it is not respect of per-

sons if he be the object of special favor.⁴⁶ Such dispensations may be made only with respect to conclusions of general precepts, never with respect to general precepts of the natural law itself.⁴⁷

Apparently the only place where St. Thomas would permit actual disobedience of a positive law is when it is contrary to the Divine law and therefore unjust because beyond the scope of human power.⁴⁸ Otherwise he would appear to advocate toleration of the law until it be changed, in order to avoid scandal⁴⁹ notwithstanding the fact that the law may be tyrannical,⁵⁰ unjust,⁵¹ or beyond the powers of the lawgiver.⁵²

From this summary of the conclusions of St. Thomas Aquinas about law, it would seem that there is a lot of scope for the use of human reason in devising rules in furtherance of the general precepts of natural law, both with respect to matters concerning the majority of the people and those concerning the application of positive laws in individual cases. Indeed, human reason and the principles impressed upon it by nature furnish us with practically the only means we have of directing our actions toward their proper end.

Certain current errors about Thomistic philosophy should obviously be corrected after such an analysis. First of all, it should be obvious that when St. Thomas speaks of the derivation of the force of human law from natural law, he is not saying that human law is formed by deduction from

⁴⁰ *Id.*, q. 96, art. 6, ad 2.

⁴¹ *Id.*, q. 97, art. 3, ad 2.

⁴² *Id.*, q. 96, art. 6.

⁴³ *Id.*, q. 96, art. 6, ad 1.

⁴⁴ *Id.*, q. 97, art. 4.

⁴⁵ *Ibid.*

⁴⁶ *Id.*, q. 97, art. 4, ad 3.

⁴⁷ *Ibid.*

⁴⁸ *Id.*, q. 96, art. 4.

⁴⁹ *Ibid.*

⁵⁰ *Id.*, qq. 92, art. 1, ad 4; 96, art. 4.

⁵¹ *Id.*, qq. 94, art. 6, ad 3; 93, art. 3, ad 2.

⁵² *Id.*, q. 96, art. 4.

natural law premises. Neither is he saying that if you know the first indemonstrable principles of natural law you know all the answers about applying laws to human beings. He is in fact saying precisely the contrary. Neither does he identify natural law with Divine law, with eternal law, with canon law, with human law, nor with positive law, whether human or Divine. He is saying the contrary of that also. A third obvious error which should be corrected after reading what he says, is the one which would associate him with those who identify natural law with the absolute and unchangeable when, as a matter of fact, he shows that whatever may be the nature of law in the mind of the Creator, our knowledge of it is variable, relative, and subject to error, since it is concerned with the contingent and the particular, insofar as human actions are judged.

Another aspect of our knowledge of law is brought out by this analysis of St. Thomas' treatise insofar as the subject of individual cases is concerned. The case method, which is characteristic of the Common Law system since Bracton's day, shifts the emphasis on law away from general rules and toward their application in particular situations. St. Thomas Aquinas was more familiar in his personal experience with the codification of Roman Law than he was with Bracton's problem as a judge of the King's Bench in England. Nevertheless, his understanding of the necessity of justice in individual cases was obviously comprehensive enough to provide a philosophical foundation for the development of the case method. Can it be that because he makes allowance for exceptions and dispensations in individual cases, he opens the way for casuistry or for law administered

according to the length of the Chancellor's foot, as the saying was? Such would not appear to be the case, since he expects that the law will be obeyed in the majority of cases, that stability will be maintained by custom or the repetition of similar acts, and that even unjust law should be tolerated until changed, insofar as it has legal form, unless it be contrary to the Divine law itself.

St. Thomas' philosophy of law would require more prudence, not less, in the lawgivers who make law suitable in the majority of cases. It would require more art, not less, in anticipating changes in law as man progresses in knowledge from the common to the particular. It would require greater responsibility on the part of the whole people the more closely their officials represent their conclusions. It would also demand great fairness and broad viewpoint in judges whose duty it is to apply the law in individual cases.

It would appear that St. Thomas' philosophy of law, far from being a support for absolutists and totalitarian dictators, would provide the guidance needed for lawgivers in an age when the strictness of positivism is giving way to measures extending human rights. In an era when the swing of the pendulum seems to be away from equity toward integrated judicial remedies, it would seem to sustain confidence in human judgment in contrast to reliance upon the mechanical applications of codes. As a middle way between the rigors of positivism on the one hand, and sociological jurisprudence on the other, it would seem to justify the call for a truly realist jurisprudence. If the revival of natural law theories be restricted to consideration of the Thomistic philo-

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