

Summa Theologica Ia IIae q97. CHANGE IN LAWS

- 1. Is human law changeable?**
- 2. Should it be always changed, whenever anything better occurs?**
- 3. Is it abolished by custom, and does custom obtain the force of law?**
- 4. Should the application of human law be changed by dispensation of those in authority?**

[From the *Summa Theologica* of Saint Thomas Aquinas as translated by the Fathers of the English Dominican Province, and from the works of Blessed John Duns Scotus as selected and arranged by Jerome of Montefortino and as translated by Peter L.P. Simpson. Texts are taken from the *Opus Oxoniense* of the Wadding edition of Scotus' works.]

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

Aquinas

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 (95, 2). 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 (90, 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 (95, 2). 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 (91, 3), human law is a dictate of reason, whereby human acts are directed. Thus there may be

Scotus [Loc. infra cit.]

Objection 1. It seems that human law is altogether immutable. For, from what was said above (q.93 a.3), human law is derived from the eternal law of God: [*Oxon.* 4 d.33 q.3 n.7] but this eternal law is altogether immutable; therefore human law too ought itself to be immutable; otherwise it could hardly be in agreement with the eternal law.

Objection 2. It belongs to the idea of law that it be just and right; otherwise it would be proved contrary to the divine law, and it would not be binding on those who are obliged to keep the divine law; but what is right and just cannot be changed except into an unjust and wrong dictate; therefore a right and just law is not mutable.

On the contrary, Augustine says (*De Lib. Arbit.* ch.6): “We call therefore that law temporal, if you wish, which, although it be just, can however justly be changed according to the times.”

I answer that, [*Oxon.* 4 d.25 q.2 n.6] it is not to be doubted but that human law can sometimes justly be changed; and not only

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 (91, 2), and therefore endures without change, owing to the

by addition of new laws, that make clear and even perfect laws already passed, so that the observance of later laws might proceed to the greater utility of the republic than the ones sanctioned earlier, as was said above about the natural law (q.94 a.5), which law becomes more explicit and more perfect through the addition of divine positive right; but also can it be changed through the lessening of it, whether as regards a part or as regards the whole.

Declaration: [Oxon. 4 d.15 q.2 n.6] the positive law necessarily demands in the legislator, by whom it is sanctioned and passed, prudence and authority. Prudence, indeed, so that he might, by the dictate of right reason, establish in the community whatever he has judged will be to its profit and proceed to its advantage, for which end the passing of laws is ordered. But authority for this reason, that he might be able to oblige to observance of the law those with respect to whom he has sanctioned the law. For if authority is lacking, laws established even by much prudence do not oblige nor do they bind anyone to obeying those sorts of command.

On these suppositions, [Oxon. 4 d.33 q.3] it can happen that what right reason has judged conduces to the public utility and to the tranquility of the republic might be found, through the process of time, to be useless and pernicious; not because the prior law was not just and right, but by the fact that the morals of men, to the direction of which it was applied, have changed, and other morals have been gradually introduced in their place, to which, thereby, another and even a contrary law agrees; then, therefore, through the legislator, with prudence preceding, a law of such a sort is to be established, the prior law having been corrected or abrogated, as is agreeable to the new morals. And for this Augustine gives an example (*loc. cit.*): “If the people,”

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.

abrogated altogether or to be corrected in part when they oppose the end for whose sake they were sanctioned; but that end is the public justice of the republic or community.

Reply to Objection 1. Augustine replies (*loc. cit.*) that as, through the eternal law, the temporal law is justly passed, so also can it through the same law be changed, the right prudence of the legislator thus dictating, which prudence regards and uniquely attends to the public good of the city. Hence he says: "I think that you see in that temporal law that there is nothing just or legitimate which men have not determined for themselves from that eternal law: for if that people at a certain time justly gave out honors, at another time again did not justly give them out, then this temporal variation, in order to remain just, is handled eternally by that law, since it is always just for a people that is grave to give out honors and for one that is fickle not to."

Reply to Objection 2. The answer is evident from what has just been said; because what is right and just is not changed into something wicked and illegitimate; but the legislator by a dictate of prudence forms, from the change of things, diverse laws that agree with such variation. Therefore each law is right and just, nor is one of them changed into its

he says, "is well moderated and grave and a most careful guardian of the common utility, and if everyone among this people gives less weight to his private affairs than to public ones, surely is not then such a law rightly passed that allows this people to create its own magistrates, by whom its own affairs, that is the public affairs, might be administered? Rightly passed indeed. Further, if the same people, having been little by little depraved, prefers its private affairs to the republic, and should put elections up for sale, and, having been corrupted by those who love honors, should commit the regime itself to the criminal and wicked, surely would not a good man who had much ability, if he should then appear, rightly again take from this people the power of giving honors and reduce it to the decision of a few good men or even of one good man?" Thus Augustine. As often, therefore, as the observance of laws proceeds to the damage of the republic [*Oxon. 4 d.45 q.1 n.11*], which laws were to serve its happiness and were even approved as sanctioned for promoting it, then they are by right reason to be

opposite; but they cannot both stand and be kept in the same community, because the morals of the city itself are adverse to each other.

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

Aquinas

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 (1), human law is rightly changed, in so far as such

Scotus [Loc. infra cit.]

I answer that, human law is not to be changed as often as something better occurs, but only when from such a change the public happiness is simply better.

Declaration: [Oxon. 4 d.14 q.2 n.7ff.] the end of human law is not the legislator himself who passes the law, nor his good, but the common good; and that is why law and its observance therefore exist. For, in order for the law to continue in place, punishments are appointed and instituted by the law against violators of it, and the proposed rewards are to be distributed to those who keep the law. But those who have become accustomed to the dictates of the law that has been passed have, from their acts elicited in accordance with the law, necessarily acquired a habit of thereby performing with delight or with ease and more promptly the same acts which they have the habit of. But as for things proposed to them in a new law, because they have not been exercised in what has been recently commanded, they are, by this very fact, sluggish in keeping them, because of the difficulty of acting against an acquired habit. It cannot be that these things come about and be done without damage to public peace and tranquility, and although from the passing of the new law certain particular advantages might follow in the future, nevertheless what has been recognized and ordered by ancestors is not, for that reason, to be revoked and something else introduced. – Nevertheless [Oxon. 4 d.46 q.1 n.11] because it belongs

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 says [Pandect. Justin. lib. i, ff., tit. 4, *De Constit. Princip.*] 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.

to law to consider the public advantage and the common happiness, and that is why it has regard to the particular claims of right of the citizens and members of the republic, when keeping the law as it affects and pertains to particular rights might lead to the loss of the public right or the well being of the republic, not keeping such a law but rather, by its abrogation, doing the opposite and introducing an opposite one would be better, as Augustine, cited in the preceding article, says. – Further, [Oxon. 4 d.33 q.3 n.7] sometimes the stubbornness of subordinates is the cause that a passed law should be abrogated and another proposed for them to keep, even though in other respects not abrogating it would, were they tractable and teachable, be to their advantage. Therefore when a prince sees his subordinates prone to that whose opposite it would be more decent and useful to keep, although he could persist in his opinion and, should his subordinates be found more ready for obedience, altogether prefer that what is better be kept, nevertheless he can justly relax the old law and abrogate it and introduce in its place another one more in agreement with their inclination, lest, if he were to persist in his opinion of keeping the passed law, they should more often commit wrong.

Article 3. Whether custom can obtain force of law?

Aquinas

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 (93, 3; 95, 2). 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.

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

Scotus [Oxon. 4 d.25 q.2]

I answer that, it must be said that custom can obtain the force of law. For, [*Oxon. 4 d.25 q.2 n.6*] as Gratian says (d.4 ch.3), as the laws are approved and confirmed by the morals of those who use them so are they abrogated by the morals of those who act in contrary fashion and establish a contrary law. But that is most of all true when the morals contrary to the new law rely on reason. Hence it is, Gratian says, that when Pope Thelesphorus decreed that clerics should generally fast from meat and delicacies from Quinquagesima Sunday, he who, because this was not approved by the morals of the users, acted otherwise is not proved by this fact to have been guilty of transgression. And in d.4 ch.1 he brings forward very many examples to show the same. He also rightly excepts natural and divine law from this rule, saying that contrary customs do not prevail against these rights. This is to be understood in line with what was said in q.94 a.5. For no custom can obtain the force of law which is proved to be contrary to natural and divine right. For a law of this sort is, by that very fact, necessarily unjust.

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 (96, 6), 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” [95, 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, than 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 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?

Aquinas

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

***Scotus* [*Loc. infra cit.*]**

I answer that it must be said that the directors of the multitude can dispense in human laws if the laws have received from them the force of binding those subject to the law or if they might, at any rate, have received from them the power of doing that. For since [*Oxon.* 4 d.3 q.2 n.9] no

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 (*Deuteronomy* 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 *Corinthians* 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 necessaries 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

inferior can revoke the law of a superior, neither simply nor for a certain time, manifestly the power of dispensing from human law resides in him who could give to the law its binding force, or in someone who has his permission. – Further [*Oxon.* 4 d.33 q.1 n.4] dispensation is *a declaration of right or a revocation of right*. And indeed that he who establishes a law can thus dispense from it again so that it should remain abrogated was said in articles 1 and 2 above. But he can more easily, or as much as he has power to declare law as it applies to certain cases or persons, refuse to bind others to its observance, for certain and rational causes. For if he should do that irrationally through imprudence he would abuse his power and, by exempting these and those from keeping the law, he would harm the republic, nor would he benefit those whom he declared exempt. – Therefore, on the basis of a dictate of right reason, the directors of the community can dispense from human laws, that is, declare that in such and such circumstances these and those are not liable to the keeping of the law. And as God dispensed the patriarchs from the law of monogamy, giving them power to take several women to wife (so that the human race might be multiplied for divine worship, which was a greater good than would have happened from the law of monogamy), so the directors of the community, in order not to seem to have received power for destruction rather than for edification, should, when dispensing from laws, have before their eyes both the common good, for whose sake the laws passed have been approved, and the good and right peculiar to the individuals of the community, of whom the community is made up. Otherwise, without a rational cause for dispensation, they would, as was said, abuse their power through imprudence, and would, by the relaxing of the laws, do very

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 (96, 6).

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 (96, 6). 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 (*Luke 12:42*): “Who, thinkest thou, is the faithful and wise dispenser [Douay: steward], whom his lord setteth over his family?”

much damage to the republic, the care of which they bear.

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.