

## Summa Theologica Ia IIae q96. THE POWER OF HUMAN LAW

1. Should human law be framed for the community?
2. Should human law repress all vices?
3. Is human law competent to direct all acts of virtue?
4. Does it bind man in conscience?
5. Are all men subject to human law?
6. May those who are under the law act beside the letter of the law?

[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 framed for the community rather than for the individual?

*Aquinas*

Objection 1. It would seem that human law should be framed not for the community, but rather for the individual. For the Philosopher says (*Ethic.* v, 7) that "the legal just . . . includes all particular acts of legislation . . . and all those matters which are the subject of decrees," which are also individual matters, since decrees are framed about individual actions. Therefore law is framed not only for the community, but also for the individual.

Objection 2. Further, law is the director of human acts, as stated above (90, A1,2). But human acts are about individual matters. Therefore human laws should be framed, not for the community, but rather for the individual.

Objection 3. Further, law is a rule and measure of human acts, as stated above (90, A1,2). But a measure should be most certain, as stated in *Metaph.* x. Since therefore in human acts no general proposition can be so certain as not to fail in some individual cases, it seems that laws should be framed not in general but for individual cases.

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

I answer that, [*Oxon.* 1 d.44] from the fact that it is the concern of the law to consider the common good of the republic, and to direct and obligate to it those subject to the legislator, as was expounded in q.90 a.2, from this it necessarily follows that the laws must be laid down in common. For about particular cases and persons there are not laws but judgments according to law, for these are inferred from those, as that this murderer is to be punished with death, because a justly passed law forbids the committing of murder and a punishment has been enacted against those who have emerged as violators of the law.

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On the contrary, The jurist says (*Pandect. Justin. lib. i, tit. iii, art. ii; De legibus*, etc.) that “laws should be made to suit the majority of instances; and they are not framed according to what may possibly happen in an individual case.”

I answer that, Whatever is for an end should be proportionate to that end. Now the end of law is the common good; because, as Isidore says (*Etym. v, 21*) that “law should be framed, not for any private benefit, but for the common good of all the citizens.” Hence human laws should be proportionate to the common good. Now the common good comprises many things. Wherefore law should take account of many things, as to persons, as to matters, and as to times. Because the community of the state is composed of many persons; and its good is procured by many actions; nor is it established to endure for only a short time, but to last for all time by the citizens succeeding one another, as Augustine says (*De Civ. Dei ii, 21; xxii, 6*).

Reply to Objection 1. The Philosopher (*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 the 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.”

Reply to Objection 2. A principle of direction should be applicable to many; wherefore (*Metaph. x, text. 4*) the Philosopher says that all things belonging to one genus, are measured by one, which is the principle in that genus. For if there were as many rules or measures as there are things measured or ruled, they would cease to be of use, since their use consists in being applicable to many things. Hence law would be of no use, if it did not extend further than to one single act. Because the decrees than to one single act. Because the decrees of prudent men are made for the purpose of directing individual actions; whereas law is a general precept, as stated above (92, 2, Objection 2).

Reply to Objection 3. “We must not seek the same degree of certainty in all things” (*Ethic. i, 3*). Consequently in contingent matters, such as natural and human things, it is enough for a thing to be certain, as being true in the greater number of instances, though at times and less frequently it fail.

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

### *Aquinas*

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

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

Objection 3. Further, human law is derived from the natural law, as stated above (95, 2). But all vices are contrary to the law of nature. Therefore human law should repress all vices.

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

I answer that, As stated above (90, A1,2), law is framed as a rule or measure of human acts. Now a measure should be homogeneous with that which it measures, as stated in *Metaph.* x, text. 3,4, since different things are measured by different measures. Wherefore laws imposed on men should also be in keeping with their condition, for, as Isidore says (*Etym.* v, 21), law should be “possible both according to nature, and according to the customs of the country.” Now possibility or faculty of action is due to an interior habit or disposition: since the same thing is not possible to one who has not a virtuous habit, as is possible to one who has. Thus the same is not possible to a child as to a full-grown man: for which reason the law for children is not the same as for adults, since many things are permitted to children, which in an adult are punished by law or at any rate are open to blame. In like manner many things are permissible to men not perfect in virtue, which would be intolerable in a virtuous man.

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

I answer that, from what was said above in q.92 a.2, it does not pertain to human law to restrain all vices, but [*Oxon.* 4 d.33 q.3 n.7] must rather allow very many things to go unavenged and to leave them to be avenged through the eternal law, as Augustine says (*De Lib. Arb.* ch.6). But this is a general truth, since there is no way of being sure about offenses that is complete and preserves the order of justice; and it would be a greater evil for those to be subjected to certain punishments about whose guilt there is no sure knowledge. For of two evils the lesser is to be chosen. For it is enough for the legislator not to command evil, and not directly to approve of it; otherwise his law would be unjust because contrary to the most right ordering of the divine law. But if he permits, because he does not punish, this pertains to his prudence, especially since he knows that evils are at some time to be completely punished justly. (But see the continuation in the following article.)

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

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

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

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

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

*Aquinas*

Objection 1. It would seem that human law does not prescribe acts of all the virtues. For vicious acts are contrary to acts of virtue. But human law does not prohibit all vices, as stated above (2). Therefore neither does it prescribe all acts of virtue.

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

*Scotus* [*Loc. supra cit.*]

I answer that, because it is the concern of the law to make decent the men subject thereto, it can rightly seem that it should also be its concern to order all the acts of everyone altogether which proceed from the virtues, since it is proper to virtue to perfect the one who has it and to make his work good. And to all the virtues altogether belongs the same office, and the same idea belongs to them all and agrees with them all. However, it was expounded above (q.92 a.1) how the virtues are per se referred to human law and to its author,

Objection 3. Further, law is ordained to the common good, as stated above (90, 2). But some acts of virtue are ordained, not to the common good, but to private good. Therefore the law does not prescribe all acts of virtue.

On the contrary, The Philosopher says (*Ethic.* v, 1) that the law “prescribes the performance of the acts of a brave man . . . and the acts of the temperate man . . . and the acts of the meek man: and in like manner as regards the other virtues and vices, prescribing the former, forbidding the latter.”

I answer that, The species of virtues are distinguished by their objects, as explained above (54, 2; 60, 1; 62, 2). Now all the objects of virtues can be referred either to the private good of an individual, or to the common good of the multitude: thus matters of fortitude may be achieved either for the safety of the state, or for upholding the rights of a friend, and in like manner with the other virtues. But law, as stated above (90, 2) is ordained to the common good. Wherefore there is no virtue whose acts cannot be prescribed by the law. Nevertheless human law does not prescribe concerning all the acts of every virtue: but only in regard to those that are ordainable to the common good--either immediately, as when certain things are done directly for the common good--or mediately, as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace.

namely, that these directly order only the acts of those virtues which serve to keep the public tranquility, peace, and justice; for it is in the exercise of these sorts of virtues that the public good of the republic stands, namely if to each is given his right, and it is not permitted to inflict violence with impunity on another, and if the neighbor is not harmed in anything and justice is kept in selling and exchanging things and, lastly, if each carries out the office incumbent on him. But if it happens that, in the process, a decent citizen also exercises other virtues for the sake of these political virtues, this can only indirectly and accidentally pertain to human law. For it is proper to divine law alone perfectly to order man to God, his neighbor, and to himself. (But see the above cited article.)

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

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

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

[For the remaining three articles Jerome finds nothing to select from Scotus. He only adds, with respect to a.5, the following: [from *Oxon.* 4 d.4 q.6 n.2] “A law promulgated universally binds everyone. I say that that law is universally promulgated in whose promulgation there is no acceptance of persons, or exception of any persons, or qualification of circumstances.” Jerome argues from this that Scotus would require princes and legislators to obey and fulfill their own laws, unless an exception for them is expressly made in the promulgation of the law.]