

DERIVATION AND FORCE OF CIVIL LAWS

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HE state is founded upon the natural law, and has for its purpose the common welfare of its subjects. It can accomplish this purpose only in so far as it induces its subjects to perform acts which lead to the common good, and to avoid those that detract therefrom. To thus induce its subjects to act or refrain from acting the state makes laws.

The laws which the state makes it derives from the natural law. And this derivation is in a twofold manner. (We shall not in this article treat of the state's adoption of laws derived by the Church from the revealed law). First, as conclusions from premises, i. e., by way of syllogism; second, by way of determination, i. e., that from the various means of fulfilling a precept of the natural law the state chooses and declares that a certain one shall be used.

Those of the first class have some force from the natural law; those of the second class have only human binding force. Thus (1a2ae,q.95,A.2) St. Thomas says: "Every human law has just so much of the natural law, as it is derived from the law of nature. But if in any point it defect from the law of nature it is no longer a law but a perversion of the law. But it must be noted that something may be derived from the natural law in two ways: first as a conclusion from premises; secondly by way of determination of certain generalities. The first way is like to that by which in science demonstrated conclusions are drawn from the principles; while the second mode is likened to that whereby, in the arts, general forms are particularized as to detail:—Some things are therefore derived from the general principles of the natural law, by way of conclusion, e. g., that one must not kill may be derived as a conclusion from the principle that one should do harm to no man; while some are derived therefrom by way of determination, e. g., the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way is a determination of the law of nature.

Accordingly both modes of derivation are found in the human law. But those things that are derived in the first way, are con-

tained in the human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things that are derived in the second way, have no other force than that of human law."

Laws of the First Class

Concerning laws of the first class it is well to note that there can be as many civil laws of this class as there are conclusions which can be drawn from the principles of the natural law, with the aid of established minors. The process of derivation is exemplified as follows:—

- Ex. 1. No man shall do evil to his neighbor.
 But killing is evil.
 Therefore no man shall kill his neighbor.
- Ex. 2. No man shall do evil to his neighbor.
 But to defraud of property justly possessed is evil.
 But to sell worthless stock is to thus defraud.
 Therefore no man shall sell worthless stock.

However it must not be thought that this process is applicable only to the negative precepts, for civil laws may also be derived from the positive precepts of the natural law in the same manner. For the positive precept of the natural law "do good" simply means that every man shall do that good which is proper to him by reason of his nature or his state in life. When taken in reference to the state, it would mean that every man shall do that common good which is proper to him by reason of his nature or his state in life. With this as a major premise, minors are applied and conclusions drawn. These conclusions when drawn by the state, constitute positive civil laws of the first class.

- Ex. 1. Every man shall do that common good which is proper to him.
 But to provide for the needs of their children is proper to the state of parenthood.
 But sufficient food, clothing and instruction constitute some of the needs of children.
 Therefore parents shall provide sufficient food, clothing and instruction for their children.
- Ex. 2. Every man shall do that common good which is proper to him.
 But to punish evil-doers who come under their jurisdiction is a common good proper to police magistrates.
 But those who sell worthless stock are evil-doers.
 Therefore police magistrates shall punish those under their jurisdiction who sell worthless stock.

Thus by example we have seen that both negative and positive civil laws are derived from the natural law by way of syllogism. These laws, according to St. Thomas, not only have human binding force, but also have some force from the law of nature. The extent of this force, we believe, is measured by the proximity and the degree of certitude that it had concerning the conclusion. Thus the further removed a conclusion is from a principle of the natural law, the less force it would have from the natural law.

Laws of the Second Class

“The law of nature has it that the evil-doer should be punished; but that he be punished in “this” or “that” way is a determination of the law of nature,”—quoted above. From the description and the example which St. Thomas gives, we come to the conclusion that an essential requisite for a law of the second class is that there be various ways or means of fulfilling a precept of the natural law, from which choice might be made. The reason is, that were there but one means of fulfilling a precept of the natural law, determination would be excluded and the use of that means would be commanded by a law, not of the second class, but of the first. From these various ways or means the state makes choice, and by a law of the second class commands that the subject use the means chosen. However since choice necessarily presupposes that there are various means by which the natural law could be fulfilled, it must follow that a subject could fulfill a precept of the natural law, without making use of the means determined on by the state. In other words, where substitution is made of a different means than that chosen by the state there follows no violation of the law of nature, but simply the rejection of the means chosen by the state, i. e., the violation of a law of the second class, a law which has only human binding force. What has been said concerning the ways of fulfilling precepts of the natural law applies also in the same manner to the ways of fulfilling laws of the first class.

That which is said above should be made clear by the following example. We have seen that evil-doers should be punished by police magistrates. But evil-doers can be punished by mutilation, imprisonment, forfeiture of goods, etc. From these various means the state may make its choice, e. g., it may declare that mutilation is the means which police magistrates shall use. Thus

upon the police magistrate there would fall a two-fold obligation: the first, drawn from the natural law by way of syllogism, namely, punish evil-doers, would have force from both the human and the natural law; the second, drawn by way of determination, namely, use mutilation as the means of punishment, would have only human force. "Those things which are derived in the second way, have no other force than that of human law." Now if the magistrate punishes evil-doers, not by mutilation, but by substituting some other means, e. g., imprisonment, he would thereby be fulfilling the law of the first class to which he was bound by force of the human and the natural law, although at the same time he would be violating a law of the second class, for he fails to use the means chosen by the state. But in this violation he has acted contrary to a law that has only human binding force.

As it is with the punishment of evil-doers, so it is with the other positive precepts of the natural law and of laws derived therefrom by way of syllogism, e. g., there are various means by which parents could instruct their children, such as placing them under the care of public or of private instructors. By a law of the second class the state would make and declare its choice, to which the parent would be bound only by force of human law. For the rejection of the means chosen by the state does not entail the violation of the law of the first class, providing another means is substituted.

We shall not in this article point out the limitations which arise from the very nature and purpose of the state, and which may effect the choice of the state to such a degree that its determination, or law of the second class, would be null and void.

Determination of Negative Precepts

At first glance it would seem that there could be no determination of the negative precepts of the natural law or of laws derived therefrom by way of syllogism, since in themselves they postulate only a negation of certain actions. However the case is parallel with that of positive determining laws. For even as the choice of means is necessary to insure the fulfillment of the positive precepts, so also is the use of means or precautions necessary to insure against the violation of the negative precepts.

Now in so far as there are various means or precautions

which will insure against the violation of the negative precept, the state may make choice, and determine which shall be used. This determination being also a law of the second class. However since it is based upon choice, it must also admit of substitution, without entailing a violation of the natural law or of a law of the first class.

Thus, for example, to insure against intoxication, one of two things could be done, either one of which would give sufficient insurance; first, use no intoxicating liquors, second, restrict its use to within moderation. Now if from these the state makes its choice and prescribes that the first precaution be used by the subject, there would be placed upon him a two-fold obligation; the first, a law of the first class, avoid intoxication; the second, a law of the second class, use no intoxicating liquors. If, however, the subject refuse to accept the means or precaution prescribed by the state but substitutes another means of precaution which will give sufficient insurance, e. g., restricts the use of liquor to within moderation, he observes the law of the first class, although he violates the law of the second class, a law which has only human binding force. It must not be thought however that choice is limited only to the negation of use and to the restriction of use, for choice might also be had concerning the degree of restriction. For example intoxication may be avoided by restricting the use of liquor to one glass per day, or by restricting it to one half glass per day. The state may choose the latter restriction, but if the subject choose the former he violates a law of the second class but not one of the first.

As it is with the avoidance of intoxication, so it is with the avoidance of other evils, e. g., to insure against damage to neighbor or self the state may restrict the use of a subject's automobile, and limit its speed to say fifteen miles per hour. However if the subject can drive his car at a higher speed, e. g., thirty miles per hour, without endangering his neighbor or himself he may do so without violation of the natural law or a law of the first class. Although this substitution of a different degree of precaution would constitute a violation of a law of the second class.

Thus by example we have seen the manner in which the state derives its laws from the natural law. We have seen the force of the laws derived; that choice between various means or precautions is an essential requisite for a determining law,

and that the violation of a determining law does not postulate a violation of the law of nature.

Relation to Morality

A sin is an act contrary to the divine law. Now a civil law, in order to bind under sin, must have a participation in the divine law; and there are only two ways in which it could thus participate, namely by way of the natural law, or by way of the revealed law.

The natural law is a participation of the divine law. Since it expresses what is contained therein, to that extent it takes on the nature and sanction of the divine law and binds under sin. Hence an act contrary to the natural law is a sin. It is well to note that over and above this, the natural law can bind with a penalty proper to itself, e. g., the drunkard suffers injury to his health.

Now we saw above that a civil law of the first class is the expression of what is implicitly or explicitly contained in the natural law. And hence we must conclude that such a law has a participation in the natural law. "Those things that are derived in the first way—have force from the natural law," and consequently participate in the sanction of the natural law. In other words, civil laws of the first class bind under sin. To this sanction the state also adds its own proper sanction, namely, fines, imprisonment, etc.

But in regard to laws of the second class the case is different, for we have seen above that they are neither implicitly nor explicitly contained in the natural law, and that their violation does not necessarily postulate a violation of the natural law. "Those things that are derived in the second way have no other force than that of human law," hence laws of this class do not have a participation in the natural law and do not participate in its sanction. In other words laws of this class do not, by way of the natural law, have power to bind under sin. Of course if scandal or some other evil should follow on failure to fulfill what is commanded by a law of the second class we would be bound under sin to obey, not however by reason of the law of the second class, but by reason of the law which forbids that evil be done.

In order that these laws of the second class bind under sin the state would have to receive power from the revealed law

to make them so bind. There are only two possible ways in which the state could participate in the divine law by way of the revealed law, namely, indirectly and directly.

But it does not participate indirectly. It is true that the Church has power to bind her subjects under sin to observe laws which she may derive from the revealed lay either by way of syllogism or by way of determination. We believe that this power may also extend to laws which she may in like manner derive from the natural law. Yet we nowhere find that she has made the state a participant in her power.

In regard to the direct participation of power by way of the revealed law, we find several passages in Holy Scripture which perhaps have led some to think that the state has power to bind her subjects under sin to observe any law to which she may so wish to bind them. Chief among these passages is that of St. Paul in his epistle to the Romans, chapter 13, verses 1, 2, and 5: "Let every soul be subject to higher powers; for there is no power but from God: and those that are, are ordained of God. Therefore he that resisteth the power, resisteth the ordinance of God. And they that resist purchase to themselves damnation.—Wherefore be subject of necessity not only for wrath, but also for conscience sake."

Whether this and similar passages are to be interpreted as giving to the state powers over and above those which it had before, or whether they are to be interpreted as merely confirming the state in its pre-existing powers, has never been declared by the Church, the official interpreter of the revealed law. But we wish to note that commentators, when treating of this passage, give us nothing to warrant the assertion that new powers are hereby given to the state. (The same holds true of other passages, which however we omit for the sake of brevity). But there is sufficient to warrant the assertion that these passages merely confirm the state in its pre-existing powers. "The Apostle speaks of power legitimately 'possessed' and legitimately exercised, neither pushed beyond its "proper" limits, nor prescribing anything evil."¹ "The Apostle employs the first seven verses of this chapter in inculcating the duty of obedience to temporal authority, or, it should rather be said, in enforcing the 'natural' duty of obedience to legitimate authority by the sanction of Christianity."² "St. Paul is supposing the civil power to be exercised within its 'proper' limits."³ St. Thomas⁴ also implies that

St. Paul was referring to powers already invested in the state and exercised within their proper sphere.

But even if testimony were lacking on this point, we would still have a strong persuasive proof of the above assertion in the fact that all moral theologians admit that there exists a class of laws which de facto do not bind under sin.

It is true that many scripture students and theologians declare that all just laws bind in conscience. But to bind in conscience, and to bind under sin should not be considered as synonymous. "Conscience" as defined by Fr. Faucher, O. P.⁵ "is a judgment of the practical intellect (derived) from common principles, declaring a particular thing to be here and now avoided because it is evil, or done because it is good."

From this it may be concluded that conscience is man's interior proximate guide. But the guide ought to be perfect and should not only direct man to avoid what is evil and to do that good which is proper to him, but it should also direct him to avoid evil more strictly according to its degree of gravity, and to perform acts which will more, or most perfectly accomplish that which is proper to him. Now conscience really does this for we not only hear it say "this act is good," "that act is evil," but also "this act is slightly sinful," that one is greatly sinful"; or "this act is good," "that act is better." Hence it is that we can say that we are bound in conscience and under sin to avoid evil and to perform that good which is proper to us; and that we are bound only in conscience to perform the good which is proper to us in a better or the best possible way. Applying this to what has been said above, it is clear that, since laws of the first class forbid evil and command the good which is proper to the subject, that they bind both in conscience and under sin; while laws of the second class, since they pertain only to the use of one of two or more possible means, bind only in conscience.

¹ Exposition of the Epistles of St. Paul—Rom. ch. 13—MacEvilly.

² *Ib.*

³ Epistle of St. Paul. Romans, chap. 13—Callan, O. P.

⁴ In Epistolam ad Romanos, chap. 13, lectio I.—St. Thomas.

⁵ Summa Theologica, Ia2ae,q.79, art.12, footnote. Leonine edition.