

QUESTION 97

Changes in Human Law

We next have to consider changes in human law. On this topic there are four questions: (1) Is human law changeable? (2) Should human law always be changed when something better comes along? (3) Is human law abolished by custom, and does custom acquire the force of law? (4) Should the practice of human law be changed by means of dispensations granted by the rulers?

Article 1

Should human law in any way be changed?

It seems that human law should not in any way be changed:

Objection 1: As was explained above (q. 95, a. 2), human law stems from the natural law. But the natural law persists unchanged. Therefore, human law should likewise remain unchanged.

Objection 2: As the Philosopher says in *Ethics* 5, a measure must be especially permanent. But as was explained above (q. 90, a. 1-2), human law is a measure of human acts. Therefore, it should remain unchanged.

Objection 3: As was explained above (q. 95, a. 2), it is part of the nature of law that it is just and right. But what is once right is always right. Therefore, what is once the law should always be the law.

But contrary to this: In *De Libero Arbitrio* 1 Augustine says, “Even if a temporal law is just, it can nonetheless be justifiably modified as time goes on.”

I respond: As was explained above (q. 91, a. 3), human law is a certain type of dictate of reason by which human acts are directed. Accordingly, there are two possible reasons why human law might justifiably be changed, one on the side of *reason* and the other on the side of the *men* whose acts are regulated by the law.

On the side of *reason*, it seems natural to human reason that it should gradually move from what is imperfect toward what is perfect. Hence, we see in the speculative sciences that those who first philosophized handed down what was imperfect and this was later made more perfect by their successors. The same thing holds true in the practical sciences. Those who first intended to discover something useful for the human community, unable to take everything into consideration on their own, instituted certain practices which were deficient in many ways and which their successors changed by instituting other practices that were less prone to fail with respect to the common welfare.

On the side of the *men* whose acts are regulated by the law, law can rightly be changed because of changes in the situations of men, for whom different things are expedient in different situations. In *De Libero Arbitrio* 1 Augustine presents an example: “If the people are mature and serious and diligently guard the common welfare, then it is right to adopt a law by which such people are permitted to appoint for themselves magistrates to administer the republic. However, if the same people, having been depraved little by little, hold a rigged election and entrust the government to dissolute and profligate men, then it is justifiable to deprive such people of the power of conferring public offices and to return to the judgment of a few good men.”

Reply to objection 1: As was explained above (q. 91, a. 2), the natural law is a type of participation in the eternal law, and so it persists unchanged—a feature it has from the unchangeability and perfection of God’s reason insofar as it institutes nature. By contrast, human reason is changeable and imperfect, and so its law is changeable.

Moreover, the natural law contains certain general precepts which always remain in force, whereas the law made by man contains certain particular precepts corresponding to the different situations that

arise.

Reply to objection 2: A measure should be as permanent as possible. But among changeable entities there cannot be anything that persists altogether unchangeably. And so human law cannot be altogether unchangeable.

Reply to objection 3: Among corporeal things ‘right’ (*rectum*) is predicated absolutely, and so, as far as it itself is concerned, what is right always remains right. However, rightness (*rectitudo*) is predicated of the law in relation to the common welfare, which, as was explained above, is not such that one and the same thing is always proportioned to it. And so this sort of correctness changes.

Article 2

Should human law always be changed when something better comes along?

It seems that human law should always be changed when something better comes along:

Objection 1: Human laws, like other matters of art, have been arrived at by human reason. But in other matters of art, what was previously embraced is changed if something better comes along. Therefore, the same thing should be done in the case of human laws.

Objection 2: We can provide for the future by drawing on the past. But if human laws had not been changed in light of better discoveries that superceded them, then many anomalies would have followed, because old codes of law contain many elements of ignorance. Therefore, it seems that the laws should be changed as often as something better to institute comes along.

Objection 3: Human laws are established with respect to particular human acts. But the only way we reach complete cognition of particulars is through experience, which takes time, as *Ethics 2* points out. Therefore, it seems that through the course of time something that is better to institute can come along.

But contrary to this: *Decretals*, dist. 12, says, “It is a ridiculous and wholly abominable disgrace for us to break off the traditions that we have received from our fathers.”

I respond: As has been explained (a. 1), human law is justifiably changed to the extent that such a change in the law is a means of providing for the common welfare. However, the very changing of the law, taken just by itself, does a certain sort of damage to the common welfare. For custom (*consuetudo*) contributes to the observance of a great many laws, to the extent that whatever violates common custom—even if it is of little importance in its own right—is seen as rather serious. Hence, when a law is changed, the constraining force of the law is diminished to the extent that a given custom is nullified.

Therefore, human law should never be changed unless the damage done to the common welfare by the change is wholly compensated for in some other way. This happens either because (a) some very great and obvious advantage comes from the new statute, or because (b) there is some urgent necessity stemming from the fact that the established law either involves a manifest iniquity or is such that its observance is very harmful. Hence, the Legal Expert says, “In order to revoke a law that has been deemed just for a long time, there must be an obvious advantage in the new practices that are going to be instituted.”

Reply to objection 1: Matters of art have their efficacy solely from reason, and so whenever a better reason comes along, what was previously embraced should be changed. By contrast, as the Philosopher points out in *Politics 2*, laws acquire an especially great force from custom. And so they are not to be changed so easily.

Reply to objection 2: This argument shows that laws should be changed, but not for the sake of

just any sort of improvement. Instead, as has been explained, they should be changed for the sake of some great advantage or out of some urgent necessity.

Reply to objection 3: The same reply holds for the third objection.

Article 3

Can custom acquire the force of law or nullify a law?

It seems that custom (*consuetudo*) can neither acquire the force of law nor nullify a law:

Objection 1: As is clear from what was said above (q. 93, a. 3 and q. 95, a. 2), human law stems from the natural law and the divine law. But human custom cannot alter the law of nature or the divine law. Therefore, neither can it alter human law.

Objection 2: It is not the case that a good can come from many evils. But the one who first starts to act against the law acts badly. Therefore, it is not the case that something good will be produced by the multiplication of acts similar to that bad act. Now a law is a sort of good, since it is a rule of human acts. Therefore, a law cannot be nullified by custom in such a way that the custom itself acquires the force of law.

Objection 3: Making law is the function of public personages whose role it is to govern the community; hence, private persons cannot make law. But a custom increases in strength through the acts of private persons. Therefore, custom cannot acquire the force of a law by which some other law is nullified.

But contrary to this: In *Epistola ad Casulanum* Augustine says, “The customs of the people of God, as well as what has been instituted by the leaders, should be embraced as law. And like those who transgress divine laws, so too those who show contempt for ecclesiastical customs should be corrected.”

I respond: Every sort of law proceeds from the lawmaker’s reason and will—divine and natural law from God’s rational will, and human law from the human will as regulated by reason. Now just as, in practical matters, a man’s reason and will are made manifest by what he says, so too they are made manifest by what he does. For each man seems to choose as a good what he brings about by his action.

Now it is manifest that the law can be both explained and changed by human words, insofar as those words make manifest human reason’s interior movement and conception. Hence, the law can also be explained and changed through acts which, especially when they are multiplied, engender customs; moreover, these acts can cause something that acquires the force of law, viz., because through repeated exterior acts the will’s interior motion and reason’s designs are effectively clarified. For when something is repeated many times, it seems to proceed from the deliberate judgment of reason. Accordingly, custom has the force of law, nullifies law, and serves to interpret law.

Reply to objection 1: As has been explained, natural law and divine law proceed from the divine will. Hence, they cannot be changed by any custom that proceeds from the human will; instead, they could be changed only by God’s authority. And so no custom contrary to the divine law or natural law can acquire the force of law. For in the *Synonymes* Isidore says, “Let custom cede to authority; let law and reason subdue a depraved custom.”

Reply to objection 2: As was explained above (q. 96, a. 6), human laws fail (*deficit*) in some cases, and so it is sometimes possible to act outside the law without the act’s being bad, viz., in a case where the law fails. And when such cases are multiplied because of some change in the men, then it becomes clear through custom that the standing law is not advantageous—in just the way this would likewise become clear if a law were promulgated that was verbally contrary to the standing law.

However, if the reason for which the first law was advantageous still holds, then the law conquers the habit rather than the habit the law—unless, perhaps, the law seems disadvantageous precisely because it is not possible given the customs of the country, which was one of the conditions for law (cf. q. 95, a. 3). For it is difficult to abolish a custom of the people.

Reply to objection 3: The people among whom a custom is introduced can be in one of two conditions:

If it is a free people that can make laws for itself, then the consensus of the whole people to observe the practice that a custom makes manifest counts for more than the authority of the ruler, who does not have the power to make law except insofar as he stands in for the people. Hence, even if particular persons cannot make law, the whole people can nonetheless make law.

On the other hand, if the people does not have free power to make law for itself or to nullify a law made by someone in charge, then a custom that is widespread among such a people acquires the force of law to the extent that it is tolerated by those who have the role of imposing law on the people. For by this very toleration they seem to give their approval to what the custom has introduced.

Article 4

Can the rulers of the people give dispensations from human laws?

It seems that the rulers of the people cannot give dispensations from human laws:

Objection 1: As Isidore puts it, law is established “for the common welfare.” But the common good should not be overridden in favor of any person’s private advantage (*pro privato commodo alicuius personae*), since, as the Philosopher says in *Ethics* 1, “The good of the nation is more divine than the good of a single man.” Therefore, it seems that no one should be given a dispensation to act against a general law.

Objection 2: Deuteronomy 1:17 gives this command to those who are placed in charge of others: “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 ‘respecting persons’ or favoritism (*acceptio personarum*) seems to consist in conceding to a given individual what is generally denied to everyone. Therefore, the rulers of the people cannot give dispensations of the sort in question, since this is contrary to God’s command.

Objection 3: If human law is to be upright, then it must be consonant with the natural law and with divine law; otherwise, it would neither “agree with religion” nor “contribute to discipline”—which, as Isidore says, are required for law (cf. q. 95, a. 3). But no man can give a dispensation either from divine law or from the natural law. Therefore, neither can any man give a dispensation from human law.

But contrary to this: In 1 Corinthians 9:17 the Apostle says, “..... a dispensation is committed to me.”

I respond: ‘Dispensation’ (*dispensatio*) properly implies a measuring out of something common to individuals. Hence, the head of a family is called a ‘dispenser’ (*dispensator*) insofar as he distributes, in due weight and measure, the tasks and necessities of life to each member of the family. So, then, every multitude is such that someone in it is called a dispenser by virtue of the fact that he determines how a general precept is to be implemented by each individual.

Now as is clear from what was said above (q. 96, a. 6), sometimes a precept that is appropriate for the multitude in the greater number of cases is not appropriate for this person or in this case, either because it would prevent something better or because it would lead to some evil. However, as was explained above (q. 96, a. 6), it would be dangerous to leave such matters to the judgment of each

individual, except perhaps in the face of an evident and sudden threat. Thus, the one charged with ruling the people has the power to dispense from a human law that depends on his authority, with the result that when the law fails for given persons or cases, he may permit a precept of the law not to be obeyed. However, if he granted such permission just by his own will alone and without the sort of reason in question, then in granting such a dispensation he would be either unfaithful or imprudent—unfaithful if he did not intend the common good, and imprudent if he knew of no reason for the dispensation. This is why, in Luke 12:42, Our Lord says, “Who do you think is the faithful and prudent steward (*dispensator*), whom his lord sets over his family?”

Reply to objection 1: When someone is dispensed from obeying a general law, this should be done not with a prejudice against the common good, but rather with the intention of promoting the common good.

Reply to objection 2: There is no ‘respecting of persons’ (*acceptio personarum*) if it is not the case that persons who are equal are being treated as unequals. Hence, when a person’s situation requires that, in accord with reason, something be observed in a special way in that situation, then it is not favoritism if some special favor is granted him.

Reply to objection 3: Insofar as the natural law contains general precepts that never fail, it cannot admit of dispensations.

On the other hand, with respect to those other precepts, which are like conclusions of the general precepts, men can sometimes give dispensations—for instance, a dispensation according to which a thing left in trust need not be returned to someone who has betrayed his country, or something of this sort.

However, every man is related to divine law in the way that a private person is related to a public law to which he is subject. Hence, just as in the case of human public law, the only one who can give dispensations is the one from whom the law has its authority or someone whom he has commissioned, so too in the case of the precepts of the divine law, which come from God, no one can give a dispensation except God or someone to whom He Himself has given a special commission.