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COEXISTING NORMATIVE ORDERS? YES, BUT NO

JOHN FINNIS

I

The issue debated by Aquinas in *S.T.*, 1-2, q. 95, a. 2 is “whether every law posited by human authority is derived from natural law.” Aquinas’s own answer is, Yes!, but in one or other of two ways (*modi*):

- [1] [S]omething (*aliquid*) can be derived from natural law in two ways: one way, as conclusions are derived from principles; the other way, as sorts of *determinationes* of generalities.
- [2] The first is similar to the way in which, in sciences, demonstrated conclusions are produced from principles. The second is similar to the way in which, in arts [or technologies], general forms are made determinate in something specific—as for example with architects, who have to make the general idea of a house *determinate* in this or that house-design.
- [3][a] So some things (*quaedam*) are derived from general principles of natural law by way of conclusions: e.g. *this*, “no killing” can be derived as a conclusion from *that*, “no harming anyone”.
- [b] And some things [are derived] by way of *determinatio*, e.g.: natural law includes *this*, that “wrongdoers are to be punished,” but *that*, “such and such is the appropriate penalty . . .,” is a kind of *determinatio* of natural law.

1. The whole text is this:

Sed sciendum est quod a lege naturali dupliciter potest aliquid derivari, uno modo, sicut conclusiones ex principiis; alio modo, sicut determinationes quaedam aliquorum communium. Primus quidem modus est similis ei quo in scientiis ex principiis conclusiones demonstrativae producuntur. Secundo vero modo simile est quod in artibus formae communes determinantur ad aliquid speciale, sicut artifex formam communem domus necesse est quod determinet ad hanc vel illam domus figuram. Derivantur ergo quaedam a principiis communibus legis naturae per modum conclusionum, sicut hoc quod est non esse occidendum, ut conclusio quaedam derivari potest ab eo quod est nulli esse malum faciendum. Quaedam vero per modum determinationis, sicut lex naturae habet quod ille qui peccat, puniatur; sed quod tali poena puniatur, hoc est quaedam determinatio legis naturae. Utraque igitur inveniuntur in lege humana posita. Sed ea quae sunt primi modi, continentur lege humana non tanquam sint solum lege posita, sed habent etiam aliquid vigoris ex lege naturali. Sed ea quae sunt secundi modi, ex sola lege humana vigorem habent.

Santiago Legarre suggests that there are two ways of understanding the norm about killing referred to in [3a]: Interpretation A holds that what is being discussed in [3a] is a purely “intra-moral” derivation, a reasoning from a general principle of morality to a less general precept of morality; here in [3a] “we never touch the realm of human positive law.” Interpretation B holds that [3a] *does* touch the realm of human positive law; it takes a precept (“no killing”) which as a moral precept is already a deduction (conclusion) from a higher-level moral principle (“no harming”), and applies it in human positive law as “a criminal-law enactment,” “a positive law,” known to us as “the law of murder.” Interpretation B yields:

P1: the law of murder is a conclusion (“deduction”) from the moral precept “one must not kill” which is itself a conclusion from the more general principle of morality “one must do harm to no one.”

And Legarre says that Interpretation B/P1 “seems clearly implicit in two separate passages” he quotes from my *Natural Law and Natural Rights*.

But neither passage holds that the law of murder *is* a conclusion or deduction from a moral precept with the same content. The law of murder is law “posited by human authority.” Positing is neither deducing nor announcing the conclusion of a deduction. It is the fulfilment of a different, affirmative moral precept, directing those who have responsibility in and for a political community to exercise that responsibility by positing and enforcing laws for common good—in particular, for the part of the common good properly called *public* good, being concerned with external acts impacting directly or indirectly on other persons. In judging what the state’s common good requires by way of positive law, law-makers in legislatures or courts can and should resort to the natural moral law’s principles and precepts about human good and the requirements of justice (in pursuit of and respect for human good). This resort to natural law as a source for positive law will have two broad types (*modi*), the one *like* (“similar to”) reading off valid conclusions from the premises that, like it or not, entail them, the other involving much more choice between eligible alternatives, *like* (“similar to”) giving specificity to a general idea such as “a maternity hospital,” a process involving thousands of choices of dimensions, materials, etc. Laws of the former type (or: belonging to the first-mentioned part of our law) are not conclusions, but can be called “like conclusions” or “analogous to conclusions” in their relationship to the moral law. Our law against euthanasia and assisting suicide appropriately has virtually the same content as the natural moral law against such choices and actions, and debates about its positing (about enacting or retaining it) substantially track moral debate about the morality of those kinds of choice

and act. But the tracking or “reading off” is only approximate or “substantial,” since the fulfilment of affirmative responsibilities such as law-making and law-enforcing is always subject to circumstances.²

So my view is similar to Interpretation B, but not identical. Notice that Interpretation B’s proposition P1 includes Interpretation A³ except in so far as Interpretation A denies that [3a] has any application to the realm of positive law. But that denial is, I think, unsustainable. [3a] has no place in q. 95, a. 2 except as part—indeed, the payoff part—of Aquinas’s answer to the question whether and how positive law is derived from natural law. So it must “touch the realm of positive law,” and it does so in the way indicated, approximately, in P1. There are deductive movements of thought to conclusions within the body of natural-law, moral precepts, and *analogous* quasi-reading off of appropriate content for positing as state law—so that even if the latter does not promulgate the highest levels of moral principles, it should promulgate many of the moral precepts deducible from them. “Many,” but not all. For not all moral precepts truly deducible from moral principles are matters of *public* good.⁴

2. See also the considerations mentioned in *Natural Law and Natural Rights*, 282-4, about the complexities and indirections involved in “the process of receiving even such straightforward moral precepts [as No killing the innocent] into the legal system,” complexities such as the avoidance of normative vocabulary in favor of indicative propositional form (e.g. “it is an offence to . . .”), with the general result that “in a well-developed legal system, the integration of even an uncontroversial requirement of practical reasonableness into the law will not be a simple matter.” And see *ibid.*, 289:

In sum: the derivation of law from the basic principles of practical reasoning has indeed the two principal modes identified and named by Aquinas; but these are not two streams flowing in separate channels. The central principle of the law of murder...may be a straightforward application of universally valid requirements of reasonableness, but the effort to integrate [it] into the Rule of Law will require of judge and legislator countless elaborations which in most instances partake of the second mode of derivation.

3. That is why, I think, Aquinas used just *quaedam* to refer to the precepts being discussed in [3][a] and [b], (and *aliquid* [something] in [1]). The discussion, especially in [3a], is *both* about natural law and about positive law (without confusion between them, but finding a thesis applicable to each type in its own way).

4. On this restriction of positive state law to the public-good part of common good, see *S.T.*, 1-2, q. 98, a. 1; q. 100, a. 2c; also q. 99, a. 5 ad 1; q. 100, a. 9c; q. 104, a. 1 ad 1 and ad 3; *In III Sent.* d. 37, a. 2 sol. 3c (quoted in *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 225n27); and see the discussion in *Aquinas*, 222-45.

II

About the part of our positive law that is related to natural moral law in the “like conclusions” manner, Legarre is concerned about my saying (sometimes) that that part *is* natural law, and about my saying that it “can be called natural law or *ius gentium* (law common to all peoples).” One of his concerns can be quickly set aside: judging that something can be called A or B does not entail judging that “A” is synonymous with “B.” *Ius gentium* is not synonymous with natural law, but rather is that part of natural law that is fit to be (and generally speaking is) straightforwardly adopted into the positive law of all peoples. So Aquinas is happy to work with the traditional saying that “there are two types of law, natural and positive”⁵ and equally with the traditional saying that “there are three types of law, natural, *ius gentium*, and positive or civil.”⁶ And he is keen to take a cue from the Roman Jurist Gaius and hold that *ius gentium* is both natural and positive.⁷ The key to the reconciliation is the account of derivation discussed in section I. Derivation in the quasi-conclusory mode is tantamount to adopting part of the natural law into positive law (by positing/enacting/promulgating it!). And that part of our positive law can be given the name given it by Roman jurists such as Gaius: *ius gentium*—a body of precepts which therefore are both natural and positive.

Does Aquinas ever say that precepts belonging to that part of our law *are* natural law precepts? Yes. I cite one such passage in my essay “The Truth in Legal Positivism,”⁸ but Legarre (n25) finds the citation “unpersuasive,”

5. See e.g., *Quodlibet* II q. 4 a. 3; *In Eth.* V l. 12 no. 8 [1023]

6. *S.T.*, 1-2, q. 95, a. 4

7. 2-2, q. 57, a. 3c, quoting Gaius, *Institutes* 1.1.

8. It is cited in the main footnote to the following passage from my *Philosophy of Law, Collected Essays Volume IV* (Oxford: Oxford University Press, 2011), 183:

The novelty, to repeat, consists in taking as the relevant subject-matter the whole of positive law—that is (in this context), the whole of human law—and showing by philosophical analysis of practical reasoning and decision how the affirmation of the positivity of all human laws is consistent with acknowledging the (various) ways in which each such law is morally justifiable (if it is!). Some positive laws are also norms of the natural moral law—that is, are requirements of practical reasonableness.⁴¹ But to say this is not to detract in the least from the positivity of those laws—that is, from the fact (where it is the fact) that they have been posited humanly, by human will, and can be studied as positive.

Footnote 41:

These are the parts of the positive law that Aquinas calls *ius gentium*. But when he is not feeling constrained to assimilate the old Roman juristic categories and labels, he will simply call these very same rules precepts of natural law: see e.g. I–II q.100 a.1c. His stock examples are: it is wrong to steal (*In Eth.* V. 12 ad 1134b20); it is wrong to

and admittedly it says no more than that “no killing” is a straightforward natural law precept—in a context where the fact that the same precept is part of our and every community’s positive law is not in focus. So here is another passage. It is the *Secunda secundae*’s parallel to the *Prima secundae*’s q. 95, a.2, and it says:

Things are just in two ways, one “from the very nature of the case”, which is called natural law/right; the other, from some human settlement of the matter, which is called positive law/right. Now laws are written [posited] as declarations of each of those kinds of law/right, but *differently*: for the written law does indeed *contain* natural law/right but does not *institute* it (for it [the natural law] has its force not from the [written] enactment but naturally). But the written law both contains *and* institutes positive law/right (by giving it the force of authority).⁹

But in the end it doesn’t much matter what Aquinas happens to have said explicitly. If one is willing to say that *ius gentium*, though not identical with natural law, belongs to or is a part of the natural law,¹⁰ and also that *ius*

kill the innocent (ST I-II q.95 a.2c), and both these precepts of the *ius gentium* reappear as precepts of natural law in I-II q.100 a.1c. In *Quaestiones Quodlibetales* II (c. 1270/1) q.4 a.3c the precepts against killing and stealing are called *moralia*.

9. *S.T.*, 2-2, q. 60, a. 5c:

iudicium nihil est aliud nisi quaedam definitio vel determinatio eius quod iustum est. **Fit autem aliquid iustum dupliciter, uno modo, ex ipsa natura rei, quod dicitur ius naturale; alio modo, ex quodam condito inter homines, quod dicitur ius positivum, ut supra habitum est. Leges autem scribuntur ad utriusque iuris declarationem, aliter tamen et aliter. Nam legis Scriptura ius quidem naturale continet, sed non instituit, non enim habet robur ex lege, sed ex natura. Ius autem positivum Scriptura legis et continet et instituit, dans ei auctoritatis robur.** Et ideo necesse est quod iudicium fiat secundum legis Scripturam, alioquin iudicium deficeret vel a iusto naturali, vel a iusto positivo.

The passage is evidence in favor of the view of recent scholars who have held that the *Secunda secundae* was the first part of the *Summa theologiae* to be written, and was composed for the needs of students training to be confessors. Its sophistication seems significantly below that of the *Prima secundae*. Note: the phrase *Scriptura legis* [sic] occurs nowhere else in Aquinas’s writings; normally he will say *lex scripta*, and when he does so it is as a rough and ready way of talking about positive law. It is clear that the phrases are effectively synonymous, though perhaps the less usual one has a flavor of “the writing of the law”—positing rather than positive or posited. And that would work reasonably well as an alternative translation, above.

10. Thus *S.T.*, 2-2, q. 57, a. 1c and ad 1; *In Eth.* V l.12 no. 4 [1019]: naturally just precepts include keeping promises, respecting the safety of even the enemy’s ambassadors, and these and similar precepts belong to the *ius gentium*.. See *Aquinas*, 268n88.

gentium is the part of positive law common to all peoples,¹¹ then one will be willing to say—even if one never or rarely got around to saying it—that that same part of the positive law belongs to or, so far forth, *is* natural law. Likewise, if one drops the old Roman jurists category, and speaks only of natural and positive law, then one can reasonably say that that part of our positive law that is, as it were, adopted from, or carried over from, or quasi-read off, the natural moral law *is natural law*. Not to forget: it is at the same time positive law, and this latter truth about it—its positivity—is the truth that directly concerns the judge, in a generally just legal order.

III

Speaking of the thought that natural law and positive law are “two coexisting normative orders,” Legarre says: “In his Frankfurt piece Finnis seemed to reject this possibility: ‘[t]he relationship of natural law to the positive law of a particular state . . . is . . . *not best thought of* as a coexisting of two normative orders.’”¹²

“Not best thought of” falls a good way short of “cannot be thought of.” And lost in the ellipses is the word “thus” which discloses that my proposition is advanced as a conclusion—not perhaps as a strict deduction, but as supported by considerations set out in the sentences preceding it. My line of thought begins with Heraclitus: “all human laws nourish themselves” from the one divine law available in the intelligence *common* among human persons. From there, I move to Aristotle: there is law common to all, comprising the just by nature, and law peculiar to particular groups or peoples. And thus to Aquinas: the law common to all (*ius gentium*) is to be found *in* our positive law, as that part which consists of precepts taken in from natural law rather like conclusions are contained in their principles, as distinct from the part that is a *determinatio*, morally binding on the law’s subjects *only* because its precepts have been posited by authority. Then—

It is of first importance to understand this fully achieved thesis of natural law theory with precision. Any proper example (central case) of legal systems will be *positive law* in its entirety and all its parts, and at the same time will comprise two elements, (i) a set of rules, principles and institutions which are natural and are, or ought to be, common to all other legal systems, and (ii) a set, doubtless much larger, of rules, principles and

11. Thus: *S.T.*, 1-2, q. 95, a. 4c: “positive law is divided into *ius gentium* and *ius civile* according to the two ways in which something is derived from natural law (as was said above)”; also 2-2, q. 12, a. 2c and *Aquinas*, 325n138.

12. Finnis, “Natural Law Theory: its Past and its Present,” *American Journal of Jurisprudence* 57 (2012): 94.

institutions which are *purely* positive, and more or less distinctive of this particular political community and legal system. **The relationship of natural law to the positive law of a particular state (or of the international order) is thus not best thought of as a coexisting of two normative orders.** Rather it is a matter of acknowledging (or denying) the validity and legitimacy (not independent of sufficient efficacy and widespread acknowledgement) of that positive law/legal system, while at the same time acknowledging the normative principles which are necessary (though by far not sufficient) to the validating and legitimating of that law and capable of invalidating and legitimating it.

Thus there are indeed two normative orders. But not “coexisting” in the sense that French law coexists with English law, and English law with international law, and all of them with canon law. No, the relation between the normative orders is much more intimate than “coexistence” (in the focal sense of that term). The one is a necessary source of the full validity, and strategically important parts, of the other, and is a real but much less straightforward source (by *determinatio*) of all its other legitimate parts; and is also an ever-present source of legitimate, and in extreme cases delegitimising criticism of the other (the positive law). Thus “coexistence” *can* be predicated of the two, but does not articulate their relationship in the best way—best for the purposes of lawyers and judges and those doing “theory of law” (such as the theorists of law gathered at Frankfurt for the meeting of the international philosophy of law association) in the footsteps of Heraclitus, Aristotle, and Aquinas.

