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THE "COMMON GOOD" AND THE PROBLEM OF  
"EQUITY" IN THE PHILOSOPHY OF LAW  
OF ST. THOMAS AQUINAS

St. Thomas Aquinas insists that the human or positive law<sup>1</sup> must always fulfill the conditions requisite to a thing which has a definite purpose or end. For "it is ordained to an end," namely "to be useful to man."<sup>2</sup> In addition it must be virtuous, just, possible to nature, according to the custom of the country, suitable to the time and place, necessary, useful, clearly expressed, and framed solely for the common good.<sup>3</sup> St. Thomas Aquinas is fully conscious of the fact that the general principles of Natural Law underlying all human laws cannot be applied to all men in the same manner for all times and in all places. Thus on account of the great variety of human affairs the human law must vary among different peoples and nations,<sup>4</sup> though its ultimate purpose, namely the achievement of the common good, always remains the same.

Law, according to St. Thomas Aquinas, is something pertaining to reason, directed "to a definite end, which is the first principle in all matters of action."<sup>5</sup> "Now the first principle in practical matters . . . is the last end: and the last end of human life is bliss and happiness. . . . Consequently the law must regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect, and since one man is a part of the perfect community, the law must regard properly the relationship to universal happiness."<sup>6</sup> "Whenever a thing is

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<sup>1</sup> As distinguished from the "Lex Aeterna" (see, in general, *Summa Theologica*, I, II, quaestio 91, art. 1; quaestio 93, art. 3; art. 4) and the "Lex Naturalis" (see, in general, *ibid.*, quaestio 91, art. 2; quaestio 94, and others).

<sup>2</sup> *Summa Theologica*, I, II, quaestio 95, art. 3.

<sup>3</sup> *Ibid.*, quaestio 95, art. 3; art. 1; quaestio 92, art. 1.

<sup>4</sup> *Ibid.*, quaestio 95, art. 2.

<sup>5</sup> *Ibid.*, quaestio 90, art. 1.

<sup>6</sup> *Ibid.*, quaestio 90, art. 2.

for an end, its form must be determined proportionally to that end;" and "everything that is ruled or measured must have a form proportionate to its rule and measure."<sup>7</sup> "Both these conditions are verified in the human law, since it is both something ordained to an end; and a rule or measure ruled or measured by a higher measure."<sup>8</sup> "Now the end of the human law is to be useful to man . . . *viz.*, . . . that it further the common weal."<sup>9</sup>

"The law is chiefly ordained to the common good."<sup>10</sup> "Any other precept in regard to some individual work must necessarily be devoid of the nature of a law, save in so far as it regards the common good,"<sup>11</sup> for, as we already know, "every law is ordained to the common good."<sup>12</sup> "Nothing stands firm with regard to the practical reason, unless it be directed to the ultimate end which is the common good: and whatever stands to reason in this sense, has the nature of a law."<sup>13</sup> "Actions are indeed concerned with particular matters: but those particular matters are referable to the common good, not as to a common genus or species, but as to a common final cause, according as the common good is said to be the common end."<sup>14</sup> Therefrom follows that "the goodness any part is considered in comparison with the whole," and that, "since . . . every man is a part of the State, it is impossible that a man be good, unless he is well proportionate to the common good: nor can the whole be well consistent unless its parts be proportionate to it. Consequently the common good of the State cannot flourish, unless the citizen be virtuous."<sup>15</sup> The common good, the common welfare is, therefore, the true "social good,"<sup>16</sup> the one and all

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<sup>7</sup> *Ibid.*, quaestio 95, art. 3.

<sup>8</sup> *Ibid.*, quaestio 95, art. 3.

<sup>9</sup> *Ibid.*, quaestio 95, art. 3.

<sup>10</sup> *Ibid.*, quaestio 90, art. 2.

<sup>11</sup> *Ibid.*, quaestio 90, art. 2.

<sup>12</sup> Compare also *ibid.*, quaestio 90, art. 3; art. 4; quaestio 92, art. 1; quaestio 95, art. 1; art. 3; quaestio 96, art. 6.

<sup>13</sup> *Ibid.*, quaestio 90, art. 2.

<sup>14</sup> *Ibid.*, quaestio 90, art. 2.

<sup>15</sup> *Ibid.*, quaestio 92, art. 1.

<sup>16</sup> Compare *ibid.*, quaestio 92, art. 1.

pervading purpose in the human law. Above everything the social interest of the community, the common good must be fostered,<sup>17</sup> even should this necessitate certain restrictions of some personal rights.<sup>18</sup>

Any law which concerns itself primarily with the achievement of the common good, that is, with the social well being of a definite society must "take into account many things, as to persons, as to matters, and as to times."<sup>19</sup> "Now it happens often that the observance of some points of the law<sup>20</sup> conduces to the common weal in the majority of instances, and yet, in some cases, is very hurtful."<sup>21</sup> Should such a situation arise the "strict Common Law" should not be observed in order that the common good, which the lawgiver had in mind, might be fully maintained or achieved.<sup>22</sup> In other words, the "strict Common Law" must, in certain instances, be supplanted by "Equitable Justice." Thus "Equity" or, as St. Thomas Aquinas calls it, "Epikēia"<sup>23</sup> becomes a vital part of his general theory of Law and Justice. According to him "Equity" constitutes but a form or kind of Justice<sup>24</sup> which is not superior to Justice in general, but merely superior in some respects to "strict Common Law Justice," inasmuch as "it is impossible to lay down rules of Common Law that would apply to every single case. Legis-

<sup>17</sup> Ibid., quaestio 96, art. 1.

<sup>18</sup> Ibid., quaestio 96, art. 2; quaestio 95, art. 3.

<sup>19</sup> Ibid., quaestio 96, art. 1.

<sup>20</sup> St. Thomas Aquinas refers here to the "strict positive law," to what we would call the "strict Common Law." We are fully aware of the fact, however, that the "strict positive law" of St. Thomas Aquinas does not completely coincide with our notion of the "strict Common Law," in as much as he is of the opinion that all human law should be statutory, originating with a definite "lawgiver." (See footnote 25.)

<sup>21</sup> Summa Theologica, I, II, quaestio 96, art. 6.

<sup>22</sup> Ibid., quaestio 96, art. 5.

<sup>23</sup> St. Thomas Aquinas borrows this mutilated term, which should be spelled "Epieikeia," from Aristotle's Nicomachean Ethics, book V, chap. 10. See Aristotelis Opera Omnia (edit. by Academia Regia Borusica, Berlin, 1831). 1137 a 33 f. (page 1137, left hand column (a), line 33). Compare Chroust, Aristotle's Conception of "Equity" (Epieikeia), in: Notre Dame Lawyer, XVIII, 2.

<sup>24</sup> Summa Theologica, II, II, quaestio 120, art. 1. Compare *ibid.*, art. 2.

lators in framing laws<sup>25</sup> attend to what commonly happens: although if the "strict Common Law" be applied to certain cases it would frustrate the equality of Justice<sup>26</sup> and be injurious to the common good which the law has in view. . . . In these and like cases it is bad to follow the "strict Common Law," and it is good to set aside the letter of the "strict Common Law" and to follow the dictates of Justice and the common good."<sup>27</sup> For "to follow the letter of the 'strict Common Law' when it should not be followed is sinful."<sup>28</sup> On the other hand "Equity" does not intend to set aside what is right and just, nor does it try to pass judgment on a "strict Common Law rule" by claiming that the latter was not well made. It merely states that, in the interest of a truly effective and fair Administration of Justice, the "strict Common Law" is not to be observed in some particular instance.<sup>29</sup> For "without doubt he transgresses the law who by adhering to the letter of the 'strict Common Law' strives to defeat the intention of the lawgiver,"<sup>30</sup> and thus obstructs the ultimate end of all human law, the common good. According to St. Thomas Aquinas the Administration of Justice should, in its attempt to supplement the ever present lack of formal sources of the law, or to bridge the gaps in these sources, take into account the inspirations of reason and of conscience in order to probe the mystery of the "just" before coming down to the examination of the positive na-

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<sup>25</sup> St. Thomas Aquinas is of the opinion that all human law should be statutory. For according to him, in the first place, it is more probable that a few wise men can be found to frame the (statutory) law, than it is that one would find all the wise men that would be necessary to judge cases as they arise. Secondly, there is more time to think while making laws than while judging cases as they arise. And most important, these laws would be made in an abstract atmosphere, and not under the compulsion of human passions and prejudices of the moment. See *Summa Theologica*, I, II, quaestio 95, art. 1. Compare also *ibid.*, quaestio 91, art. 4.

<sup>26</sup> The concept of equality comes to St. Thomas Aquinas likewise through Aristotle's *Nicomachean Ethics*, book V, chap. 10. See, in particular, 1129 a 34; 1130 b 9; 16; 24; 33; 1131 a 10 f.; 12 f.; and others. Compare Chroust and Osborn, *Aristotle's Conception of Justice*, in: *Notre Dame Lawyer*, XVII, 2, p. 130 f.

<sup>27</sup> *Summa Theologica*, II, II, quaestio 120, art. 1; art. 2.

<sup>28</sup> *Ibid.*, quaestio 120, art. 1; art. 2.

<sup>29</sup> *Ibid.*, quaestio 120, art. 1; art. 2.

<sup>30</sup> *Ibid.*, quaestio 120, art. 1.

ture of things which will settle its diagnosis, and will call into action the principles of reason. For there are principles of Justice which are superior to the contingencies of fact as well as to the contingencies of established "Common Law rules,"<sup>31</sup> and which are embodied in the concept of "Equity" of St. Thomas Aquinas.

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<sup>31</sup> Compare F. Génv, *Méthode d'Interprétation et Sources on Droit Privé Positive*, vol. II, p. 100 f.