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# Ius Gentium in the Philosophy of Law of St. Thomas Aquinas

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## THE "IUS GENTIUM" IN THE PHILOSOPHY OF LAW OF ST. THOMAS AQUINAS

The whole of St. Thomas Aquinas's philosophy of law rests upon the notion of an absolute, eternal, and wise order or government within the created Universe, ordained by God Himself. Everything that exists or moves exists and moves by this sublime government which directs everything to its proper end. This government of all things in God and through the Divine reason has the nature of a law. And since the Divine reason is not subject to time, but is eternal, the law by which God governs the Universe must also be eternal.<sup>1</sup> Hence the eternal government of everything, which like every Divine concept is true by reason of itself,<sup>2</sup> is but the Divine wisdom and providence directing all actions and movements.<sup>3</sup> This is the "*lex aeterna*" the Divine law of St. Thomas.<sup>4</sup> It constitutes the final authority to which man has to turn "in order . . . that (he might) . . . know without any doubt what he ought to do and what he ought to avoid."<sup>5</sup>

All men, some more, and some less, know of the "*lex aeterna*." For God has implanted in the soul of man the principles of proper action.<sup>6</sup> This is man's partaking of the "*lex aeterna*" — a participation which is called the "natural law,"<sup>7</sup> and by virtue of which we have within us a knowledge of certain general principles and precepts of right and justice.<sup>8</sup> No one can know the "*lex aeterna*" as it is, in its entirety; but every rational being knows it in its reflection or

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1 Summa Theologica, I. II., quaest. 91, art. 1.

2 Summa Theologica, I. II., quaest. 93, art. 1.

3 Summa Theologica, I. II., quaest. 93, art. 1.

4 Compare St. Augustine's definition of the "*lex aeterna*": "*Lex aeterna est ratio Divina vel voluntas Dei, ordinem naturalem conservari iubens, perturbari vetans.*" Contra Faustum, XXII, 27.

5 Summa Theologica, I. II., quaest. 91, art. 4.

6 Summa Theologica, I. II., quaest. 91, art. 2.

7 Summa Theologica, I. II., quaest. 90, art. 1; quaest. 91, art. 2; quaest. 94.

8 Summa Theologica, I. II., quaest. 91, art 3; quaest. 90, art 2; quaest 94, art: 1.

effects.<sup>9</sup> All laws, insofar as they partake of right reason, are derived or proceed from the eternal law. For nothing is just and lawful but what has been drawn from the "*lex aeterna*."<sup>10</sup>

We remember that St. Thomas Aquinas's basic precept of his natural moral law is, "that good is to be done and ensued, and evil is to be avoided."<sup>11</sup> This constitutes the most self-evident and at the same time indemonstrable proposition; that is to say, the first precept of natural law.<sup>12</sup> "All other precepts of natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided."<sup>13</sup> From this fundamental precept are derived "certain most general principles known to all,"<sup>14</sup> that is to say, the "*primary*" natural (moral) law. These general principles of right and lawful action are discovered by reason. They can never entirely be blotted out of the hearts of man.<sup>15</sup> Neither could they change,<sup>16</sup> for they are valid for all times and places.

Besides the primary precepts, "there belong to the natural law certain secondary and more detailed precepts, which are, as it were, conclusions following closely from first principles,"<sup>17</sup> and which constitute the "*secondary*" natural (moral) law. Now we are told that the secondary natural law is not valid for all times and all places, but does, and must, change,<sup>18</sup> since it is related to matters of concrete human actions. These conclusions from first principles, which form the secondary natural law, cannot be drawn, however, with absolute certainty. For "the practical reason is concerned with

<sup>9</sup> Summa Theologica, I. II., quaest. 91, art. 2; quaest. 93, art. 2.

<sup>10</sup> Summa Theologica, I. II., quaest. 93, art. 3.

<sup>11</sup> Summa Theologica, I. II., quaest. 94, art. 2.

<sup>12</sup> Summa Theologica, I. II., quaest. 91, art. 1.

<sup>13</sup> Summa Theologica, I. II., quaest. 94, art. 2.

<sup>14</sup> Summa Theologica, I. II., quaest. 94, art. 6; See also *ibid.* quaest. 91, art. 3.

<sup>15</sup> Summa Theologica, I. II., quaest. 91, art. 3.

<sup>16</sup> Summa Theologica, I. II., quaest. 94, art. 5.

<sup>17</sup> Summa Theologica, I. II., quaest. 94, art. 6.

<sup>18</sup> Summa Theologica, I. II., quaest. 94, art. 4; art. 5.

practical matters which are singular and contingent. . . . Wherefore human laws cannot have that inerrancy that belongs to demonstrated conclusions of science.”<sup>19</sup> But the fact that these conclusions lack inerrancy does in no way lessen their practical importance. “Nor it is necessary for every measure to be altogether unerring and certain, but according as it is possible in its own particular genus.”<sup>20</sup> The practical human reason, which draws these conclusions, is concerned with human *actions*, that is to say, with contingent matters. And “the more we descend to matters of detail, the more frequently we encounter defects,”<sup>21</sup> inasmuch as “the truth is not known to all as regards the conclusions, but only as regards to the principles which are called common notions.”<sup>22</sup> “In matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to the general principles: and where there is the same rectitude in matters of detail, it is not equally known to all.”<sup>23</sup>

St. Thomas Aquinas’s justification of the existence and necessity of a human (positive) law is that “the natural law was perverted in the hearts of some men, as to certain matters . . . which perversion stood in need of correction.”<sup>24</sup> In short, the fall of man perverted human nature, blurred reason, and weakened the will,<sup>25</sup> particularly as to “a particular action, insofar as reason is hindered from applying the general principle (which can nowise be blotted out from the hearts of men) to a particular point of practice.”<sup>26</sup> It is, therefore, always the secondary natural law which may be-

<sup>19</sup> Summa Theologica, I. II., quaest. 91, art. 3; See also *ibid.* quaest. 94, art. 4.

<sup>20</sup> Summa Theologica, I. II., quaest. 91, art. 3; See also *ibid.* quaest. 92, art. 2; and quaest. 94, art. 4.

<sup>21</sup> Summa Theologica, I. II., quaest. 94, art. 4.

<sup>22</sup> Summa Theologica, I. II., quaest. 94, art. 4.

<sup>23</sup> Summa Theologica, I. II., quaest. 94, art. 4.

<sup>24</sup> Summa Theologica, I. II., quaest. 94, art. 5; See also *ibid.* quaest. 93, art. 6; quaest. 94, art. 4.

<sup>25</sup> Summa Theologica, I. II., quaest. 94, art. 6; quaest. 93, art. 6; quaest. 94, art. 4; quaest. 94, art. 5.

<sup>26</sup> Summa Theologica, I. II., quaest. 94, art. 6.

come obscured through sin and evil inclination. As to the essence of the human law, St. Thomas states that, "it is from the precepts of the natural law, as from general and undemonstrable principles, that the human law needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed . . ." <sup>27</sup> The basic importance of the human law lies therein that it enables, so to speak, disabled persons to follow the dictates of the natural law. <sup>28</sup> From all this we may infer that the human law must always be in complete conformity with the principles of natural law, and that the power to frame human laws must be derived from the natural law itself: <sup>29</sup> "The first rule of reason is the natural law . . . , consequently every human law has just as much of the nature of law, as it is derived from the natural law." <sup>30</sup> For the human law "is ordained to an end (the common good), <sup>31</sup> and is a rule or measure ruled and measured by a higher measure. And this higher measure is twofold, *viz.*, the Divine law and the natural law." <sup>32</sup>

When St. Thomas Aquinas came to discuss the different subdivisions of the human (positive) law, his system, that had up to this point been extremely clear and logical, becomes somewhat indefinite. The amazing thing is that this was on a part which seemed absolutely unnecessary to his system of right and justice. His attempt to subdivide and classify the different aspects of the human law is primarily an effort to reconcile Aristotle, Gaius, Ulpian, and Isidore of Sevilla <sup>33</sup> by clinging, however, to the classification laid

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<sup>27</sup> Summa Theologica, I. II., quaest. 91, art. 3; — As to the "essential conditions of the law," see *ibid.* quaest. 90.

<sup>28</sup> Summa Theologica, I. II., quaest. 95, art. 1.

<sup>29</sup> Summa Theologica, I. II., quaest. 93, art. 3; quaest. 95, art. 2.

<sup>30</sup> Summa Theologica, I. II., quaest. 95, art. 2.

<sup>31</sup> See, for instance, Summa Theologica, I. II., quaest. 90, art. 1; art. 3; art. 4; quaest. 92, art. 2; quaest. 93, art. 2; quaest. 96, art. 1; art. 3; art. 6.

<sup>32</sup> Summa Theologica, I. II., quaest. 95, art. 3.

<sup>33</sup> St. Thomas refers to Isidore and his division or classification of the human law in: Summa Theologica, I. II., quaest. 95, art. 1; art. 2; art. 3; and particularly

down by Isidore. Gaius and Ulpian had divided law into (a) "*ius naturale*," which is that "law which nature has taught to all living beings;" (b) "*ius gentium*," which is that "law which natural reason has set up among men," or that "law which all peoples make use of;" and (c) the Roman civil law.<sup>34</sup> The Roman "*ius naturale*" fully corresponds to what St. Thomas defines as the natural law, namely (a) as that law according to which "every substance seeks the preservation of its being, according to its nature;" (b) as that law "which nature has taught to all animals, such as . . . education of offspring and so forth; and (c) as that "inclination to good, according to the nature of (man's) reason, which nature is proper to him."<sup>35</sup> According to the third definition of the natural (moral) law, by virtue of which "man has a natural inclination to know the truth about God, and to live in society,"<sup>36</sup> one should expect that the Roman concept of the "*ius gentium*" would be classified by St. Thomas under the natural moral law, particularly under the "secondary" natural law, since both seem essentially to be the same.

Now in spite of the close affinity of the Roman "*ius gentium*" and the natural moral law of St. Thomas, the "*ius gentium*" of St. Thomas takes a rather vascillating position somewhere between the natural law and the human (positive) law. For, as we shall see later, this "*ius gentium*" is really of dual origin and, therefore, of dual essence with St. Thomas. In his "article," "whether the *ius gentium* is identical with the *ius naturale*,"<sup>37</sup> St. Thomas declares it of form of human (positive) law, while in other places he calls it a form of "secondary" natural law.<sup>38</sup> Then he again asserts that the positive (human) law is divided into the

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in quaest. 95, art. 4 — Isidore drew heavily upon the Fathers from Tertullian on, and probably on some elementary books of the "Institutes" of Gaius. — See, for instance, Kuhler, "Isidore Studien," in: *Hermes*, vol. XXV (1890), pp. 497, 518.

<sup>34</sup> See, for instance, Gaius, *Institutiones*, I, titl. 1.

<sup>35</sup> *Summa Theologica*, I. II., quaest. 94, art. 2.

<sup>36</sup> *Summa Theologica*, I. II., quaest. 94, art. 2.

<sup>37</sup> *Summa Theologica*, II. II., quaest. 57, art. 3.

<sup>38</sup> *Summa Theologica*, I. II., quaest. 95, art. 4.

"*ius gentium*" and the "*ius civile*,"<sup>39</sup> and that the "*ius gentium*" "falls short of the natural law, as the Jurist says, because the latter is common to all animals, while the former is common to man only."<sup>40</sup> But soon he remembers again the proximity of his own natural (moral) law and the Roman definition of the "*ius gentium*," of the "law which all peoples make use of."<sup>41</sup> Thus he is induced to incorporate the "*ius gentium*" in his natural law, or to be more exact, in his "secondary" natural law.

As to the origin of the "*ius gentium*," St. Thomas Aquinas, on the one hand, asserts that it is grounded, quite in accordance with its "positivistic" nature, in certain historically existing conditions, in the mutual agreement among men, in human consent, or in a common determination caused by a certain necessity or by the utility or idea of the common good to be fostered thereby.<sup>42</sup> On the other hand, he again declares it to have originated, like the "secondary" natural law, from logical conclusions from first principles,<sup>43</sup> thus including the "*ius gentium*" in his natural law. In the latter sense this "*ius gentium*" partakes of the absolute essence of the natural law, insofar as its first principles are to be found, in the last analysis, in the eternal law.<sup>44</sup>

Undoubtedly, the "*ius gentium*" of St. Thomas Aquinas is of dual essence. Its more immediate origin and the cause of its existence or validity is to be looked for in a rather hypothetical common human agreement and custom. However, since it also partakes of the moral absoluteness of the natural law, and, in the last analysis, of the eternal law, its ultimate grounds are to be found in the "*lex naturalis*" and, therefore, in the "*lex aeterna*."

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39 Summa Theologica, I. II., quaest. 95, art. 4.

40 Summa Theologica, II, II, quaest. 57, art. 3.

41 Compare St. Thomas Aquinas, Summa Theologica, I. II., quaest. 94, art. 6: ". . . there belong to the natural law . . . certain most general precepts, that are known to all."

42 See, for instance, Summa Theologica, II. II., quaest. 57, art. 3.

43 Summa Theologica, I. II., quaest. 95, art. 2.

44 Summa Theologica, I. II., quaest. 95, art. 4.

The basic problems of the "*ius gentium*" of St. Thomas Aquinas are the questions of private property and slavery. St. Thomas insists that originally a universal community of all property or possession<sup>45</sup> as well as the complete freedom of all men prevailed.<sup>46</sup> In compliance with a general custom existing among the peoples the institutions of private property and slavery made their appearance. In order to reconcile these new institutions with the precepts of natural law, St. Thomas maintains that they form part of the "secondary" natural law, since both are not only beneficial to the human race, but also were introduced for their necessity and utility in achieving the common good,<sup>47</sup> in spite of the fact that the "primary" natural law proclaims the community of all property as well as the freedom of all men. Originally neither private property nor slavery were part of the natural law. Man was at liberty, however, to introduce both as soon as their necessity and utility for the common good was perceived. But once introduced, these two "secondary" natural law principles must be observed with the same consistency as every "primary" natural law precept. It cannot be denied that this rather vascillating position of St. Thomas as regards the "*ius gentium*" is, from a practical point of view, of the most far-reaching social and political consequences. For it furnishes an excellent argument not only against the excesses of a capitalistic economy by referring to the original or "natural" community of all property, but also against any form of communism by pointing out that the institution of private property rests upon the sanctity of an irrevocable agreement among men.

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<sup>45</sup> See, for instance, *Summa Theologica*, I, quaest. 98, art. 1; II. II., quaest. 66, art. 1; art. 2.

<sup>46</sup> *Summa Theologica*, II. II., quaest. 57, art. 3.

<sup>47</sup> *Summa Theologica*, II. II., quaest. 57, art. 3.