THE STATE AS GUARDIAN OF MORALS?

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THE publication of the Wolfenden Report has re-opened an old debate. How far should human legislation enter the field of morals and condemn behaviour reprobated by the Christian tradition? The difference between crime and sin is pretty generally recognized at the extremes; thus a man will admit to a technical breach of the rules and regulations without concluding thereby that it is matter for the Sacrament of Penance. The difficulty is to know where to draw the line between what should be legislated against and what should be left well alone, even though it may be objectionable to many on grounds of ethics, religion, or culture. Let us attempt to mark the frontier, or rather to narrow the marches between the temporal and spiritual powers in the culpability country.

Among Catholics the guarded approval which greeted the Report was presently followed by dissent. Perhaps their attitude will harden when the proposals come before Parliament, but for the moment it remains unsettled. The ambiguity reflects an oscillation between two opposite charges in the widespread suspicions entertained about our social mentality. Grumbles at one moment about clerical fussiness and intrusion into private affairs are followed at the next by mutters about condoning human frailties which do not interfere with ecclesiastical privileges. We are told of priests with blackthorns scouring the hedgerows for courting couples of a summer evening, of petulant sacristans shooing lightly-clad tourists away from the churches, of orders from the pulpit telling us how to vote: behind all this lurks an archetypal Mrs Grundy—crowned with a biretta. On the other hand, what about bagnios in the old Papal States? and smuggling through the Customs with a clear conscience? Even nuns, my dear; and you may be sure if you see a clerical collar on the racecourse or in the bar he's a Roman. So there we are, either meddling with the private conscience or letting down the public standards. Prudery and pools. Torquemada and Tammany.

So let us look at a classical statement of our position found in the Treatise on Law by Thomas Aquinas.[1] Its teaching on the

1 *Summa Theologica.* I-II, 90-108.

present question can be summarized under two injunctions:

(1) that all legality should be moralized; and

(2) that not all morality should be legalized.

The second is our main topic, yet the first, more vexed, is relevant. Before touching on them both, however, it will be well to indicate some presuppositions and define some terms.

Law is taken to mean a reasonable ordinance enacted and promulgated by the ruling power of a complete community for the sake of its common good.[2] The idea is more majestic than that of *ad hoc* precepts of parents and superiors or of departmental standing orders. The visible Church and the State are the two communities on our map. When Aquinas wrote they were not separate as they are now, even where the Christian religion is officially established. Nevertheless his acknowledgment that each has proper rights underived from the other allows his argument to apply wherever in the contemporary scene their relations are those of mutual support, or at least of mutual tolerance. Moreover, we agree with him that the State is a natural growth, represents an intrinsic value, and is endowed with moral power; not with the Stoic Christian theory that it is merely a conventional institution, a provisional arrangement *propter peccatum*, a coercive system to check anarchy.

Church and State both channel an authority descending from God; consequently their commands share in some of the force of Natural Law. Natural Law is taken, not in its eighteenth-century sense as limited to a level of human nature imagined as stretching horizontally under the stratum of grace, but as governing all activity which springs spontaneously, voluntarily, and responsibly from within the human subject. In other words *nature* is given a teleological rather than a positional reading; in this sense the fulfilment of the two great precepts of charity and the supernatural activity of the cardinal virtues obey the Natural Law. Thus a man living in grace serves the State by the infused justice of the sons of God, not only by a sort of acquired 'pagan' justice. Our dead in the wars are witnesses to *dulce et decorum est pro patria mori*; they also earn our Lord's tribute, 'Greater love hath no man than this, that he lay down his life for his friends'.[3]

The peculiar function of the Church and the State considered as

2 I-II, 90, 1-4.

3 John xv, 13.

juridical bodies is to issue Positive Law, *lex positiva, lex humana,* called Canon Law for the Church, Civil Law (in the widest sense) for the State. Here the obligation of obeying arises less from its interior content than from the fact of its due enactment by authority. As such the ordinance is not an inference from Natural Law but a choice of certain measures to maintain and protect the body politic.[4] Of course the moral principle of obedience to the commands of just authority is supposed. The ready test of the difference between Natural Law and Positive Law is this: by the first, certain behaviour is right or wrong, and therefore commanded or forbidden; by the second, certain behaviour is commanded or forbidden, and therefore right or wrong. The Natural Law is concerned with morality; what is forbidden is sin, an act, and vice, a habit. The Positive Law is concerned with legality; what it forbids and will punish we call a crime. Henceforward when we speak of Law without qualification we mean Positive Law. Good morals consists in our moving towards God, bad morals in the contradiction (not moving) or the contrary (moving away). Moral science will judge laws to be good or bad by reference to this movement. Juridical science will rightly take a less sweeping view, and restrict itself to what is legal and what illegal.

Moral and legal categories can coincide in given types of activity. Thus good morals can be legal (for instance, keeping contracts), and bad morals can be illegal (for instance, murdering). Instances abound of the clash between conscience and Law under a tyranny. Yet even in a true polity good morals could conceivably be illegal (almsgiving in a Welfare State?); and bad morals can certainly be legal (for instance, a Catholic who takes advantage of the divorce laws to be faithless to his wife and to re-marry during her lifetime).

In this last situation, where the moral convictions of Catholics are not shared by their fellow-citizens, difficulties can arise, but no great social problem. The State cannot be expected to endorse the tenets of a minority. Even the Church's own legislation (as distinct from the Divine Law and the Gospel Law), while proceeding against certain offences (usually reducible to outward injustice), will not attend to others. A penalty is attached to procuring an abortion, but not to the deadlier sin of despair.

4 I-II, 95, 2. See T. Gilby, *Principality and Polity*, London, 1958. *The Political Thought of Aquinas*, Chicago, 1958. Pp. 159-191, 214-250.

Ecclesiastical judgment stresses the work of virtue not its mode, the fulfilment of a plain obligation not the interior dispositions. It can insist that God should be publicly worshipped; our devotion, however, is beyond its reach. A legislator can pronounce and enforce only within the field of his knowledge. God alone searches the heart and the reins. Here we may note that for all the lurid glamour popularly shed on excommunication its proper effects are nothing like so tragic as those which follow when a man cuts himself off from God's friendship by grave and perhaps hidden sin.[5]

The relations between morality and legality present more of a problem when certain practices are repugnant to moral sentiments shared by most citizens. Unanimity was more comprehensive when Aquinas wrote, and extended to such matters as heresy, usury, irreligion, the breaking of vows. Since then we have retreated to certain fundamental decencies, despite gains on certain fronts, for instance against cruelty to animals, bad working conditions, the abuse of private property, and, more patchily, victimization and invasions of freedom. Even so, we hesitate before demanding that the State should enforce an ethical code to which most of us consent. It is time to return to the two injunctions we have drawn from the *Summa Theologica.*

First, should all Law be moralized? In other words, does human legislation carry the moral obligation that it should be obeyed? The question, whether human law binds at the bar of conscience, is answered with an unqualified yes in the case of just laws.[6] These are those which pass the threefold test of purpose (for the common good), agent (competent authority), and form (fair distribution of responsibility). The only doubt concerns unjust laws: these, however, are off our present beat. Aquinas does not envisage purely penal laws, *leges mere poenales*, the notion of which was introduced by sixteenth-century moralists. Their moral force is expressed in the disjunctive proposition: Keep the law or pay the price. There is no sin if you break the law so long as you are not guilty of contempt for authority and are prepared to suffer the consequences. The notion is defended as a practical contrivance for not being hag-ridden by the multiplicity and complexity of regulations, or for preserving conscience from

5 I-II, 100, 9; 106-108. *Codex Juris Canonici*, cc. 2257-2267.
6 I-II, 96, 4.

pettifoggery, or for meeting the legislator's intention of not imposing a moral burden and perhaps his preference for collecting the fine. It seems to be more native to those countries where the Roman Law has been received and where the policeman is your natural enemy and, with genial cynicism, you have to defend yourself against the State, than to England where Common Law traditions survive. It has never been really digested by the higher-minded moralists to whom Law is too noble and stately to descend to such shifts and deal with the by-blows of by-laws. We repeat, Law as such commands a moral response; and pass on to the second question.

Should all morality be legalized? Aquinas treats the question in two articles, considering first the prohibiting or negative and next the encouraging or affirmative rôle of legislation.[7] Here we may note in parenthesis a difference between the two: the obligation of keeping a negative precept is continuous (*obligat semper et ad semper*) whereas an affirmative precept binds only on the proper occasions (*obligat semper sed non ad semper*). Thus I must never be stealing but I need not always be fearing God and honouring the Queen. Or again, I am constantly bound to avoid sin and crime, but always to be practising the virtues or actively serving the State would be an impossible burden.

Well then, is it the office of Law to restrain all vices? The reply is careful and restrained. Law, Aquinas argues, is a measure for human acts, and a measure, according to Aristotle, should be congruous (*homogenea*) to the thing measured. Laws should tally with social conditions. Thus Isidore requires legislation to make practicable regulations, in keeping with nature and the customs of the country. Now what is practicable depends on ability and training: a grown-up can do what a child cannot do, a developed character can do what a person lacking formed habits cannot do. Hence you do not lay down the same laws for grown-ups and for children, and you will censure and have the law against grown-ups for doing what you will tolerate in children. Similarly with men of probity and worth and with middling sort of men. Laws are enacted for the mass of men, the majority of whom are not highly virtuous. You do not prohibit all the vices from which excellent men refrain, but only the graver ones which most of us

7 I-II, 96, 2, 3.

have the ability to avoid, and chiefly those harmful to others and to the conditions essential to social life.[8]

There is no shrug accompanying this recognition that lawfulness should be within the power of ordinary people. Aquinas is aware that Law is educational.[9] All he is doing is to enunciate a good Colonial Office principle: mature citizenship cannot be suddenly demanded but should be led up to by stages. We know what happens when the forms of democracy are imposed and the democrats are too few. Here and elsewhere he is sensitive to the dangers to freedom when our governors take too much on themselves and nag at our morals. It has been left to the Communist States to create internal crimes of mind and heart, and, logically, to treat them with brain-washing.

The next article turns to affirmative precepts, and considers whether virtuous conduct should be enforced.[10] He admits the social implications of all the virtues. Bravery, itself a personal quality, springs to defend the State and the rights of our friends. And so it is with all the virtues: all more or less immediately involve the well-being of the community. Since Law is ordered to its end, there is no virtue about which it cannot pronounce. But, he adds the rider, it cannot prescribe every act of every virtue, but only those acts which serve the general welfare. These are those matters affecting public decency and security which in the judgment of the legislator belong to good manners (*pertinentia ad bonam disciplinam*).

This teaching is qualified with a distinction. There are two elements: the virtuous deed, and the doing of it virtuously. Law commands the first, and intends the second. Thus it may require us to perform deeds of justice and courage, but not that our dispositions should be just and courageous, for these are habits only we ourselves and grace can produce. This is the meaning of the saying, 'the purpose of a precept is not contained within the law', *finis praecepti non cadit sub lege*.

The underlying principle is that the scope of human government is limited to what is outward and evident. It does not cover purely internal acts. Where it cannot judge, there it cannot punish. If we take crime to mean what in fact will be punished, then we

8 I-II, 96, 2. *Metaphysics*, 1053 a24. *Etymologies*, ii, 10. v, 21. (PL lxxxii, 121, 203).
9 I-II, 96, 2 ad 2.
10 I-II, 96, 3.

can conclude that its forbidding function is concerned with criminality as such, not with immorality as such—we take immorality to signify every kind of sinfulness, not merely one kind, and that not the worst.

Punishment is pain inflicted on us against our will. Both notes, of suffering and of involuntariness, call for apology. The position, roughly, is this, human punishment can be defended only on pragmatic grounds. Somehow the community is the better for it: the actual criminal is reformed, the potential criminal deterred, the innocent have a danger removed from their midst. Human punishment is prospective in that it seeks a future good effect, and it is the office of the legislator in the light of this purpose to decide what acts are to be treated as crimes.

It is not for us to assume the rôle of manifesting retributive justice by purely retrospective punishment. We have not the ability, even if we could be trusted to have the proper purity of motives, to bring about an exact correspondence and an intrinsic connection between crime and punishment, between choosing evil and finding it. An eye for an eye and a tooth for a tooth is but a slapdash approximation too easily made an occasion for spleen and fright. The vindication of the outraged sentiments of the community may contribute to forensic rhetoric, but is better left to the prosecution than to the judge and jury. Temperamentally most of us are bad punishers, being either too soft or too irascible. There would not be such a need for *vindicatio*, which is a part of justice, were we better at *correctio fraterna*, which is an effect of charity.[11]

11 II-II, 33, 1; 108, 4.