

Chapter 3

Limited Government and Rule of Law

Any discussion of the nature and ends of liberty and justice inevitably touches upon the role of government and law in society. A good place to begin reflecting upon natural law's approach to these questions is Aquinas's understanding of law.

In his *Summa Theologiae*, Aquinas defined law “an ordinance of reason for the common good, made by him who has care of the community, and promulgated” (ST I-II, q.90, a.4). “Law” in this statement means laws formally made by the legitimate political authority. “Reason” means natural law, which signals the law itself must be reasonable rather than driven by whatever the authorities just happen to want. “Him” means the political authority: i.e., government and legal officials such as legislators, judges, and government ministers. Finally, the “common good” means the conditions that assist individuals and groups in a given political community to make free choices for the goods that promote human flourishing.

This last point is especially important because the common good of a given political community is not a license for the state to do whatever it wants. What is called the “political common good” puts firm limits what the state can do vis-à-vis individuals and non-state communities ranging from the family to businesses.

The political common good

Natural law understands the political common good as consisting of all those conditions in a given political community (like the Commonwealth of Australia, the State of Michigan, or the City of Montreal) that tend to favour,

facilitate, and foster the coherent participation of each individual in goods like truth, work, and beauty, which are self-evidently good for all humans.

Note that a particular characteristic of the political community's common good is that it is not the all-inclusive end for its members. Rather it is instrumental insofar as it is directed to *assisting* the flourishing of persons by fostering the conditions that facilitate—as opposed to try and directly realize—the free choice of its members to flourish.

The ways in which the legitimate authorities of a political community serve this end might include, among others, interacting with other legitimate political authorities, protecting the members of the political community from hostile outsiders, vindicating justice by punishing wrongdoers, and defining and adjudicating the responsibilities associated with particular relationships, such as contractual duties. It is harder, for example, to choose to pursue the good of knowledge in a situation of civil disorder. Likewise, we know that the incentives for us to work are radically diminished if there is no guarantee that our earnings will not be arbitrarily confiscated by others or the state.

It's important, however, to remember that all this is about assisting people to flourish, and that helping individuals and associations in a given political community means precisely that: *helping*. The state does not assist individuals and communities by dulling, usurping, or annulling their ability and personal responsibility to make the free choices that actualize human flourishing. In short, the activities and powers of the political authorities are themselves limited by the rationale for a political community. This means that the goal of the political common good is *not* the all-round moral fulfillment of every member of that community. The political common good thus limits what state officials may do in a given political community. That includes the realm of what is called public morality.

Natural law, the state, and morality

Natural law's approach to the topic of the state's role concerning public morality is grounded on three pivotal points.

First, natural law holds that all human-made law (positive law) has a moral dimension. Even something as mundane as traffic regulations is understood as possessing an underlying moral logic. Traffic laws rightly regulate the free choices of millions of people to drive, because without such laws goods

such as human life and health are put at unreasonable risk. When we obey traffic regulations, we implicitly embrace that moral rationale.

Second, natural law underscores that the moral principles and norms of justice that apply to all forms of human action apply as much to state actors as they do to individuals and communities. In Chapter 1, we observed that natural law emphasizes that there are exceptionless moral norms that identify certain choices as always and in every case evil, and hence never to be chosen by individuals or communities. Those who write legislation, apply policy, or interpret law are *not* exempt from adherence to these norms. Thus the state cannot engage in activities such as stealing people's property, violating their bodily integrity by torturing them, forcing them to lie, etc.

Third, natural law does not hold that all moral evil can or should be prohibited by the state. The free choice to lie, for example, is always wrong because such acts always damage the good of truth. Yet we don't legally prohibit and punish all acts of lying. An act of lying damages the liar himself and many types of communities (friendships, families, etc.). Not all lies, however, directly undermine the *political* common good. Hence, we generally restrict legal prohibition and punishment of lying to areas such as court proceedings or devices like contracts. By contrast, all acts of murder are not only wrong in themselves; they also severely damage the political common good insofar as failure to deter and penalize murderers severely undermines the ability of individuals and communities to pursue the good. The law consequently prohibits and punishes acts of murder.

Some of these distinctions were worked out at length by Aquinas. Consider, for example, the *Summa's* description of the proper goal of law: "For the end of human law is the temporal tranquility of the state, which end law effects by directing external actions, as regards those evils which might disturb the peaceful condition of the state" (ST I-II, q.98 a.1c).

The words "external actions" and "peaceful condition of the state" tell us that positive law is concerned primarily with the demands of justice and peace. Aquinas spells out the fuller significance of this when he explains:

Because human law is ordained for the civil community, implying mutual duties of man and his fellows: and men are ordained to one another by outward acts, whereby men live in communion with one another. This life in common of man with man pertains

to justice, whose proper function consists in directing the human community. Wherefore human law makes precepts only about acts of justice (ST I-II q.100 a.2c)

Then, as if to make sure his readers get the point, Aquinas states: “and if it commands acts of other virtues, this is only in so far as they assume the nature of justice” (ST I-II q.100 a.2c).

Underlying this claim is Aquinas’ argument that not all acts of virtue have the political common good as their object. The object of many acts of virtue is the *private* good of individuals, families, and other communities. Such acts fall outside the immediate scope of the political common good for which the rulers are responsible.

This becomes clearer when Aquinas answers the question, “Whether human law prescribes acts of all the virtues?” His response is as follows:

The species of virtues are distinguished by their objects... Now all the objects of virtues can be referred either to the private good of an individual, or to the common good of the multitude: Thus, matters of fortitude may be achieved either for the safety of the state, or for upholding the rights of a friend, and in like manner with the other virtues. But law... is ordained to the common good. Wherefore there is no virtue whose acts cannot be prescribed by the law. Nevertheless human law does not prescribe concerning all the acts of every virtue: but only in regard to those that are ordainable to the common good—either immediately, as when certain things are done directly for the common good—or mediately, as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace (ST I-II, q.96 a.3c).

To be sure, Aquinas does not regard justice and peace as having minimalist content. But to Aquinas’ mind, the law’s proper concern for justice and tranquility does not authorize the state to promote all acts of virtue. Natural law’s conception of the political common good thus puts *principled* constraints on using positive law to shape the free choices and actions of individuals and groups living within a given political community.

Subsidiarity and the state

This does not exhaust the ways in which natural law restricts the scope of state power. Not only does the political common good limit what the state may do vis-à-vis individuals; it also constrains what the state may do concerning the freedom of the communities over which it exercises authority.

One way of understanding this is through the natural law concept of *subsidiarity*. The word itself is derived from the Latin *subsidium*, meaning “to assist.” This idea was partially formulated by Aquinas when he commented, “it is contrary to the proper character of the state’s government to impede people from acting according to their responsibilities—except in emergencies” (Aquinas, 1265-1273/1975: III c.71, n.4). An example of such an emergency might be when the government requires my business to provide certain goods to the military in time of war, even if doing so makes me unable to fulfil my contractual obligations to supply the same goods to private actors. In this case, the state’s responsibility to protect the country from external aggressors rightly overrides my personal obligations.

The principle of subsidiarity thus reminds us that there are numerous free associations and communities which precede the state and establish many of the conditions that assist people to achieve perfection. They thus have a primary responsibility to give others what they are objectively owed in justice. The way this works in practice was outlined by John Paul II in his 1991 encyclical *Centesimus Annus*. It states:

a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good (John Paul II, 1991: 48).

The same encyclical further clarifies that

Such supplementary interventions, which are justified by urgent reasons touching the common good, must be as brief as possible, so as to avoid removing permanently from society and business systems the functions which are properly theirs, and so as to avoid enlarging excessively the sphere of State intervention to

the detriment of both economic and civil freedom. (John Paul II, 1991: 48)

The interventions of higher communities, such as the state, in the activities of lower bodies should therefore be made with reference to the political common good: i.e., the conditions that enable all persons to make the free choices through which they fulfill themselves. Subsidiarity thus combines axioms of *non-interference* and *assistance*. It follows that when a case of assistance and co-ordination through law or the government proves necessary, as much respect as possible should be accorded to the rightful liberties of the assisted person or community.

The primary significance of this principle thus lies in the fact that such liberties are essential if people are to choose freely moral goods and virtues: i.e., through acting and doing things for ourselves—as the fruit of our own reflection, choices, and acts—rather than have others do them for us.

Subsidiarity thus suggests that the state may intervene directly only when it is clear there is no other association or community in closer proximity to those with a particular need, or that all other associations and communities have failed to meet the need. And even in those instances when the state appears to be the only institution capable of meeting the need, the principle of subsidiarity suggests that once a non-state community or association has emerged which is capable of addressing the need, the state should allow that association to assume responsibility for fulfilling this need.

At the same time, there are particular responsibilities that natural law does regard as the state's prerogative. Perhaps the most important of these is something that free societies see as fundamental to their very identity: rule of law.

Reason and the rule of law

Aquinas specified that the rule of law is “not the rule of men” (Aquinas, *Sententia Libri Ethicorum*, V.11 n.10 in Busa, 1996). By “rule of law,” Aquinas did not primarily mean that those charged with administering the law simply upheld established rules consistently. Rule of law was, for Aquinas, a matter of acting according to *reason* rather than our passions or in an arbitrary fashion.

Aquinas believed that law should determine as far in advance as possible what judges should decide (Aquinas, 1271-1272, *Sententia Libri*

Ethicorum, V.11 n.10, in Busa, 1996). Nonetheless even after laws are made, announced, and implemented, Aquinas recognized that further exercises of judgment (and therefore reason) are required, not least because many laws inevitably require judges to resolve unavoidable ambiguities of meaning, to reconcile different laws, and to fill in gaps in law.

This attention to reasonableness is at the heart of natural law's conception of the rule of law. It stresses that the very idea of the rule of law is partly derived from the conclusion that it is *reasonable* to limit arbitrary power. Rule of law thus contains a distinct inner morality insofar as arbitrariness is understood to be inherently unjust.

In the twentieth century, this point was emphasized by the legal philosopher Lon Fuller. He maintained that rule of law incarnates an inner moral reasoning inasmuch as there are certain conditions of reason that a law must meet before it is understood to be a legitimate law (Fuller, 1977). For Fuller, rule of law means that a law must be:

- ♦ sufficiently general;
- ♦ publicly promulgated (you cannot have secret laws);
- ♦ prospective (i.e., applicable only to future behaviour, not past);
- ♦ clear and intelligible;
- ♦ free of contradiction;
- ♦ relatively constant in the sense that they are sufficiently stable to allow people to be guided by their knowledge of the content of the rules;
- ♦ possible to obey; and
- ♦ administered in a way that does not wildly diverge from their obvious or apparent meaning (Fuller 1977: 33-38).

Unless, for instance, a law is clear and promulgated, it fails to meet a basic requirement of reason and is therefore unjust. Note, however, that this requirement is not simply a technical precondition for a functioning legal system. It contains an inner reasonableness insofar as these requirements testify that there are coherent and just (reasonable) and incoherent and unjust (unreasonable) ways of applying laws. Hence, it is through conforming to these basic principles of reasonability that law meets the minimal requirements of

justice and makes a vital contribution to freedom from unjust coercion and arbitrary decision-making by those wielding legitimate coercive power.

From law to the economy

Natural law's conception of limited government and rule of law relies heavily upon the notion that protecting the ability of individuals and communities to make free choices cannot be grounded on a notion of freedom detached from reason, or the idea of liberty for the sake of autonomy. The same logic manifests itself in an area to which natural law thinkers have long devoted considerable attention: the realm of property and economic relations.