Global Science Research Journals

ISSN: 2437-1904 Vol. 3 (3), pp. 094-106, July, 2015

http://www.globalscienceresearchjournals.org/

Global Journal of Art and Social Science Education

Review

The rationality of law: Aquinas and Africa

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Accepted 22 July, 2015

Many African legal students have hardly been properly schooled on Thomas Aquinas' legal thoughts. Part of the reason is general ignorance of the contribution of Aquinas to the historical development of the legal system. Those, who at all, mention Aquinas in their legal write-ups, simply engage in criticizing his natural law theory without paying a holistic attention to his legal doctrines. With that bias, Aquinas is hardly objectively presented in the legal field. This paper undertakes the challenge of unveiling, to African legal scholars, the rationality of law in the perspectives of the Angelic Doctor. Aquinas classical definition of law, his insistence that law is for the common good backed by a competent authority are strong indications that Aquinas' legal datum is not simply a walk-over in the packages of legal theories. African countries are veritably governed by constitutions, but it is noteworthy that there is no rule of law in the continent. The dearth of rule of law is unquestionably the brain child of corruption in the black continent. People do to others whatever they wish and whenever they want and go legally unchallenged. Some political ministers loot public properties, kill political opponents with all impunity; judges discharge their legal duties based on financial might and many are involved in corrupt practices with utter disregard of the law. This paper is challenged to critically evaluate the African legal system with the values of Thomistic jurisprudence in order to inculcate the sense of rule of law in the continent.

Key words: Africa, authority, common good, justice, Law

INTRODUCTION

This essay is powerfully motivated by a committed desire to bring the legal thoughts of Thomas Aquinas, the great giant of the 13th century AD to Nigerian legal students, who have not known much of him as a strong legal theorist. Many scholars have written and criticized Aquinas' natural law doctrine without actually reading the legal treatise of the Angelic Doctor (*ipsissima verba Aquinati*). This essay aims at exposing the spirit of Aquinas' legal doctrines so that interested students can know what the Angelic Doctor penned down about

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law in general and especially on the nature of natural law about which Aquinas is widely criticized. This essay wishes also to see to what extent Aquinas legal insights could be applied to the African context. We shall ask whether African laws have always been properly established by competent authorities; whether they have been just, and have promoted the common good.

The significance of this composition cannot be over-emphasized. It is requiring that legal scholars feel the pulse of Aquinas on natural law and not to read of him merely from his critics. As one of the patriarchs of the legal schools, Aquinas' theory of law would be of much interest for African juridical system. The primary method of this essay consists in an unbiased exposition of Aquinas' legal treatise. The method calls for a thorough comprehension of Aquinas' treatise on law, in order to empower critical debates on the validity of Aquinas' jurisprudence, which, in turn, will assist in no great measure towards answering the challenges of this essay. Without losing sight of other legal theories, this essay focuses mainly on Aquinas' legal *opus*, in order to allow Aquinas to address us mainly on the nature and rationality of law.

This essay presents Thomas Aquinas first of all as a legal theorist; the conceptual history of law before Thomas Aquinas. It will then grapple with Aquinas' legal sensibilities: his definition of law, characteristics of law, the purpose of law, the origin of law, the major divisions of law, the fundamental features of law, pro and contra polemics on Aquinas' Natural law theory, how Aquinas natural theory applies to Africa, then the conclusion.

Thomas Aquinas as a Legal Philosopher

Thomas Aquinas was born in Roccasecca in 1225 AD. He began his academic formation at the age of five at the Benedictine Monastery of Monte Casino in 1230. At the age of fourteen, (1239), Thomas entered the University of Naples. He joined the Dominicans in 1244 and did his study under his mentor Albert the Great at the University of Sorbonne, Paris. Thomas became also a professor at the University of Sorbonne, Paris. Aquinas was an ambulant lecturer who lectured not only in Sorbonne his alma mater, but also in Italy-- Orvieto, Anagni, Viterbo and Rome. In Sorbonne, Aquinas engaged in embattled debate against Averroists regarding the unity of man and in defense of morality, which resulted in his book: *The Unity of the Intellect against Averoeists* (*De unitate intellectus contra Averoistas*).Aquinas died in Lyon on 7th March, 1274.[1] Aquinas was mainly a theologian but also a seasoned philosopher. In his days what counted was theology, of which philosophy was only a handmaid (*ancilla theologiae*).In the early part of the *Summa theologiae*, Aquinas made a distinction between *sacra doctrina*—which proceeds from the light of faith (*exlumina fidei*) and *philosophia* which proceeds from the light of human reason(*ex lumina rationis humanae)*.[2]Aquinas exhibited his mastery of philosophy in his arguments for God's existence, epistemology, anthropology, morality and politics.

Aquinas was also an acclaimed legal philosopher. Indeed, "the best developed part of Aquinas' political theory is his account of law."[3]Regarding his treatise on law, Aquinas was powerfully influenced by Aristotle, St. Augustine, Isidore of Seville, the Bible and the *Pandectae* (all receivers, all containing) or Digest. *Pandectae* is"a name given to a compendium or digest of the Roman law compiled by order of the emperor Justinian I in the 6th century (Ad 530-533)."[4]Ulpian, Gratian, Papimian, Paulua, Modestinus, and Gaius were made the primary juristic authorities who could be cited in court.[5] Aquinas' treatise on law could be found in the second part of the first part of his *Summa theologiae* from questions 90-97, excluding the part that bears on Divine Law—Old Testament Law, (Q. 98).

The Conception of Law before Thomas Aquinas

The English term "law" is etymologically associated with the Greek *νόμος* meaning custom, or traditional social norm.[6]*Nomos* is equivalent to the Latin *mores*. A popular Latin name for law is *lex* (*legis*) coming from the verb *ligo*, to fasten, to bind, to oblige.[7]Another Latin word associated with law is *jus* (*juris*) meaning that which is right, binding, obliging, dutiful, just.[8] It is from its binding character that the *Oxford Advanced Learner's Dictionary* defines law as "the whole system of rules that everyone in a country or society must obey."[9]Jurisprudence (*juris*: law *prudentia:* knowledge) simply means philosophy of law.

The binding connotation of law shaped the meaning of the Greco-Roman and Medieval legal theories before Thomas Aquinas. Plato's dualistic perspective of reality made him distinguish the world of reality and the world of appearances. Only reason can take us to the world of "what is": the world of stability, constancy, permanence, immutability as against the world of appearance, ephemerality, transmutability, convention, custom and relativism. In Plato's perspective there is a wide difference between "law"—the convention (agreement) of the people[10] and "Law" that is solely discovered by reason. It is only reason which can discover that which is the essence of the particular. The law established by human beings or by the judgment of judges can be false or true, while the principles of nature are fixed, true and unchangeable. That is why in *Minos*, Plato instructs that "The law (ho nomos) … wishes to be the discovery of what is."[11] Patrick Kerman, explains that "Nomos"

in the Platonic context, "means more than just a written, specific law in our sense, it means something like principles and customs which guide the whole way of life of a community, including specific commands and prohibitions, of course, but also including accounts of the nature of things and justification of the law itself.[12]"What is" represents permanence, stability, immutability, imperishability, which can only be captured by reason alone. Hearing belongs to the ear, seeing to the eye, law, to reason. The truths of the principles of nature background their binding forces.

Aristotle dwelt on the nature of law in book five of his *Nicomachean Ethics*. Aristotle was well aware that apart from the virtues of prudence, courage and temperance that are essential for individual maturity, justice is the excellence that holds society together. Justice is the virtue exercised for the benefit of the other, other oriented virtue. Without justice the city-state would disintegrate into chaos and disorder. To act justly, Aristotle insists, is to act according to the law. The just is lawful and the lawful is just. Aristotle, like Plato, distinguished natural law from conventional law. Natural laws are the universal or general guiding principles of things, while conventional laws are particular agreements of respective communities. Aristotle, however, was more interested in particular laws (positive laws), conventional laws, which he considered inevitable for the common good: peace, unity and happiness of a society.[13]

Thomas Aquinas would not overlook the Stoics on their natural law doctrine. Simona Vieru has observed that "Aquinas also encountered Cicero's work, which exemplified Stoic philosophy". According to Cicero, Simona states, "Natural or True Law was based on right reason in agreement with nature." Cicero proposed that True Law applied across all communities and he identified God as both the law-maker and law-enforcer."[14] The Roman orator Cicero instructed that "true law was right reason that was congruent with nature". Cicero concluded that "there was one eternal, immutable, and unchangeable law," and that God had established it as the Emperor and Master of all mankind.[15]

St Augustine undoubtedly influenced much of Thomas Aquinas' theory of law.[16] Augustine did recognize that law remains normative, commands, prohibits, forbids and punishes. Law serves as a guide to living correctly.[17]St. Augustine distinguished between eternal law and natural law (*lex naturalis*). God, who is without us, is the source of eternal law, which providentially is the sublime guide of all things. Natural law is eternal law imprinted in our rational soul. Natural law is eternal law within us, which is discoverable only by reason as the sole guide of good conduct.[18] Law, in St. Augustine's perspective, must be just, (giving every human being what is due) for an unjust law is no law (*lex injustitia non est lex*). God is the ultimate lawgiver, but rulers can establish laws for their subjects provided that the laws do not conflict with God's commandments.[19]

Thomas Aquinas was further influenced by the jurisprudence of some Roman jurists. Gaius taught that the law of the nations (*jus gentium*) owes its validity from the natural reason of all humankind.[20]In the third century Ulpian whose legal doctrines was included in the Justinian's Comprehensive Codification (the Digest), defined natural law as "what nature teaches all animals," including human beings. Isidore of Seville in his *Encyclopedic Etymologies* defines natural law as being the law common to all nations that was established by the instigation of nature, not by human legislation.[21] Gratian in his *Decretum* (collection of ecclesiastical norms), brought natural law to the forefront of all future discussions about the structure of all human laws.[22]The human race, according to Gratian is ruled by two things: natural law and customary usages. Natural law s is contained in the law and in the Gospels.[23]In formulating his philosophy of law, Aquinas was borrowing from all the legal sources before him. Most of Aquinas' legal predecessors constituted his authority in some legal debates.

The Legal Theory of Thomas Aquinas

The overarching importance of law for social co-existence, in Aquinas perspective, cannot be over-emphasized. There must be law, in Aquinas' judgment, for social justice, social harmony and individual's salvific perfectibility in virtue. Perceiving the importance of law for Thomas Aquinas, *Stanford Encyclopedia of Philosophy* puts it thus: "Even in a paradise unflawed by human vice, there would, Aquinas thinks, have been need for government and law, though not necessarily 'political' government, still less coercive law."[24]Law is important for the common good and for man's eternal salvation. Aquinas' definition of law, its characteristics, kinds, effects and changeability occupy the attention of this essay.

Aquinas' Definition of Law

Aquinas tackles the nature of law from its etymological meaning. In his perspective, *lex* (law) derives from *ligare*—"to bind," because it binds one to act.[25]Question 90, art. 4, objection 1 holds it that: "It belongs properly to a law to bind one to do or not to do something." From its etymological sense, Aquinas states that: "It belongs to law to command and to forbid" (*ad legem pertinent praecipere est prohibere*).[26]Law for Aquinas is about human acts.[27] That is why he describes "law as a

rule and measure of acts whereby man is induced to act or restrained from acting."[28](*Lex quadam regula est et mensura actuum, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur*)."Law," Aquinas further clarifies, "denotes a kind of plan directing acts towards an end" (*Lex importat rationem quandam directivam actuum ad finem*).[29] This definition convinced Aquinas that "a law is a dictate of the practical reason" (*Lex est quoddam dictamen practicae rationis*). [30]In question 92, art. 1, Aquinas states it clearly that "a law is nothing else than a dictate of reason in the ruler by whom his subjects are governed." In question 90, art 4, Aquinas gives us his classical definition of law. In his perspective, "law is nothing else than an ordinance of reason for the common good, made by him who has care of the community and promulgated."[31] Aquinas definition of law details certain characteristics which shall be considered later in this essay.

On the Origin of Law

The origin of laws can be looked at from two major perspectives. In the first place, if God is considered as the creator of the universe, then He must be the ultimate governor of creation. As it is written in the *internet Encyclopedia of Philosophy*, "According to Aquinas, everything in the terrestrial world is created by God and endowed with a certain nature that defines what each sort of being is in its essence. (…) God's authorship and active role in prescribing and sustaining the various natures included in creation may rightfully be called law."[32]Aquinas would, here, agree with the Stoics, St Augustine, and some of the Roman jurists that God is the ultimate lawgiver. Expressing God's governance of the universe, Robert P. George states thus: "And 'natural law' is the supreme act of (practical) reason by which an omnipotent and omnibenevolent Creator freely orders the whole of His creation."[33]The whole universe including the world community belongs to Him and every dimension of the universe is subject to Him and governed by His eternal laws (divine providence). God governs the human order through the natural laws. Secondly, the origin of law can be considered with regard to conventional laws instituted by the local authorities of particular communities. Even at that, Aquinas believes that conventional laws, as laws issuing from reason derive from natural law which in turn is traceable to God's eternal laws. Invariably, Aquinas maintains a theocentric origin of law.

Major Divisions of Law

Aquinas divides law into four parts: eternal law, natural law, human law and divine law. They are considered as enumerated.

Eternal Law

Aquinas believes that law is issued by one who governs a community. Aquinas agrees with his Christian predecessors that God is the efficient cause (*causa efficientis*) of the whole universe. Aquinas asserts, consequently, that the whole universe is ruled by Divine Providence or Divine Reason. Wherefore, the very idea of the government of things in God the Ruler of the universe, has the nature of a law. And since the Divine Reason's conception of things is not subject to time but is eternal, therefore, it is that his kind of law must be called eternal.[34]

Natural Law

Aquinas appeals to St Paul's doctrine in Romans, chap. 2: 14, to justify the existence of natural law (*lex naturalis*). According to Paul, "Although they have no written law, yet they have the natural law, whereby each one knows and is conscious of, what is good and what is evil. "Aquinas traces the root of natural law to eternal law. For Aquinas, "all laws derive from eternal law," for all administrations issue from the chief governor. Hence all laws must issue from the eternal law of God."[35] Aquinas reiterates that "things partake of the eternal law in so far as from its being imprinted on them, they derive their respective inclinations to their proper acts and ends."[36]Aquinas goes further to explain natural law in relation to rational creatures. In Aquinas' perspective, the rational creature partakes of divine providence by being provident both for itself and for others. What does this really imply? It means that if nature has programmed the irrational creatures according to their natural inclinations, humans are to discover their natural inclinations through reason and free will (*ratio etvoluntas*). Léon Charette reads Aquinas' characteristic belief that "action follows being" (*agree sequitur esse*) from human's ontology to act rationally.[37]Thus "the natural law, as applied to the case of human beings, requires greater precision because of the fact that we have reason and free will (…). That is, we human beings must exercise our natural reason to discover what is best for us in order to achieve the end to which our nature inclines."[38]A rational creature, therefore, shares in eternal reason by discovering rationally its proper inclination and end; and this participation of the rational creature in eternal law is called natural law. Therefore, "natural law is the process whereby man, as a rational being, participates in the eternal law."[39]

Aquinas details some characteristics of natural law. Natural law, Aquinas instructs, is not a habit. A habit is that by which a thing acts. Natural law, on the other

hand, is something appointed by reason, just as a proposition is a work of reason.[40] As the dictate of reason, Aquinas would mean that "Natural law is the transcendental standard to which manmade laws must correspond in order to be legitimate."[41] Again natural law is distinguished from conventional laws and is further different from supernatural laws—divinely revealed laws.[42]Secondly, natural law is envisioned for the production of virtuous acts. Aquinas' argument is that all virtuous acts results from right reason, and reason follows the dictates of natural law. Therefore, all virtuous acts issue from natural law.

Since the rational soul is the proper form of man, there is in everyman a natural inclination to act according to reason and this is to act according to virtue. Thus, all acts of virtue are prescribed by the natural law; since each one's reason naturally dictates to him to act virtuously.[43]

Another characteristic of natural law is that it functions the same in all men. On this Aquinas writes that the natural law as a general principle is the same for all, both as to rectitude and as to knowledge. Also as to certain matters of details, which are conclusions, as it were, of that general principle; but in some few cases, natural law may fail, both as to rectitude, by reason of certain obstacles and as to knowledge, since in some the reason is perverted by passion, or evil habit, or an evil disposition of nature.[44]

Natural laws, in the view of Aquinas are self-evident truths and truths are unchangeable. Therefore, natural laws are unchangeable. In Aquinas' perspective, "natural law dates from the creation of the rational creature. It does not vary according to time, but remains unchangeable."[45] However, natural law can accidentally change by way of addition or by way of subtraction—that is, natural law ceases to be. Otherwise, natural law is unchangeable in its first principles.

Lastly, natural law is written in men's heart and can never be blotted out. Here, Aquinas is writing under the influence of St. Paul. Regarding the natural law, Aquinas affirms that "there are certain most general precepts that are known to all, and secondly, certain secondary and more detailed precepts which are conclusions following closely from first principles. The general principles of natural law as abstract can never be blotted out from men's hearts."[46]Here, Aquinas might face some critical questions like whether natural laws are innate; and whether they are known also to morons or imbeciles. However, it can be blotted out accidentally in particular cases where reason is hindered from applying the general principles to a particular point of practice on account of concupiscence or passion.

Aquinas takes us further to the content of natural law. Delineating the contents of natural law, Aquinas appeals to both theoretical and practical reasons. The precepts of natural law, Aquinas claims, are to the practical reason what the first principles of demonstrations are to the speculative reason. The precepts are self-evident truths—"a whole is greater than the part." The precepts are universal truths. In the order of universal truths, what first falls under apprehension is being (all things whatsoever in man's apprehension). The first theoretical principle is that the same thing cannot be affirmed and denied at the same time based on the notion of being and non-being. Now as being is the first thing that falls under the apprehension simply, so good is the first thing that falls under the apprehension of the practical reason, which is directed to action, since every agent acts for no end other than the aspect of good. Thus, the first principle in the practical reason is established on the notion of good. It states that good is that which all things seek after (*bonum est quod Omnia appetunt*). The first principle of natural law, then, is that "good should be done and pursued and evil is to be avoided" (*quod bonum est faciendum et prosequendum, et malum vitandum*). Here, apparent good and real good should be properly distinguished. Apparent goods are ends that seem good but are not really good. Shakespeare would tell us that "all that glitters is not gold." Aquinas would similarly tell us that not all ends are goals or truly good. Here practical reasoning should dominate in earmarking the truly good and the seeming good. The truly good (end) is that which is approved by right reason as conducing to the common good. The apparent good is that which deceives and does not lead to the welfare of all. Hence, all those things that man has a natural inclination are naturally apprehended by reason as being good and consequently, as objects of pursuit and their contraries are evil and objects of avoidance. Here, we have the law of self-preservation, sexual intercourse, education of off-springs, intention to know the truth about God, to live in society, to shun ignorance, and to avoid offending neighbours.[47] One can say generally "that Aquinas holds a natural law theory of morality."[48]

Human Law

Aquinas regards human law as positive law—law established through the convention or agreement of a particular people. Aquinas is convinced that "human law derives from the law of nature," which Aquinas believes is based on justice and reason. Human law which also derives from reason must well derive from natural law as its source. Human law draws its validity and necessity from the fact that it assists humans towards the acquisition of virtue and good conduct. Aquinas recalls Aristotle's statement that "as man is the most noble of animals, if he be perfect in virtue, so is he the

lowest of all, if he be severed from law and righteousness." While those who are naturally good require only some admonitions to continue to be good, the unruly, intransigent, impenetrable, violent, untamed and indifferent, require fear and force in order to train them to live in peace with others and to desist from evil doing. It is thanks to law that they can through training acquire the attitude of being good to others through fear and force.[49]

Like all laws, human law should serve the course of justice. The mark of a just law, Aquinas aligns with Isidore of Seville, "is that it should be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful, clearly expressed, lest by its obscurity it lead to misunderstanding. Human laws should be framed for no private benefit, or interests, but for the common good."[50] Aquinas takes us to some divisions of human law. The first is positive law which can be divided into law of the nations, which determines just buying and selling, without which humans cannot live together; and civil law which derives from law of nature and aims at considering particular determinations according as each state decides on what is best for itself. Secondly, in human laws, there are those laws established for the common good and this time with respect to different kinds of men who work in a special way for the common good such as priests who pray to God for the people; princes who govern the people, soldiers who fight for the safety of the people. Thirdly, there are human laws established according to various constitutions: monarchy, which rules according to royal ordinance; aristocracy—government of best men, has authoritative legal opinion and decrees of the senate. Oligarchy government (few rich and powerful men) has honorary laws. Democracy (government of the people) would have decrees of the commonality. Tyrannical government would have a corrupt constitution. There are laws with respect to what matters a law treats, for example *lex Julia*—about adultery.

Aquinas next takes us to the powers of human law. The first is that human law should not be for private benefit but essentially for the common good. Aquinas agrees with Isidore of Seville that "The end of law is for the common good; that is why Isidore said that the law should be framed, not for any private benefit, but for the common good of all the citizens. Hence, human law should be proportionate to the common good. The common good of the citizens comprises of many things. Therefore, law should take account of many things, as to persons, as to matters and as to times."[51]Secondly, human law forbids the more grievous vices which are possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained such as murder, theft and so forth. Lastly, human law is for the acquisition of all virtues which further the common good: immediately—as when things are done directly for the common good or immediately by the order of a lawgiver. All are subject to human law especially when they are just and made in view of the common good and people should not act beside such good laws. Human laws should not be changed arbitrarily because such laws are customary and are passing from one generation to the other and should remain permanent especially when they defend the common good. But where the common good is violated law can be changed so that people can live in peace with others.

Divine Law

This has to do with the Old Testament and New Testament laws. They are laws meant to guide God's people to their supernatural end or eternal happiness. In the view of Simona Vieru, "The Divine Law is derived from God and guides man to perform acts in order to reach his or her end, which is eternal happiness."[52] The divine laws are necessary, firstly, because they are to direct humans regarding how they should perform their proper acts in view of their last end which is eternal happiness. Secondly, human judgments vary according to situations, a law given by God is necessary for humans to know what to do and what to avoid. Thirdly, human laws are not competent enough to direct both external and interior acts. Only divine laws are competent to direct interior acts. Lastly, human laws are not capable of punishing or forbidding all evil acts; divine laws are necessary in order that no evil might remain unforbidden orunpunished.[53]

Critical Fundamentals of Aquinas' Jurisprudence

Aquinas general treatise on law unveils some crucial characteristics. In the first place, Aquinas gives us what one could call a theocentric jurisprudence: According to Simonas Vieru: "Both Aristotle and Aquinas discussed law by reference to morality, justice and ethics, although Aquinas tailored his discussion to the Catholic doctrine."[54] Aquinas' legal theory was shaped by an interest to "present for beginner students of theology an overview of the universe and of the vast sweep of creatures out from their divine creator and back to the same transcendent being as their ultimate destiny, and to synthesize the traditional vocabulary and classic theological sources on law."[55] Another observer has written that: "Aquinas bases his doctrine on the natural law, as one would expect, on his understanding of God and on his relation to His creation."[56] Aquinas' legal sense is basically theocentric. All the species of laws invariably derive from eternal laws of God as the eternal efficient cause, the sovereign of the whole universe, who had providentially planed all things

according to his fashion. Invariably, all laws end in guiding humans to their final destination which is no other than God himself.

The primacy of natural law cannot be over-emphasized. It is believed that "medieval ideas about natural law were transmitted to the modern world primarily through the vehicle of theology, especially the theology of St. Thomas Aquinas."[57] Like among his predecessors, natural law plays a fundamental role in Aquinas' jurisprudence. Aquinas trusts in humans' rational capacity to discover the legal and moral principles laid down in nature for their natural and supernatural well-being.

Aquinas insists that Law is about human acts. Aquinas' definition of law reveals, first of all, that law has to do with human acts. Aquinas distinguished between "human act" (*actus humanae*) and "act of man" (*actus hominis*). An act of man is a behavior that man has no proper control, an act of which man is not the master. Such act is considered involuntary because it did not proceed from reason and will. Involuntary act includes breathing, sickness etc. A human act is that which is attributed to the human person as the master. Human actsare rational, deliberate, chosen and the consequences, (end, or goal) are known to the agent (*Illae ergo actiones proprie humanae dicuntur, quae ex voluntate deliberate procedunt*).[58] In question 92, art. 2, Aquinas states that "law is about human acts." Law deals with man's deliberate behaviours, because it is only a human act that can be termed good or evil. It is only a human act that can conduce to happiness or pain. Law is a means by which people can be guided to produce acts that can lead to general happiness. Aquinas divides human acts into three: (a) acts that are good generally—acts of virtue; and in respect of these the acts of law is a precept or command, for the law commands all acts of virtue; (b) acts that are evil generally—acts of vice, and in response to these the law forbids; (c) acts that are generally indifferent (not distinctly good and not distinctly bad) and in respect of these the law permits.[59]

Law, in Aquinas' perspective, is the product of reason. It belongs to reason, Aquinas insists, to be the rule and measure of human acts. For Aquinas law is not the product of sentiments or desires, or prejudice or benefits, but deriving strictly from deliberate reason (*ex ratione deliberata procedat*) Here, Aquinas is in agreement with his legal predecessors that the rational nature of human beings as that which defines moral law. Consequently, since human beings are by nature rational beings, it is morally appropriate that they should behave in a way that conforms to their rational nature.[60] The practical order demands from humans to act according to right reason and not on sentiments. On the relationship between law and reason Aquinas writes:

The rule and measure of human acts is the reason, which is the first principle of human acts; since it belongs to reason to direct to the end, which is the first principle in all matters of action. Therefore, law is something pertaining to reason.[61]

Law, Aquinas instructs, must derive from a competent authority. Aquinas believes that laws are not arbitrarily established. No private person, Aquinas instructs, can make law because he would not be able to enforce and punish offenders.[62] Authentic laws should be established by the elders of a community or by a recognized representative of a community. Thus, just laws must be backed by competent authority. That is why Aquinas concurs with Isidore of Seville that "A law is an ordinance of a people, whereby something is sanctioned by the elders together with the community."[63] On law and authority Aquinas writes:

Law is for common good. Now to order anything to the common good belongs either to the whole people or to someone who is the vice-regent of the whole people (…). In all other matters the directing of anything to the end concerns him to whom the end belongs.[64]

The community, in Aquinas' understanding, should participate in law-making because by that they become laws to themselves, since they cannot disobey the laws made by themselves.

Aquinas approves Isidore of Seville's stand that "laws are enacted for no private profit, but for the common benefit of the citizens."[65] Any law that detracts from the common good would be spurious and unjust. Aquinas joins Aristotle in affirming that law is for the unity and general happiness of all. On law and the common good Aquinas writes:

Law belongs to the principle which rules and measures human acts. Law issuing from reason is a practical action meant to achieve a certain end—namely happiness. The practicality of law must aim not at particular but universal happiness.[66]

Law is, therefore, for integral human fulfillment.[67] Laws have not only the virtue of making individuals good; they owe their rationality to the promotion of the common good—unity, peace, justice, and happiness without which no society would solidly survive. It is by being intended for common good that law appeals to its subjects' reason and gives them reason for regarding the law as authoritative and obligatory, morally as well as legally.[68]

Aquinas believes that every law should be promulgated in order for it to command compliance. Aquinas concurs with whom he calls the jurist[69] that "laws are established when they are promulgated."[70] It is requiring that the people who are being governed should be informed about the law that would be guiding their conduct. Promulgation is made by word of mouth or by writing. On this Aquinas writes:

Wherefore, in order that a law obtains the binding force which is proper to a law, it must needs to be applied to the men who have to be ruled by it. Such application is

made by its being notified to them by promulgation.[71]

God promulgated the natural law by implanting it in the mind and heart of every human person. Indeed, what Aquinas calls *synderesis* refers to the natural knowledge held by all people instructing them as to the fundamental moral requirements of their human nature. Ignorance does not excuse obedience to an instituted law: As Aquinas states it: "Those who are not present when a law is promulgated are bound to observe the law, in so far as it is notified or can be notified to them by others after the law has been promulgated."

From Aquinas' legal theory, one understands that law is for the moral perfectibility of humans. According to *Internet Encyclopedia of Philosophy*, "Aquinas' celebrated doctrine of natural law no doubt plays a central role in his moral and political teaching."[72]Aquinas' anthropology signals that humans are not perfect by nature, but are capable of perfecting themselves through the acquisition of virtues. Like his predecessors, Aquinas sees a strong connection between law and justice(law and morality). Aquinas agrees with Aristotle and Isidore that law should not only be just but should also be at the service of justice. In human affairs a thing is said to be just from being right, according to the rule of reason."[73] Aquinas is unrelenting in asserting that "that which is not just seems to be no law at all. The force of a law depends on the extent of its justice.

Justice, one of the Greek cardinal virtues, is a virtue exercised towards others. In the view of Aquinas, Justice (*iustitia*) is the "perpetual and constant will to render to each one his/her right."[74] Justice is "an inner disposition of the will by which those possessing it refer all their actions to the common good."[75] "The good of every virtue," Aquinas directs, "whether such virtue directs man in relation to himself, or in relation to certain other individual persons, is preferable to the common good, to which justice directs: so that all acts of virtue can pertain to justice, insofar as it directs man to the common good."[76] The natural law is the rule and measure of justice or conduct. Laws are rules and guide of human acts and in this criterion laws are for the moral perfectibility of the human person. Laws assist the human person towards the acquisition of those virtues necessary for living well with others. Law should guide people to conduct themselves rightfully not only for the sake of the common good but also for their eternal salvation.

A just law must not exceed the power of the lawgiver; and the burden on the subjects must be proportionate and with a view to the common good. Aquinas believes that a just law should bind in conscience. An unjust law is not aimed at the common good; it exceeds the power of the lawgiver; and lays unjust burden on the subjects.[77]Law, as a guiding principle, is consequently, envisioned to hold human audacity in check, that innocence might be safeguarded in the midst of wickedness, and that the dread of punishment might prevent the wicked from doing harm.[78] Law guides human acts to their proper ends, namely to the proper good of both the individual and the common good of the society. The aim of law is to make humans virtuous by their living in accordance with right reason.

Aquinas believes that every person is bound by his/her local law. This is another legal *credo* of Thomas Aquinas. Those subject to any authority are bound to obey the just laws of the power they are subject to. All subjects are also bound to obey the just laws of those higher in rank than their local authorities. One should not act besides the laws of one's local authority, unless those laws are hurtful and purely unjust.[79] One is not, however, bound to obey the laws of other localities one is not subject to.

Another characteristic of Law is that they should be permanent. Laws should be stable, permanent and not to be changed arbitrarily, especially when they are serving the common good. They can, however, be changed when they need to be perfected due to change in human condition. But vicious laws should be changed for the welfare of the individual and community.[80]

Law, in the thinking of Aquinas, must be coercive in order to realize its objective. Aquinas states it clearly that: "it is the fear of punishment that law makes use of in order to ensure obedience."[81] Although he did not include it in his definition of law, Aquinas underlines it perfectly that any authentic law must have a coercive force (threat) for it to be obeyed. If for Aquinas, an unjust law is no law, likewise is an unenforced law grossly defective. Individuals have no power to make laws, because of the individual's inability to enforce it; the making of law must be reserved for public authority that can punish offenders with the aim of directing them to work for the common good. Punishment is strictly for correction and not merely for the humiliation of offenders. It is to help offenders acquire social virtues in order to live in harmony with others[82].

Pro and contra Polemics on Aquinas' Legal Treatise

Aquinas, representing the spokesman on medieval legal thought, has sharply been criticized by later moral and legal philosophers for holding what is regarded as a highly untenable metaphysical jurisprudence. Aquinas theocentric legal theory, it is argued, can only hold on Christian ground. It is irrelevant for those who do not believe in the existence of Aquinas' God. There is the question whether the "alleged natural moral order require that we believe that there is a God that has produced this natural moral order."[83] Anti-metaphysicians look at Aquinas' legal theory founded on an extra-mundane supernatural being as spurious and meaningless. As R. T. Long puts it, "How can there be a law that doesn't rest on any legal institutions or practices? What is it grounded

on instead? In other words what is the metaphysical basis of Natural law?"[84] Such laws lack metaphysical foundation and consequently, credibility. Law, positivists argue, is for humans and they are established only by a sovereign of a community.

There is serious doubt regarding the existence of natural law. Thomas Hobbes and his skeptic colleagues would insist that there is no standard in nature at which humans can veritably look to distinguish what is right and what is wrong. Such standards are only the inventions of the human mind. The skepticism is further pushed not only as to whether natural law actually exists, but also as to human reason's capacity to capture from natural law the essences of what is right or wrong. Regarding this criticism, it must be asked whether empirical experience is the only criterion for true knowledge. Must we appeal to a positivistic experience of natural law to believe that such laws exist? How rationally justifiable is it to locate the totality of human experiences to empirically observable facts?

Anti-natural law theorists frown at Aquinas' pretension that by rationally discovering the laws of nature the creators plan for human life would be made clear. A part from revelation, anti-natural law philosophers argue, Aquinas pretension is simply impossible. There is no way humans can by analysis of natural laws determine the goal the creator intended for humans.

Augustinian-Thomistic legal credo: *lex industrial non est lex* (unjust law is no law) has raised skeptical eyebrows. There is a view, contrary to Aquinas' position, that a law established by a competent authority, is a law whether it is just or unjust. Those who contravened established laws would be punished granted that the laws were blatantly unjust. It is, here, that legal positivists would seriously contend that there is a thorough distinction between law and morality. John Austin "explicitly endorsed the view that it is not necessarily true that the legal validity of a norm depends on whether its content conforms to morality."[85] Borrowing from Simona Vieru, it is important to note that "Aquinas accepted that even an unjust law should be followed if disobedience leads to scandal or greater harm. Aquinas merely stated that an unjust law does not bind in conscience; he did not propose that every unjust law lacks legal validity."[86]Lon L. Fuller agrees with Aquinas that laws have moral values in two aspects: (a) law conduces to a state of social order and (b) does so by respecting human autonomy because rules guide behavior. Since moral principles are built into the existential conditions for law, they are internal and hence represent a conceptual connection between law and morality."[87]One may ask whether there is anything wrong disobeying a law that stands strictly opposed to the common good. How did Aquinas go wrong in that proposition?

The first principle of natural law as given by Aquinas: doing good and avoiding evil does not provide humans with much content for pursuing the moral life. How, one must ask, do we know what things actually are good and evil?[88] Here, Aquinas would refer us to practical reason (*ratio practica),*the rational ability to discern through right reasoning what truly promotes the common good. Aquinas trusts in reason's power to discern what truly is good or avoidable for the common good of all.

Aquinas' natural law, it has been argued, cannot protect humans' natural rights because there would be no agent to enforce it.[89] Such abstract laws would not be able to enforce both individual and social rights. Consequently, natural rights such as right to life, to peace and social harmony without an enforcement agent would be a mere dream. Is the mere fact that people, the learned and unlearned, habitually appeal to their natural rights to defend themselves against abuses, not a sure criterion that natural rights exist? It is supposed that a natural right is not a legal right but a normative right.[90]I do not think any human being, even the most ardent liberalist, would accept being treated like an animal. He/she would insist on possessing some basic natural rights, which the brute animals cannot participate invite does not require enforcement agents for natural rights to be effective rules in any society.

If natural law is embedded in human nature, Aquinas' natural law theory would face David Hume's onslaught that natural law theory conflates that which is the case with that which ought to be the case. One cannot, as Hume pointed out, logically derive a moral imperative or value judgment simply by observing facts of nature."[91] It is fallacious, according to Hume, to think that nature, for example, ordained sex for procreation, therefore, it cannot be done for any other purpose. This interpretation does not suit Aquinas' understanding of natural law. The principles of practical reason derive from moral principles which Aquinas describes as indemonstrable. As such natural law does not derive from human nature. Robert P. George agrees with this view when he writes:

Contrary to Hume's argument, Aquinas asserts that the first principles of practical reason, which are the basic principles of natural law, are self-evident (*per se nota*) and indemonstrable. As such they are not deduced from prior judgment about nature, human nature, the nature of society, or anything else. On the contrary, practical reason proceeds from its own principles.[92]

The Legal Logic: Aquinas and Africa

There is no country in Africa, contemporarily, that is not founded on a recognized constitution. Each African country would also claim to be faithful to the ideals of her constitutional laws. Yet Africans know from experience that African legal systems have several serious challenges.

Aquinas may be facing some intellectual protests against his theocratic legal system, yet the fundamentals of his legal theory are considered inevitable not only for the world, but also for the development and consolidation of African legal thoughts.

Aquinas' stand, for example, that law is an ordinance of reason, challenges many legal norms in Africa. Some of the laws imposed on people in some African countries, especially customary laws, are bluntly irrational. Some of them are based on individual or group sentiments and desires or geared towards the benefits of some persons. Some communities in Africa, for example, forbid an aggrieved member to report his/her case to the police in demand for justice. The purpose is to uphold the spirit of consanguinity and social unity within the ancestral-fold. The consanguine community rather arrogates to herself the authority to preside on all cases within her-fold and seriously tasks any member, who invites the police into the family-fold on whatever pretext. Such laws are irrational as it dangerously frustrates one's legal right to seek justice where one considers it appropriate. Aquinas challenges African communities to make laws that truly derive from right reason and not laws instituted for the benefit of some individuals.

Again, Aquinas instructs that laws must be established by a competent authority. In Africa, though there are national constitutions, laws are still made arbitrarily by whosoever and at any desired place and time without due process. Once in Nigeria, a self-acclaimed leader of an ethnic group forbade all belonging to the ethnic group attending to their civil duties on a particular date and he was fully obeyed. It is normal in Africa for a group to assume self-willed power to mount road-blocks, cause disorder on the roads, and frustrate travellers on distant journeys, without obtaining any legal permission from the police. It is commonplace in Africa for a group to abscond from civil duty in the name of celebrating one festival or the other. There are militant groups, who have illegally defied all dialogue, fighting one African government or the other for religious or political reasons. They establish their private laws at the expense of the national constitutions. There are so many law-making authorities in Africa: individuals, groups of various categories, and the states. Each enforces her laws on the masses with all impunity. This often leads to the question: who makes laws in Africa, and whose laws should be obeyed? Who is truly in charge? Aquinas teaches Africans that law must be made by the representatives of the people and not by private groups or individuals.

Africans should learn from Aquinas' legal theory that laws are for the common good and neither for private benefits nor for unjust victimization of innocent people. Africans claim to be communalistic in behavior, but there is among them a serious lack of the sense of common good. Victor E. Dike, has noticed that one of the hindrances to economic development in African is owed to leaders who do not "work for the common good."[93]The lawgiver should bear in mind the general welfare: peace, happiness and unity of the people. Laws that are not founded on the spirit of common good are no real laws for Thomas Aquinas. John Finnis corroborates with Aquinas when he says that "a rulers use of authority is radically defective if he exploits his opportunities by making stipulations intended by him not for the common good but for his own or his friends or party's or faction's advantage, or out of malice against some person or group."[94]We should beware, in Africa, of laws that breathe divisions, marginalization, discrimination or that protect only the private interests of individuals instead of that of the common good. The sense of common good would help Africans bridge ethnic divides,[95] foster common purpose, close human gaps due to poverty, create jobs for all, engage in promoting authentic education and human empowerment.

The promulgation of law is still a difficulty in Africa. Aquinas accepts that ignorance does not actually excuse from compliance with the law, yet he insists that laws should be properly promulgated for them to command genuine obedience. We know that in Africa, people are in most cases arrested or financially extorted for breaking certain laws that were not properly made public. Such prescriptive laws were neither published in the newspapers, nor announced on the radios, nor seen on road signs. Yet people are arrested or financially extorted for contravening them. It is requiring that we restrain from punishing people about breaking laws the promulgations of which were hardly made.

Aquinas sees a tight connection between law and morality. The weight of any law consists in its ability to dispense justice. Aquinas states it categorically that "an unjust law is no law at all" (*lex injustitia non est lex*). Law is for the moral perfection of both the individual and the society. We know also that in Africa the laws do not always defend the course of justice. Everybody in Africa is in one way or the other licking severe wounds of social injustice. Africans have suffered gross injustice owed to political assassination, kidnapping, human trafficking, religious massacre, ethnic massacre, gender discrimination and so forth. Kathryn Birdwell Wester has decried injustice against women in Africa. In her perspective, "In contemporary sub-Saharan Africa, women are facing human rights abuses unparalleled elsewhere in the world. Despite the region's diversity, its female inhabitants largely share experiences of sexual discrimination and abuse, intimate violence, political marginalization, and economic deprivation."[96]Africans have at one time or the other felt the weakness of the African legal system in defending their legal plights. In the view of Afegbua, S. Issa, et al., "the search for leadership in Africa is a search for social justice, which

automatically, eliminates social injustice."[97] We learn from Aquinas to operate on laws that are sincerely right and just and to defend the course of justice in the black continent.

Aquinas believes that there would be no social order unless there are legal deterrents against intransigent behaviours. Social laws must be backed with force and punishment so that people, for fear of punishment, would comply with legal mandates for the sake of the common good. Aquinas position implies that for social coherence, there must be rule of law. For peace to reign in a community, people must obey laws that foster the welfare of all. Talking about rule of law in Africa would appear ludicrous, for without mincing words, Africans are truly lawless. People break the laws even at the very presence of law enforcement agents. Of course some Africans are above the law and are unanswerable to anybody about what they do or did. Aquinas instructs us that without rule of law society would hardly live in peace. It is requiring therefore that we agree with Aquinas that African laws should be informed properly by reason; they should have legal authenticity, made for the common good, thoroughly publicized and enforced.

CONCLUSION

I undertook to expose Aquinas' theory of law to students who have not come in contact with Aquinas legal mentality. What we have are often polemical essays that do not first take an interested scholar to the very texts of Aquinas' treatise on law before criticizing what Aquinas taught or did not teach; what he meant or did not mean. From our study, it is clear that Aquinas believes that law is necessary for the moral perfectibility of both of the individual and of the society. Law is to facilitate the practice of justice. Law is the rule of reason made by a competent authority, for the common good and promulgated. Law is theocentrically divided into four kinds: eternal, natural, human and divine. Eternal, natural and divined laws are primarily unchangeable except on particular accidental cases that the general laws did not apply. The essence of law is for the common good.

Aquinas has received harsh criticisms from Anti-metaphysicians and pure naturalist philosophers for holding what they regard as a theory of natural law that is not easily and evidentially accessible to reason. Some reject his stand that unjust law is no law. Some have, on the other hand, seen Aquinas legal theory as fundamental for the holistic perfection both for the individual and the society. Aquinas' legal theory is considered a landmark in taking human mind beyond the confines of mundane thoughts.

Facts are sacred, commentaries can be different. Aquinas' theory of law has revealed his unalloyed interest in the well-being of the totality of the human being: spiritual and corporal. His definition of law is yet to be overtaken. That is all the more reason this essay has employed his legal thought to evaluate African legal systems. Truth is perspective and no one angle of the truth should be regarded as the "whole truth" that predominates over all others. Aquinas legal thought is a perspective in the whole legal system and he has right to his opinion like any other positivistic lawyer. Since God's existence has not been absolutely disproved in the philosophical enterprise, atheists and the so called anti-metaphysicians have not the majority vote regarding man's quest for comprehensive self-understanding. Aquinas' legal thought is theocentric: yes, and what about it?

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