THE LIMITS OF LAW
'Lex injusta non est Lex'[1]

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YOU will remember that in the final stage of the trial of Sir Thomas More, when, according to William Roper, Sir Thomas had alleged that the law of God overrode the laws of England, and that, in addition, the indictment, which relied on the word 'maliciously' to bring More under the Statute, was faulty, the Chancellor, Audley, momentarily shaken by his predecessor's eloquence and known legal wisdom, turned to his colleague the Chief Justice, Sir John FitzJames, and asked him what he thought of the indictment. FitzJames was not to be caught. 'My lords all, by St Julian', he replied, 'I must needs confess that if the acte of parliament be not unlawful, then is not the indictment in my conscience insufficient.' Thus saying, he threw the case back upon the Act of Supremacy, with the implication that a Statute was beyond the reach of criticism.

As it happens, the latest of all Tudor historians, in a remarkable survey that appeared only a few months ago, gave it as his opinion that in the years 1530–3 a great revolution in legal and political theory and practice was achieved in England: that Parliament—that is, of course, the king in Parliament—became then both in theory and practice what it has ever since remained, the self-sufficient, omnicompetent legislative body. That this was so *in foro externo* was proclaimed and understood at the time. The legislative competition of the Church, whether in the form of ancient canon law or new decretals, or in the form of conciliar decrees in England, had been for the future eliminated by Henry VIII. That it was so *in foro interno*, that is, that no appeal was valid to the subject of the king of England to any alleged law of God or conviction of conscience was certainly the immediate effect of the Henrician legislation, though Henry himself would of course have stoutly maintained that there could be no contradiction between his law and God's. In the course of time, I hope I

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am right in saying, a purely secular, positivist view of Statute law has prevailed. A Statute is law—we do not consider whether it is lawful. And yet, illogically enough, some Statutes, such as those requiring an oath, or imposing military service or dealing with the marriage of divorced persons, take notice of the existence of divergent convictions as to what is permitted to a man to do.

The trial of Sir Thomas More, then, with all the circumstances preceding it, raises in an acute form two problems which, throughout the history of the western world, have been debated again and again. What is law? What is authority? I do not propose to consider either of these as deep practical issues—though they certainly are such—but rather to glance briefly as an historian at some of the answers given to them in the ancient and medieval worlds, and so to arrive at some sort of understanding of the climate of opinion in the England of Sir Thomas More's day.

In the two great civilizations of the ancient world, Greek and Roman, bodies of ancestral written law preceded the great ages of criticism and were in both cases regarded with a veneration that was almost religious in character. You will remember how Socrates, that great questioner, twice in his life faced obloquy and violence rather than depart from legal procedure, and how, when himself under sentence of death and offered a collusive escape from prison, he personified the laws as coming before him and solemnly pleading with him not to dishonour them. In Rome you will also remember how the twelve tables were regarded as intangible. Such an attitude could not long continue in a highly sophisticated and corrupt society. In Greece, the penetrating thought of Plato and Aristotle, both of them, in their different ways, convinced that human life should be ordered by rational principles, and both preoccupied with care for morality and justice—their thought, added to the evolution of a full democracy, threw every question of moral and legal sanction into the fire of criticism. In Rome, the vast growth of an empire embracing men of many laws, and the prevailing corruption of society, had an equally dissolvent influence, though nothing ever shook the innate Roman pride in their law.

In the sequel, Roman law won recognition over the greater part of the Empire, eastern as well as western, and a long series of eminent jurists, followed by a brilliant group of codifiers, gave to the corpus of imperial law a design and a cohesion

unattained by any code before or since, and added to this not only principles of interpretation but definitions of the nature and end of law in itself. These were made primarily by men influenced by philosophy, and in particular Stoic philosophy, but this influence was contaminated, before the age of Justinian, by the very similar teaching of the Fathers of the Church. Put very briefly, we may summarize their outlook by saying that the Roman jurists, while eliminating any specifically religious or mystical conception of law, nevertheless regarded it as the expression in the ethical sphere of the common conviction of mankind, as something as natural to a human being as are the shapes taken by plants or the instincts of animals. The law, in other words, was the expression in words of what all normal human beings agree upon as being the desirable forms of conduct in human life. Above and below, so to say, this central law there were the *jus gentium*, the principles of public intercourse recognized by all civilized peoples, and the customary law which regularized numberless details of daily life in the way found most suitable in this or that region or race. Law therefore was not something arbitrary; it defined conduct in terms of pre-existing human nature; but it was the result of empirical observation rather than of speculative principles; it gave expression to what was universally experienced and agreed. On this view, there might be mistaken legislation and miscarriage of justice, but legislation widely accepted or desired was *ex hypothesi* an expression of nature. The Stoic, therefore, had no place in his system for a clash of obedience. The Christian appeal to the law of God or the dictates of conscience was irrelevant. Curiously enough, the Fathers of the Church, especially after the Empire became Christian, took over the Roman jurists' view almost in entirety, though substituting the God of the Bible for Nature. I say curiously, because the early Christians, and the later scholastics, laid such emphasis upon the totally new, *supernatural* demands of the New Testament. 'It was said to you of old . . .' 'A new commandment. . . .'

As for the other problem, that of authority or sovereignty, we find a twofold stream of thought. The jurists, at least in theory, regarded sovereignty as residing in the people, who had delegated it to the emperor as their representative; the power

therefore behind the law is the will of the people, and the emperor is their chosen executive. On the other hand, Christian and oriental influences alike were combining to make the Emperor at Constantinople the representative, almost the vicar, of God. The original Christian position had been simple: God rules all; civil authority is necessary; such authority therefore represents God. When the empire became Christian this doctrine, sorely strained but never abandoned under persecution, became much more agreeable. It received additional strength in the eastern half of the empire from the adoption by the emperors of some of the ceremonial and outlook of the Persian monarchs who claimed some sort of divinity.

When the barbarian invaders occupied the western half of the empire and the whole region was effectively separated from the emperor in the east, a totally different conception of law and authority became common. In the fragmented Europe of the dark ages the idea of law as a written code, based upon reason and justice, and having coercive power over minds as well as bodies, disappeared altogether from whole regions. Law was now equated with custom and deprived of its rational, speculative basis. Being custom it was *ipso facto* accepted without question when formulated, and when, as especially in England, it was amplified by the pronouncements of kings and their counsellors, the wisdom and leadership shown made this seem not very different from custom. In England, as is familiar to all, this mixture of Anglo-Saxon custom and law, contaminated by a number of purely feudal technicalities, became the foundation of Common Law which was saved from becoming submerged by codified law, whether civil or canon, largely by the accident of its development by a body of experts in close proximity to the courts and without any connection with the universities.

The first great awakening of Europe in the eleventh and twelfth centuries was marked by the great contest of empire and papacy and this was modified by, and itself in turn helped to promote, the development which amounted almost to a rediscovery of two great ancient bodies of law, the Roman and the ecclesiastical, henceforward known as the civil and the canon law. These two systems were in many ways a contrast. The one—civil law—was a complete, coherent code covering the whole life of a great civilization, and in its final form reflecting great legal principles.

On the other hand, it had been devised for a world-wide, highly organized, secularized empire; it had at first sight little relevance to the Europe of the feudal kingdoms, unorganized, largely agrarian, primitive and administered by churchmen. It owed its revival and victories to two medieval characteristics: the reverence for and desire to imitate the intellectual achievements of the ancient world; and the ability to apply and adapt past institutions and principles to present circumstances, however different, so long as some connection, even a purely nominal or imaginary one, could be established. In this case the connection lay in the name and claim of the Western Emperor and his alleged universal dominion.

Canon law was very different. Probably no body of law was ever more disparate. Its origins had been occasional and eclectic. Decrees of popes, councils and emperors, fragments of the civil code, forgeries of the ninth century, scripture texts, liturgical directions, all without any order or relation. The resulting amalgam owed its success almost entirely to its actuality. It expressed actual procedure and it was controlled by the most powerful and dynamic institution of the age, the Roman Curia.

Both these systems of law accepted as axiomatic the pre-existence of unalterable principles. The civilians took over from the Roman legists the concept of a law of nature, though they gave a different answer to the question where this law was to be found. Some adopted the ancient conception of a quasi-instinctive law completed by the *Jus Gentium*. Others tended to see the natural law in the main principles affirmed by the Mosaic law and the New Testament. But all agreed that the natural law was immutable; man-made law could re-affirm it, but not change it.

The canonists were less divided. They took over the concept of natural law and the law of nations from the Roman legists, but they interpreted these as being the moral principles and conclusions that came as natural and compelling to all men not corrupted by sin or false instruction; they had been reiterated first by Moses and then by Christ. They were in their main lines unalterable, though their application might change and human depravity might demand some modifications.

As regards the source of political authority, the civilians found it solely in the emperor, to whom it had been delegated by the people. This of course is simply a repetition of the Code and of

the Roman jurists. One might have thought it to have had little relevance to twelfth-century conditions, when the emperor's authority was very limited, and denied or defied by many. It served, however, as a valuable weapon with which to fight the Roman Curia, and gave a new strength to the old imperialist claim that God had given to the emperor supreme dominion over all Christians. This theory had a great future before it. The doctrine, recognized early in the thirteenth century, that the King of France was emperor in his own dominions was eagerly appropriated by the new national states, and we can see its influence in one of the most celebrated of Cromwell's preambles: 'Whereas England is and always hath been an empire. . . .'

The canonists ultimately had far more trouble with the question of authority and never attained complete unanimity. In the end they bifurcated into the extreme papalists who attributed to the pope supreme authority, both secular and spiritual, and those who still clung to some form of the Gelasian doctrine of the two powers. This debate, however, is irrelevant to our present purpose.

To sum up. Both civilians and canonists were in a sense defenders of an absolutist government, either imperial or papal. Both, however, held most strongly that law, however made, must be based upon an ascertainable, immutable law of God, in part ingrained in human nature, in part affirmed by God or his representative. The concept of law as merely the instrument of policy or the expression of mere convention or general consent, would have been alien to all representative thinkers of the twelfth and thirteenth centuries.

Into these two worlds of civilians and canonists, resting as they did upon the philosophy and social outlook of Imperial Rome and the contest of empire and papacy, there broke with great suddenness the purely Greek and severely systematic thought of Aristotle as seen in particular, for our purpose, in the complete text of the *Ethics* and *Politics* which became fully available only between *c.* 1230 and 1265. As is well known, St Thomas was the first great master to adopt the philosophical teaching of Aristotle not merely here and there as a useful theory, but as the complete rational basis of his thought. When St Thomas came to read the *Politics* of Aristotle, made available in Latin in the translation of his friend William of Moerbeke, *c.* 1265, a great Christian thinker

was confronted for the first time with the picture of a Greek city-state in its essentials, free from all the associations, social and economic, glorious and romantic, sordid and tragic, with which it has been clothed for us, and presented in the cool, sane, realist, and yet profoundly humane and genial light that Aristotle never fails to diffuse.

St Thomas was profoundly sympathetic to this picture. He was, as has so often and so truly been said, the great philosopher of order. For him, the whole universe of matter and spirit is a vast hierarchy of beings each fulfilling its own end, and each working in or upon its neighbour; the lower exists for the sake of the higher, and the higher cares for the lower. No man is materially and mentally self-sufficient; he needs the family and he needs the higher organization of the city. Once this higher organization exists it has an end of its own, the common good, which may not always exactly coincide with the end of the individual and the family. It needs laws and government. So far St Thomas and Aristotle might agree.

St Thomas, however, has more to say than this. In the first place, the end of human society is not, absolutely speaking, an end in itself. The end of man is not earthly happiness, but the knowledge, love and service of God, and of God as revealed by Christ. Secondly, human society, unlike an animal species, is made up of responsible individuals each of whom has a direct and immediate relation to God. From these two theses follow three conclusions, each of them as relevant to our own day as they were to the thirteenth and sixteenth centuries. The first is, that no society, not even a nation or a bloc of nations, has a final end of its own, as an individual has. Secondly, its aim is the common good of all its citizens, not of itself as a power or a nation, and it has no end apart from them; its rulers must not exploit the citizens; their business is simply to direct the activities of the community for the common happiness here and hereafter. Thirdly, each individual of the community has an inalienable duty to God, and an inalienable right to be protected in performing this duty. He cannot, to use the fine phrase that Burke borrowed from Shakespeare, 'barter the immediate jewel of his soul', nor can he be forced to abandon it. As for the ruler, one thing at least is clear; no authority, whether of king or senate, can be regarded a sovereign in an absolute or possessive sense. The

ruler is the vicegerent of the community; he is the *persona* acting for the corporate whole.

As for authority in its aspect of a moral force, St Thomas is neither a democrat nor a social contractist. The ruler does not derive his authority from the community, but from the need that rational beings have for direction in an ordered life, and thus ultimately from God, the supreme ruler. On the other hand, as befits a Dominican and an Aristotelian, St Thomas's emphasis is always on right reason rather than on the word of command. Men are rational beings who do right because they are directed to it by reason expressed in law, not because—speaking on the purely political plane—they are following the will of a superior fellow-creature. As Aristotle and Aquinas repeat, an army exists for its general to use, but the ruler exists for the sake of the people he guides.

St Thomas's doctrine of law has long been recognized as being, both in form and content, one of the most masterly and pregnant sections of the *Summa*, and for all who accept the divine governance and providence it is the classic expression of the relationship of human law and man's conscience to the immutable will of God. This is not the place to expound once more St Thomas's divisions of the various kinds of law. But if we look for a moment at the whole scheme of law as exposed in the *Summa* certain important conclusions stand out.

The first is, that the sanction and guarantee of all law is the fact that all law is a fragmentation or, to use Aquinas's own term, an irradiation of the eternal law which is divine truth itself.

The second is, that law is the enunciation of reason; it is therefore itself in the last resort reasonable and amenable to the criticism of reason.

The third is, that all law as such is just. No doubt a particular law may be unjust in certain circumstances, and therefore in the judicial forum there is need of equity as well as justice, and in the private forum an individual may neglect the law if he is prepared to abide by the consequences. But essentially, the adjective 'just' adds nothing to the term law, and St Thomas does not hesitate to say: *Lex injusta non est lex*.

The fourth conclusion, therefore, is that in the last resort, and speaking of human law only, the individual has the right and duty to examine a law and, if needs be, to refuse to obey. Often,

of course, even if a law is unjust in particular applications, no moral issue is involved, and it would be foolish to refuse obedience; in the colloquial phrase, it is 'just too bad'. But in the last analysis the man of intelligence cannot plead the law at the bar of conscience.

To us, the Thomist system appears as a peak, a summit of attainment. We should expect it to have become, what some of the older text-books assume it to have been, the representative and ruling system of the middle ages. But in fact medieval Thomism was only one school of many, and St Thomas was soon replaced in the academic world by thinkers of a very different cast. There was a great and almost universal flight from Aristotle, save as a logician, and the Aristotelians who remained were either Averroists or secular thinkers such as Marsiglio. In particular, there was a great swing away from all that seemed like determinism and that appeared to limit God's freedom. For St Thomas the universe is the expression of the design of the wisdom of God; all law radiates from, and is a participation in, divine law. Humanly speaking, therefore, God's law is absolute and he himself is bound by it since it reflects his nature; if he willed otherwise he would not be God. In other words, the will follows the reason.

Scotus looked rather to the freedom and love of God. Things are as they are because God loved them and willed them to be so; his freedom is absolute and his love immeasurable. As things are, we know from Scripture that his commands are such and such, but they could have been different, and he is not restricted to act thus. Ockham took his way of argument several stages further and brought to bear upon it his conception of human knowledge. To put a controversial matter very summarily, Ockham denied the possibility of any certain knowledge of anything except individuals. There could be no certain proof of God's existence, or that he was of such and such a nature. Faith, on the other hand, told us that God was all-free and all-powerful. We did indeed know from the Church what God commanded us to do here and now, but we could not say that this was absolutely good or right, still less that God of his nature must act thus. He might have ordered us to murder our parents and hate him. To Ockham's followers, indeed, what God was and had commanded was of much less interest than what he could do if he would. We are not concerned with the progress of Ockhamism or Nominalism.

But I do not think it is too much to say that this way of thought, which captured almost all the universities of Europe save in Bohemia and Spain, was one of the most powerful influences in preparing the way for the non-rational, fideistic theology, and the absolutist theories of sovereignty of the early sixteenth century, which led so easily to the doctrine of the divine right of kings. It is true that in England Fortescue used St Thomas and his doctrine of a natural law. But Fortescue resembles the Roman civilians in failing to use the doctrine as a check on authority, and, as a matter of fact he had very little apparent influence on the contemporaries of Sir Thomas More. In the early sixteenth century in England, there was very little live speculative discipline among either lawyers or theologians, and the rare theorists of the fifteen-thirties, whom Cromwell enlisted as propagandists of the régime, tended towards a reconstruction of the Empire of the Code or accepted the political realism and positivist philosophy of a Marsiglio or a Machiavelli. I would suggest that one of the reasons why the legislation of Henry and Cromwell had such an easy passage was that the lawyers, brought up at the Inns of Court without any adequate philosophical or theological background, were taken unprepared by the flood of crucial, controversial Statutes fed to them by government. Whatever may have been the reason, they did not realize that government, or rather revolution, by Statute was upon them, and that whereas in the courts of common law a judge gave reasons for his judgment, which might be reversed in chancery or criticized by a fellow judge, a Statute, devised and operated by a minister such as Cromwell, could in a bland preamble beg all relevant questions and rivet a new way of thinking upon the nation. To Audley or Rich or Paget the maxim *lex injusta non est lex* would in any case have meant nothing—partly, no doubt, because, like Pilate, they had neither truth nor justice within themselves, but partly also because no English lawyer had hitherto had to face the prospect of Statute law conflicting with religious truth or moral justice—and also because, as we have seen, for two hundred years the conception of law as the rational expression of divine and natural ways of behaviour had been lost, and the independent will of the ruler substituted for it.

St Thomas, when he wrote his celebrated phrase *lex injusta non est lex*, which in some ways, like so much of Aristotelian

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thought, is a truism, almost a glimpse of the obvious, probably had no programmatic intention. In the thirteenth century, almost all lawmakers were churchmen. But in fact the truth behind this phrase makes a tremendous assumption and, unlike all the opinions of the civilians and canonists, throws a tremendous weight of responsibility. It assumes that truth and right are objective, and can be attained by man's reason. No one but the individual can in the last instance decide, and he must decide in the ultimate predicament even if he is alone against the world. Both More and Fisher stood in that predicament when they opposed the Act of Supremacy. It has sometimes been said that they were standing for the tradition of European unity or for the rights of conscience. No doubt, by implication, they were so doing, but it was not for European unity, nor even for freedom of conscience as such, that they were standing, but for the non-entity of a law which traversed a higher primary law, and specifically for the principle that the secular power had no competence to change or to delimit the nature of Christ's Church.

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