TEMPORAL LAW AND TIMELESS HUMAN RIGHTS**

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Introduction

Two main ideas integrating the value of time constitute the pillars of this study, namely temporal law, on the one hand, and timeless human rights, on the other hand. The idea of temporal law represents worldly or secular law, thus law relating to time. The idea of timeless human rights signifies a reality not affected by the passage of time. Having as a general theme criminal law and time, and following the lecture of Professor Joachim Renzikowski on "Aquinas on eternal and time-bound law", we aim to analyse the effects of time regarding punishment, in particular offenses to human rights.

1. Temporal law

Aquinas, one of the great philosophers of the Middle Ages (13th century), was – unlike Saint Augustine – an optimist in his perceiving of man or human nature not as deteriorated, but only as corrupted by original sin, thus still maintaining an original virtue and felicity being the ultimate end of human life[1].

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[1] Luís Cabral de Moncada, *Filosofia do Direito e do Estado*, I, reimp., Coimbra: Coimbra Editora, 2006, 76-77. A consequence thereof is the fact that

In this sense, Aquinas, echoing Aristotle's thought, defines God intellectually[2] as thought of thought so that *logos*, or divine intelligence, becomes the guiding principle of the world[3].

This guiding principle leads to the understanding – much as Aristotle – that human happiness consists of activities of reason (of the soul). Law, therefore, belongs to reason, since reason is the source of human acts. According to Aquinas, "Law is an ordination of reason for the common good by one who has the care of the community, and promulgated"[4].

Since the common good is the end of the *populus* (the people as a political unit), law-making must therefore belong "either to the whole people or to a public personage who has the care for the whole people"[5]. Because the law needs coercive power to induce others to virtue – to oblige persons to act – it is only effective if obeyed by those subject to it, even if sometimes they obey it out of fear of punishment. This is why promulgation is necessary: it leads the subjects of law – the whole people – to knowledge of law.

God, being thought of thought and, as such, theoretical reason, His reason governs the entire community of the universe, and His conception of it is eternal; God's law is eternal law, the end of which is God himself[6].

As a rational creature, man takes part in eternal law, since man is subject to God's providence, and said participation is natural law.

Both theoretical and practical reason have a similar process of proceeding from principles to conclusions: human law is then the exercise of reason in drawing conclusions from indemonstrable first principles, or better, precepts of natural law, to the matter particularly regulated[7].

Augustine understands the principle of justice not in the nature of things nor in reason, but in the imperative divine will, thus voluntarism, whereas Aquinas follows intellectualism. IDEM, 63-64, 78.

[2] And not as will.

[3] Cabral de MONCADA, *Filosofia do Direito e do Estado*, I, 80.

[4] AQUINAS, *Summa Theologica*, Q 90, art. 4.

[5] AQUINAS, *Summa Theologica*, Q 90, art. 3.

[6] Cabral de MONCADA, *Filosofia do Direito e do Estado*, I, 80-81.

[7] A. KAUFMANN, *Introdução à Filosofia do Direito e à Teoria do Direito Contemporâneas*, Lisboa: Fundação Calouste Gulbenkian, 2004, 25.

As such, although natural law is mutable, it is not time-bound, in contrast to human law. However, under Aquinas' thought, human laws should only be revised insofar their revision serves the commonweal[8]: "laws can be rightly revised to suit the changed conditions of human beings, and different things are expedient for human beings according to their different circumstances"[9].

So, human laws are temporal. Temporal in the sense of not only being worldly, but also of including their time-bound significance: the change of circumstance can determine a change of law.

Only natural law is not time-bound, since it signifies the participation in eternal law and "a human law diverging in any way from the natural law will be a perversion of law and no longer a law"[10].

In Aquinas' thought we can find two important elements: *i)* punishment is regarded upon as a means of leading the subjects of law to virtue (a virtue they could not reach by themselves, by obeying the law); *ii)* eternal law, and natural law is a part thereof, signifies the direction to supreme virtue.

Four centuries after Thomas Aquinas, another Thomas makes a significant contribution to the perception of natural law. 17th century *Leviathan* (1651), by Thomas Hobbes, signifies a shift of meaning in the way universal order is seen. In fact, by casting aside the idea of common good on the grounds that it is unrealistic or impossible, Hobbes ceases to base universal order in the divine:

> "For there is no such *finis ultimus* (utmost aim) nor *summum bonum* (greatest good) as is spoken of in the books of the old moral philosophers. (…) Felicity is a continual progress of the desire from one object to another, the attaining of the former being still but the way to the latter"[11].

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[8] Aquinas, *Summa Theologica*, Q 97, art. 2.
[9] Aquinas, *Summa Theologica*, Q 97, art. 1.
[10] Aquinas, *Summa Theologica*, Q 95, art. 2.
[11] Th. Hobbes, *Leviathan*, XI, 60.

For Hobbes, natural law ceases thus to reflect the teleological view of human nature: man becomes a mechanical model seeking the satisfaction of selfish passions and is held together as a people by a coercive sovereign.

The idea of greatest good is therefore an illusion, which only reinforces the importance of the minimal good. The minimal good (of avoiding death), being common to all selfish beings, becomes the basis for natural law, and is no longer understood as a duty but as the right to preserve one's own life. Hobbes states:

> "For though they that speak of this subject [*lex naturalis*/law of nature] used to confound *jus* and *lex*, right and law, yet they ought to be distinguished, because right consists in liberty to do, or to forbear; whereas law determines and binds to one of them: so that law and right differ as much as obligation and liberty (…)"[12].

Herein lies the major shifting away from the thought of Aquinas, namely in the fact that natural law is now perceived as a right or liberty[13], in other words, as natural rights.

These natural rights reflect the universal moral truths that are immanent to human nature. Positive (or temporal) law is then a means to ensure security and consequent civil peace of the community.

2. Timeless human rights

The idea of natural rights constituted the foreground for the modern perception of human rights. In fact, the ultimate purpose of natural law is that the legal order regulating society be just and as such respectful of human dignity. Human rights embody the first principle of justice and so, under a secular view of human nature as based on human dignity, human rights – in the sense of the hobbesian "minimal good" – are the body of

[12] Hobbes, *Leviathan*, XIV, 80.

[13] Kraynak, "Thomas Hobbes: From classical natural law to modern natural rights", *Natural Law, Natural Rights, and American Constitutionalism* <http://www.nlnrac.org/earlymodern/hobbes>, 2.

natural law. The ultimate purpose of justice constitutes the basis for the international protection of human rights[14]: the rights that allow man to attain self-fulfilment. Along this line of thought, human rights, as natural law, are timeless; in other words, they are universal and not limited by time.

Natural law principles are applicable at any time and place where there is law, because of their eternal validity claim as prototype of the ideal legal order[15]. Human rights, as natural law, constitute general principles and not a complete legal system applicable without mediation to a particular situation[16]. However, natural law principles, as models for any temporal legal order, can also complement or overcome legal gaps of said legal order.

Human rights, as natural law, are thus considered the pillars of any legal order. The human rights theory rests upon the perception of a legitimate universal order (an idea that can be traced to moral universalism), following the argument of Aristotle's *Nicomachean Ethics* concerning a natural moral order: "the natural is that which has the same validity everywhere and does not depend upon acceptance"[17]. In this sense, human rights and natural law share the same origin. With one difference, though: classical natural law relates to the direction of the acts, whereas human rights relate – in Locke's wording – to the possibility of self-preservation[18].

In other words, although classical natural law and the human rights theory share the same conceptual origin of a universal order, their outcome stands at opposite points: natural law has "subjects", whereas the human (or natural) rights have "power": the power to set limits to the authority of the ruler, better, the State[19].

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[14] Varela Quirós, "Posibilidad y Esencia del Derecho Natural em Helmut Coing", *Revista de Ciencias Juridicas* 71 (1992) 37-61, p. 48.

[15] Varela Quirós, "Posibilidad y Esencia del Derecho Natural em Helmut Coing", 48.

[16] H. Coing, *Fundamentos de la Filosofia del Derecho*, Barcelona: Ariel 1961, p. 172.

[17] Aristotle, *Nicomachean Ethics*, (Book V, 7) 1134b18.

[18] Locke, *Two Treatises of Government*, 1689.

[19] Although there have been opponents to the idea of the validity of human rights as natural rights, as Bentham, in *Anarchical Fallacies*, who states that

It is true that the human rights theory has evolved and today human rights activists speak of – economic and social – second generation rights, and even third generation human rights (*e.g.*, environmental rights). However, the debate over the origin of these second and third generation human rights is much more disputed than that of first generation (civil and political) – natural – human rights. As such, one can consider the timeless nature of human rights is held only by first generation human rights, since they do not depend upon institutions or circumstances that may or may not exist. In fact, a

> "human right, by definition, is something that no one, anywhere, may be deprived of without a grave affront to justice. There are certain actions that are never permissible, certain freedoms that should never be invaded, certain things that are sacred"[20].

3. Punishment and time

The theory of temporal – or positive – law and timeless human rights has implications in the framework of the limitation of punishment by time. The right of the State to punish is exercised under criminal law rules.

Criminal law, as a part of the legal system, is to be understood as a legal order of peace, *i.e.* as legal peace[21]. And there can be no peace without justice. This undisputed relationship of

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"natural rights is simple nonsense", *apud* A. Sen, "Elements of a theory of Human Rights", *Philosophy and Public Affairs* 32/4 (2004) 315-356, p. 316. It is also possible to dispute the ontological universality of human rights based on the absence of its anthropological universality, only to accept their relative universality, as J. Donnelly, "The relative universality of Human Rights", *Human Rights Quarterly,* 29/2 (2007) 281-306, p. 293.

[20] M. Cranston, "Are there any Human Rights?", *Daedalus*, 112/4 (1983) 1-17, p. 12, who adds: "Thus the effect of a universal declaration that is overloaded with affirmations of economic and social rights is to push the political and civil rights out of the realm of the morally compelling into the twilight world of utopian aspirations".

[21] José de Faria Costa, *Noções Fundamentais de Direito Penal*, 4.ª ed., Coimbra: Coimbra Editora, 2015, 11.

the impossibility of the existence of peace without justice brings time as a mediation factor of justice through criminal punishment, both past time and future time, considering the time of commission of the offense.

The liberal ideas and principles of the Enlightenment have much influenced the criminal system, in particular the *ius puniendi* of the State. One of the most important principles is the principle of legality. Based on the rule-of-law principle and expressing today's democratic principle, the principle of legality is, moreover, an expression of the principle of culpability.

The value of time is significant in connection with many of the elements of the principle of legality. On the one hand, as far as the principle of culpability is concerned, a person cannot be punished for his or her actions if those actions are not defined as crime before their commission. On the other hand, under the *nulla poena sine lege praevia* maxim, retroactive application of criminal law (to the detriment of the offender) is also prohibited.

The idea of peace through time is then present in the prohibition of retroactive application of criminal law. Here, it refers to past time. The "no punishment without law" principle – of which the above mentioned prohibition is a part of – is expressly foreseen (or, in Aquinas' terms, promulgated) in art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[22]. Under art. 7 (1) *no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.*

However, the ECHR limits this principle in number 2 of article 7[23], in the sense that the punishment of the offender can exist without previous law if the *act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations*. This number 2 represents a "modern addition" relating to offenses under international law. Although,

[22] Signed in Rome on November 4th, 1950.

[23] G. Danneker, *Das intertemporale Strafrecht*, Tübingen: Mohr Siebeck, 1993, 180.

at the time the Convention was drafted, international law was not clearly defined,

> "the Nuremberg trials have established the principle that individuals may be held responsible before an international tribunal for acts which are criminal according to the general principles of law recognized by civilised nations. This principle applies even though such acts may not have been specifically defined as criminal by the law of any particular state at the time they were committed"[24].

This rule recognizes a conflict of interests, namely between the prohibition of retroactive application of criminal law and the impunity of offenses against core values recognized as such by the international community. These core values are the *corpus* of international criminal law; values which constitute the essential human rights and freedoms[25]. The fact of the matter is that international criminal law should only be called upon when the States fail, through national law, to duly protect those values[26]. Herein lies the scope of art. 7(2) ECHR and the meaning of the limitation to the principle of prohibition of retroactive application of criminal law: in such cases, when sufficient protection of those values is not accomplished by national criminal law, legal peace can only be ascertained if justice – through punishment of the offenses to those values – is made.

Concerning punishment and time there is also another important aspect, namely, prescription or statutory limitation.

Statutory limitation, or periods of prescription, is a time limit. This time limit sets forth the maximum period of time after an event that legal proceedings based on that event may be initiated.

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[24] Coblentz/Warshaw, "European Convention for the Protection of Human Rights and Fundamental Freedoms", *California Law Review* 44 (1956) 94-104, p. 99.

[25] Leonor Assunção, "TPI e Lei Penal e Processual Penal Portuguesa", in Vital Moreira *et al., O Tribunal Penal Internacional e a Ordem Jurídica Portuguesa*, Coimbra: Coimbra Editora, 2004, 49 s., p. 53.

[26] Leonor Assunção, "TPI e Lei Penal e Processual Penal Portuguesa", 53.

Statutory limitation defines criminal law as a legal order of peace through time. The passing of time or future time. In fact, it would be difficult, if not impossible, to conceive a legal order of peace – peace amongst its members – if there were no time limit for the prosecution of offenses. This limit, however, is bound by the principle of proportionality[27], meaning that more serious offenses have a longer prescription period.

However, this time limit does not determine whether the action or omission ceases to be understood as an offense. It only aims to contribute to a pacification of the community, stating that the punishment pretension of the State – aiming criminal justice – has to be exercised within a certain time frame. Here it is also important to underline the above mentioned principle of legality (here, of criminal prosecution): statutory limitation is also part of those rules that should pre-exist to the time of commission of the offense[28].

Both the prohibition of retroactive application of criminal law and the prescription periods are examples that justice exists through time. Either one of them limits the punishment of the offense based on the time factor.

Existing through time, Justice is, moreover, a universal and timeless first principle of natural rights. So, an offense against a human right is therefore timeless. And there can only be justice if said offense is punished. As Aquinas states, the natural law ordains that crimes should be punished, and temporal laws should derive said ordainment into penalties for crimes[29]. In some cases, temporal law correctly draws the conclusions from natural law, and the offense to the human right is punished with respect to time limitations of punishment. Justice is made and then there can be legal peace. But, along the line of Aquinas, it is also possible that temporal laws do not respect the first principle of justice and are, as such, no law at all. In the absence of a temporal

[27] Faria Costa, "O Direito Penal e o Tempo (Algumas reflexões dentro do nosso tempo e em redor da prescrição)", *Linhas de Direito Penal e de Filosofia: alguns cruzamentos reflexivos*, 2005, 163-190, p. 187.

[28] Faria Costa, "O Direito Penal e o Tempo", 178-179.

[29] Aquinas, *Summa Theologica*, Q 95, art. 2; Kaufmann, *Introdução à Filosofia do Direito*, 25.

law without binding or coercive power, there can only be natural rights (as natural law). And natural rights pursue the first principle of justice. The impunity of an offense to a human right is the denial of said first principle of justice. Considering justice is also made through punishment, the impossibility of punishment due to time limitations cannot be applicable when it is the case of imperfect temporal laws that do not respect the first principle of justice, because they fail to duly protect timeless human rights. Justice can only exist if offenses to human rights are punished.

Naturally, none of these considerations could be possible if the penalty were to be regarded as an evil. However, the penalty is a good. Following Faria Costa, the penalty cannot be perceived as an evil, since the penalty has in itself, unlike an evil, the limits of its own expansion, through the principle of legality. And the penalty is a good, because through the penalty it is possible to rebuild the early original care-of-peril relationship destroyed by the offense[30]. Thus, the punishment of an offense to a human right by a penalty serves justice.

Some temporary conclusions

Offenses against human rights should be promulgated by temporal laws. However, human rights are timeless. This means that even if a criminal offense against human rights has not been promulgated by a temporal law, said offense already existed as natural law, since human rights are to be perceived as the body of natural law. The human rights theory acknowledges the timeless validity of said rights.

Human rights, as said before, set limits. And, given the timeless nature of said rights, those limits are not time-bound. This means that, on the one hand, time-bound laws cannot overrule human rights – in terms of not granting them protection or dismissing them – and, on the other hand, the violation of human rights also constitutes a timeless offense.

[30] Faria Costa, "Uma ponte entre o direito penal e a filosofia penal", *Linhas de Direito Penal e de Filosofia: alguns cruzamentos reflexivos*, 2005, 205-235, p. 219-20; Idem, *Noções Fundamentais de Direito Penal*, 351-352.

Punishment of an offense against human rights serves justice. This punishment should be carried out within the time limits set by past time and by future time. However, if a temporal law does not grant due protection to a human right, said law is not valid and the punishment of the offense is not time-bound by that law.

In this regard it is also important to bear in mind the teachings of Aquinas: punishment is a means used to lead the subjects of law to virtue. And by doing so, we might add, it has the virtue of contributing to peace through justice.