The essential elements of valid law

By John Nader QC

Australians were shocked recently by the CCTV footage which emerged from the Don Dale Youth Detention Centre in the Northern Territory. In response, the Australian Government established the Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory. The commission will examine (among other things):

- the effectiveness of any oversight mechanisms and safeguards to ensure the treatment of detainees was appropriate; and
- whether the treatment of detainees breached laws or the detainees' human rights.

The essential elements of valid law

An understanding of the essential nature of valid law would be useful to persons concerned with cases involving the possible deprivation of physical or economic freedom.

Although a court cannot invalidate legislated law made with formal correctness, in an appropriate case it may be persuaded that the sentence of an offender for breach of an unjust law should be moderated for that reason.

Persons involved in the making and administration of law should accept seriously the proposition that a law which does not possess the essential ingredients for validity is unjust and, as such, is not law in the full sense, and to the extent of its defect is objectionable.

I strongly favour the opinions of Thomas Aquinas (Aquinas), as I understand them regarding the essential requirements of valid and binding law. Aquinas was a jurist of standing in his own time and continues to be so since.

His definition of valid law by reference to its essential elements is quite ancient. It dates from the middle ages. However, his writings are so mixed with theology -- a subject that many people regard as superstition-- that they are rarely read and the force of the secular jurisprudential arguments is missed. Aquinas was very strongly influenced by Aristotle whom he referred to as 'The Philosopher'.

I will summarise his formal teachings on the essential elements of valid law.

Reasonableness

The first question dealt with was whether a valid law must be reasonable. According to Aquinas, law pertains to reason [*lex sit aliquid pertinens ad rationem*]. Because the phrase 'pertains to' originates from the Latin word '*pertineo*', it should be understood that when Aquinas used it it was more forceful than the modern English signification of the word. Latin was the language of Aquinas and in his time the word 'pertains' signified 'belongs to; extending to; or reaching.' It is worth remembering that Aquinas rejected expressly the proposition 'whatsoever pleases the sovereign has the force of law.'

In a democracy the reasonableness of a law ought to be considered by or under the authority of the legislator: a term which includes the parliament as well as delegated authorities.

In this respect delegated legislation made under power conferred upon the bureaucracy by Act of parliament is a danger zone. The generality of statutory delegations are sometimes such that public servants, without sufficient attention to the reasonableness of their delegated legislation, make laws which are not reasonable. I believe that this encourages parliament to make statutes expressed in general terms that receive little ventilation in the parliament but which confer power on bureaucrats to make more specific regulations etc which may receive little or no publicity or scrutiny.

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Loose and imprecise wording creating delegated power is open to abuse. An overzealous bureaucrat might well be tempted to interpret the imprecise wording of a delegation in such a way as to favour an intention which the relevant minister has expressed to him/her in private. It should be understood that it is important that legislation potentially affecting peoples' lives should always be safeguarded by complete unambiguity.

The work of promulgation should not be left to the media which has no relevant responsibility and which tends to publicise only laws that have a sensational quality, and then, often inaccurately.

The Youth Justice Act (NT) is a statute that forcefully illustrates the point. The generality of the words that create the power to make regulations and the regulations themselves appear to give the public servants exercising the power an open slather. Surely there can be no dispute that the effects of that legislation are so unpredictable as to render the empowering legislation itself unreasonable. Indeed, it must be conceded that, in respect of the point now under focus, the Youth Justice Act is not a reasonable law and ought to be repealed or radically amended.

I refer especially to the Youth Justice Act as an illustration of non-reasonable law – the statute – used by the parliament as a device for the creation of delegated legislation: regulations concerning serious and contentious matters that never face the scrutiny of the parliament in a session special for the purpose. Mere tabling of the subordinate legislation is insufficient. Many like laws are readily found in the statute books.

My researches did no go far enough to say with certainty, but I think that the old maxim, '*delegatus non potest delegare*' is ignored: that the Youth Justice Regulations empower even further delegation.

The common good

The second question dealt with by Aquinas was whether every law must be ordained to the common good. Aquinas regarded the promotion of the common good as an essential purpose of every valid law. He wrote, that every (valid) law is ordained to the common good. ['*omnis lex ad bonum commune ordinatur*.']

Of course, the 'common good' does not imply 'the direct material benefit of every person in society'. A law which benefits only very few persons of a society may be properly categorised as being ordained to the common good. It would be condescending to my reader if I were to illustrate that point: but consider the legal requirement that there be ramps for persons using wheelchairs to gain access to buildings.

Promulgation

The third significant matter raised by Aquinas was that a law must be promulgated to the persons to be affected or bound by it. I summarise a passage of Aquinas that explains this conclusion. He wrote that in order that a law obtain the binding force which it should possess, it must be applied to the persons who have to be bound by it. Such application is made by its being notified to them by promulgation. Therefore, promulgation is necessary in order for a law to bind those intended to be bound by it; and it must be in precise, unambiguous terms.

There is a maxim of law in this country that every person is presumed to know what the law is. That of course is no more than a fiction that has to be maintained for obvious reasons. The work of promulgation should not be left to the media which has no relevant responsibility and which tends to publicise only laws that have a sensational quality, and then, often inaccurately.

Earlier in this paper when dealing with the topic of reasonableness I referred to ambiguous and uncertain legislation. But under this heading it is appropriate to point out that official publication of ambiguous and imprecise legislation may not amount to adequate promulgation.

Summary

Near the conclusion of his treatise on law Aquinas summarised his conclusions in these words: 'a law is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.'