
WHAT IS AN UNJUST LAW? AN ACCOUNT OF NATURAL VERSUS POSITIVE SCHOOL OF LAW

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ABSTRACT

Is an unjust law invalid only because it does not conform to the moral values or do other factors also play a role in deciding if a law is proper or not? *Lex iniusta non est lex*, simply translated, “an unjust law is not law”, has come to be known as one of the bedrock principles propounded by natural law theorists. More specifically the phrase has been attributed to the medieval natural law theorists. Its origins can be narrowed down to the directives of St. Augustine and the principle was thence made popular by Thomas Aquinas. This principal till date, is ascribed to be the starkest difference between natural law and positive law. While natural law theorists set out that determining whether a law is valid or not involves engaging in moral reasoning that ascertains if a law is just or unjust, positive law theorists advance that a law’s validity is a social question that is distinct from the merits of the law.¹ The title question demands an exploration through the various factors that render a law invalid. In this paper, by majorly using the directives put forward by Aquinas and that of Augustine, I will attempt to explain what factors constitute to make a law unjust and the authority these unjust laws hold. By doing this I hope to argue that the authority of every positive law is to an extent limited by morals.

¹ Samuel Ellemor, *Law and Authority*, <http://www.ellemor.com/files/unjust-law-not-law.pdf>.

Lex Iniusta Non est Lex

Over the years, prescriptions of scholars are sometimes exaggerated, reduced, neutralised or dramatized. The birth of the assertion that *Lex iniusta non est lex* or ‘an unjust law is no law’ is an example of one such dramatization. The phrase finds its roots in the directives of Augustine and Aquinas; however, their holdings were never so starkly bold as the assertion that a State could not make or enforce a law that was unjust. What their directives did contain was their perception of unjust laws and their belief that an unjust law would never be backed by any moral force in a state.

Augustine, in his work, laid out was that “nothing which is just is to be found in positive law (*lex temporalis*), which has not been derived from eternal law (*lex aeterna*)”.² In other words, Augustine believed that any law that was not in congruence with the higher (divine) reason was an unjust law and could be perceived to have been made or directed for an improper purpose. He said that such improper laws could be coercively imposed on people and enforced in a state, but the laws would lack moral force. His arguments were directed towards proving the “moral obligations attaching to law”³ and not to disprove a State’s ability to promulgate unjust laws.

Aquinas believed that “positive law is derived from natural law”.⁴ He defined just law to be those “which [are] consistent with the requirements of natural law, that is, it is ordered to [be rational and to] the common good, the law-giver has not exceeded its authority, and the law’s burdens are imposed on citizens fairly”⁵ and if a law does not meet these criteria it is deemed unjust. He further laid out that unjust laws were not laws but a ‘perversion of law’⁶ and that they were to be perceived as ‘acts of violence’⁷ rather than laws. He believed that “a law that is unjust seems not to be a law”.⁸ However, equating ‘a law that is unjust seems not to be a law’ with ‘an unjust law is no law’ would be fallacious because the through the former, Aquinas

² James Penner & Emmanuel Melissaris, Mccoubrey & White’s Textbook On Jurisprudence (5th ed. 2013).

³ *Id.*

⁴ Brian Bix, Jurisprudence: Theory And Context (3rd ed. 2003)

⁵ BIX, *supra* note 4.

⁶ Aquinas, *The Treatise on Law: Summa Theologiae, I-II*, University of Notre Dame Press (1993), <https://doi.org/10.2307/j.ctvpj79s7>.

⁷ *Id.*

⁸ *Id.*

could have simply been conveying that unjust laws are not laws ‘in the fullest sense’, and that they might not carry the same moral force or offer the same reasons for action as just laws.⁹

Both Augustine and Aquinas, simply put, state that laws that do not resonate with the moral ‘higher laws’ are considered unjust and even though they might be enforced in a state and maintain their legal authority, they are not backed by any moral force. Thence, the maxim ‘an unjust law is no law’ is used by natural lawyers to shake and deter the authority of a positive law.

Distinction between Two Senses of Law

If a law can have legal authority and at the same time lack moral authority, it must mean that there are two different mutually exclusive platforms. In other words, it points to the idea that there is a “distinction between two different senses of law, between the positive law understood with reference only to the society and institutions that created it, and the positive law understood with reference to the natural law”¹⁰. This refutes Hart’s critique of the statement ‘an unjust law is no law at all’. As per Hart’s belief if this statement was directed keeping positive laws in mind and the positive law was to be seen strictly with reference to the society and its institutions, then the statement itself would be contrary.¹¹

This means that the validity of a positive law, when understood in reference to society and its institutions, is free from any influence from the natural law. While on the other hand, when positive law is understood with reference to natural law, its validity depends on its consonance with ‘right reasons’. For example, if a freedom fighter in his struggle used the phrase ‘an unjust law is no law at all’ in his speech, it would not mean that he is denying the existence of the oppressive laws present in the country, rather, it would mean that he is saying that since those laws were ‘unjust’ they lacked moral force since they were contrary to the right reasons and thus, breaking those laws would be justifiable even though the laws were valid at the time in the country and were enforced by the oppressive legal institutions.

Critique

⁹ BIX, *supra* note 4.

¹⁰ *supra* note 1.

¹¹ *Id.*

Positive law theory propounds that law is an independent social phenomenon. It requires no validations from morals. Leslie Green advanced that, “legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits”.¹² Hart refuses that “the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice”.¹³

Hart claims that by distinguishing law from morality he can assess the merits of a law better than natural law theorists. To support this argument, he gives an example saying that not all evil laws lack a valid purpose.¹⁴ For example, if in a state, a woman is only allowed to own property if she is from an upper-class background. Prima facie, this law is unjust, but it is better than no woman being allowed to own a property. Situations like these often constitute an interplay between law and morality and Hart believes this is “muddled by the natural lawyer who is concerned with determining the validity of the law by reference to its ethical merits”.¹⁵

This poses a dilemma since there is no scale that determines just how unjust a law needs to be, to be no longer valid as it is contrary to right reason. Aquinas’s definition of unjust laws not only includes prima facie unjust laws, but also irrational laws and laws enacted as a result of corruption. This makes the paradigms of the scale to determine the validity of a law even more convoluted.

Positive Law vis-a-vis Natural Law

Hart identifies the natural law understanding of law as a teleological conception of law.¹⁶ As per the theory of natural law, law is not merely a social phenomenon. The purpose of legal institutions is to “facilitate the achievement of a good and just society, and the moral authority of the laws they administer depends on their ability to advance society towards that goal”.¹⁷ And it is natural law that decides what a good society is. As per Finnis, there are several basic goods that have an intrinsic value and humans pursue these goods till the very end.¹⁸ It should

¹² Leslie Green, *Legal Positivism*, Stanford Encyclopaedia of Philosophy (2003), <http://stanford.library.usyd.edu.au/entries/legal-positivism/>.

¹³ H. L. A. Hart, *The Concept of Law*, Oxford University Press (3rd ed. 2012).

¹⁴ *Id.*

¹⁵ *supra* note 1.

¹⁶ *supra* note 13.

¹⁷ *supra* note 1.

¹⁸ John Finnis, *Natural Law and Natural Rights*, Oxford University Press (2nd ed. 2011).

be the aim of a law to help people achieve these goods by providing a framework for them to interact with each other.¹⁹

Positive lawyers deny that positive laws are codified natural laws, but they cannot deny that the underlying principle that drive positive laws are based in natural laws. For example, a positive law punishes people for murder because murder is contrary to the reasons of natural law. Moreover, if positive law is contrary to the principles of natural law, it is said to have exceeded its authority and is rendered invalid in as much, it loses moral force. This is why, when a law is being legislated upon, legal officials should ensure that the law in question is morally valid, and the citizens should be constantly questioning whether they should obey a statutory law.

Conclusion

It is the maxim ‘an unjust law is not a law’ that ensures that the authority of law is contingent on whether the law fulfils its purpose of advancing right reasons for the common good, because if the law is incongruent to this principle, it loses moral force and is rendered invalid. It must be kept in mind though, that this maxim makes a law invalid only on the moral front, the legal validity of a law does not depend on natural law. Natural lawyers can claim that a law possesses moral authority since “they recognise that morality and legal validity are intertwined”.²⁰ Once it has been recognised that the validity of a law is contingent upon the law resonating the principles of natural law, legitimate authority of that positive law is limited, so much so, that only when this positive law meets certain moral standards, can it demand obedience from an individual.

¹⁹ *supra* note 1.

²⁰ *Id.*