2009

A Comparative Analysis of the approaches of St. Thomas Aquinas v Legal Positivism

Zieneb Susi

Available at: https://works.bepress.com/zieneb_susi/5/
‘A COMPARATIVE ANALYSIS OF APPROACHES OF ST THOMAS AQUINAS V LEGAL POSITIVISM’

Zieneb Susi
0417691
Susan Easton- Dissertation tutor

This dissertation is submitted for the degree of LLB of Brunel University 2009. This dissertation is entirely my own work and all material from other sources published or unpublished has been duly acknowledged and cited.

(Signature of Student) (Date)
I would like to deeply thank my wonderful husband Aaron for his love, support and understanding throughout this core dissertation. His patience, endurance and encouragement have provided me with the kind of support I cannot place into words. Thank you Aaron. I would also like to thank my tutor, Sue Easton, for all her help throughout this core dissertation, in addition I would like to thank God for the strength he has given me in order to write this dissertation bearing in mind the illness I have suffered and the trials over the last two years. I would also like to thank Jules Coleman for his time, input and co-operation, by applying his expertise to my core dissertation.
‘Valid human laws must be based on God’s Laws’

William Blackstone 10th July 1723 - 14th February 1780
Abstract

In this dissertation not only we will explore St. Thomas’ Natural law thesis of the innate laws that govern us but we will also explore legal positivism and consider whether we may come to the conclusion that law and morality may not, as the positivists claim, be strictly separable. It will be argued that Natural law gives effect to the most important fundamental principles of law and that positive law is merely a derivation of such laws. In this dissertation we hope to achieve two conclusive elements. One, that positive laws are derivations of the Natural law and two that laws and morality may not be strictly separable. The Naturalists presuppose laws originating from God, and some Positivists, presuppose that laws are man made. We shall do this by using the works of St Thomas Aquinas, a naturalist, and W.J Waluchow, Jules Coleman and Joseph Raz who are positivists. We hope to conclude that both the Natural law and the Positive law both play very important roles in the philosophical foundation of our laws.
# Table of Contents

**CHAPTER 1: Introduction**  
Page 1-3

**CHAPTER 2: St Thomas Aquinas and the Natural law**  
Page 4-16

2.1 St Thomas Aquinas’ Early life and Career  
Page 4-6

2.2 Epistemology- What is the Natural Law? Lex Naturalis  
Page 6-9

2.3 Lex Aeterna (Eternal law)  
Page 9-10

2.4 Lex Divina (Divine law)  
Page 11-12

2.5 Lex Humana (Humanly Posited law)  
Page 13-16

**CHAPTER 3: Natural law dissected**  
Page 17-29

3.1 The Connatural Element of Natural law  
Page 17-18

3.2 Mystical Aspect  
Page 18-19

3.3 Exploring Moral Experience  
Page 19-21

3.4 Natural laws’ Ontological and Epistemological Elements  
Page 21-23

3.5 Natural laws’ Gnoseological Element  
Page 23-24

3.6 Natural law and its connection betwixt Other kinds of law  
Page 24-28

3.7 The Requirement of a Solid Foundation for Human Rights  
Page 28-29

**CHAPTER 4: Positive Law and Legal Positivism**  
Page 30-44

4.1 Positive Law  
Page 30-31

4.2 Natural Law and Positive Law-The Relation of Natural Law to Positive  
Page 32

4.3 Positive Law derived from the Natural Law  
Page 33-34

4.4 Reduced to or Derived from Natural Law  
Page 35

4.5 What is Legal Positivism?  
Page 35-37

4.6 Inclusive and Exclusive Legal Positivism  
Page 37-42
Chapter One:

Introduction

Discourse betwixt Natural law theory and legal positivism continues to be apparent in the jurisprudential arena (*Vexata quaestio*). Both the former and the latter are factious. Natural law theory has been acquiesced in that it ‘… provides a name for the point of intersection between law and morals’¹. ‘True law is right reason in agreement with nature: it is of universal application unchanging and everlasting…[God] is the author of this law, its promulgator, and its enforcing judge’². Thus Natural law can be described as *lex non scripta*³ or unwritten.

There is a disputation which espouses that human posited laws are not necessarily derived from the Natural law, this is one aspect requiring analytical investigation and thus may be a tortuous belief on the part of positivists. Aquinas’ most famous statement is that ‘every law laid down by man has the character of law inasmuch as it is derived from the law of nature’⁴.

Moreover, the argument that law and morals are strictly separable is another very important part of our discussion. Our central aim is to conclude that human posited laws are indeed derivations of the Natural(*Lex Naturalis*) or Eternal law(*Lex Aeterna*) and also that law and political morality may not be strictly separable.

We have chosen Aquinas(1225-1274) as our jurisprudential theologian of the Natural law. In Chapter two, not only will we expatiate the rudiments of Natural law (*Lex Naturalis*), but the

---


³ *Lex non scripta* - The unwritten or common law.

⁴ 118 omnis lex humanitus posita...habet de ratione legis inquantum a lege naturae de-rivatur. St. Thomas Aquinas, Summa Theologica , I-II, Question 95 2nd Article Volume 2 , Published by Christian Classics 1981 page 1014
A Comparative Analysis Of Approaches Of St. Thomas Aquinas V Legal Positivism

Divine (Lex Divina), Eternal (Lex Aeterna) and Human (Lex Humana) posited law according to Aquinas. In Chapter three we will dissect Natural law by way of exploring the connatural element, the mystical aspect, moral experience, ontological and epistemological element, the gnoseological element, and move on to Natural law and Jus Gentium. Additionally we shall explore the requirement of a solid foundation for human rights.

Thereafter, In Chapter four, we shall be discussing Positive law, Inclusive and Exclusive legal positivism, with the use of authors such as Jules Coleman, W. J. Waluchow, James Bernard Murphy and Joseph Raz.

Legal positivism claims laws are ‘posited’ and underived from the Natural law but are acquiesced and enshrined by people for their mutual benefit. Bentham and Hart were the first to articulate the legal positivistic acuity. These early legal positivists argued repugnantly with the Natural law doctrine, due to the fact that they purported it was being used to demarcate and enshrine the English legal system, which at the time was irresolute and in need of reform. Bentham repudiated that the English legal system was not founded on Natural law principles. Thus the legal positivists seek laws which are not founded on ethics. Most legal positivists repudiate Natural law or any reference to God, as promulgator, or any other higher guiding principle of law. Now what we appear to have are hard and soft legal positivists. The former are known as exclusive, the latter as inclusive. Soft positivism acquiesces that morality may play a part in the determination and question of what is ‘law’, or that judges can and do employ moral reasoning.

Natural law and Legal Positivism are factious and equally highly interesting controversial arenas of discussion. Not only does Natural law contain questions relating to God, fatalism, ethics,
animism and morality but it also refers to ideas and questions from whence our foundational societal principles of law arose. Legal Positivism, as previously mentioned, rejects the view that there is indeed a higher guiding source from which we obtain our morals.

Our aim in this core dissertation is to conclude, in Chapter five, that one, positive laws are derivations of the Natural law and two, that law and morality may not be strictly separable. Thus we shall begin our compendium and disputation, not only will our study be assiduous but it will be audacious.
Chapter Two:

St Thomas Aquinas and the Natural Law

2.1 St Thomas Aquinas Early Life and Career

Aquinas was the most famous natural law theorist and he enshrined the natural law doctrine. The birth of Aquinas was in 1225 in Naples\(^5\). He was given the name Aquinas, as his father was the Count Landulf of Aquin\(^6\). His mother was called Theodora, Countess of Teano\(^7\). When he was five years old he was educated in a monastery\(^8\) by Benedictine monks at Monte Cassino\(^9\). He studied at the University of Naples for six years\(^10\) in about the year 1239\(^11\). In his later years his peers and superiors noticed his great natural ability for theological study\(^12\). Consequently, he was sent to the Dominican school in Cologne\(^13\). There Albertus Magnus lectured on theology and philosophy\(^14\). In 1245 they both went to the University of Paris for three years\(^15\). In 1248 he graduated as a bachelor of theology, then he returned to Cologne\(^16\). Here Aquinas began his literary activity and public life, as he had been appointed a *magister studentium* and second lecturer\(^17\). Albertus Magnus was a great philosopher-theologian; Aquinas remained with him and

\(^6\) http://www.stac.viv.edu/A_Brief_Life_of_St_Thomas_Aquinas.htm
\(^7\) ibid
\(^11\) http://www.stac.viv.edu/A_Brief_Life_of_St_Thomas_Aquinas.htm
\(^13\) ibid
\(^14\) ibid
\(^15\) ibid
\(^16\) ibid
\(^17\) ibid
this was the most important influence in his development. Aquinas achieved his master’s degree from the University of Paris in 1257. Here he attained and developed his intellectual power and grew familiar with the vast field of philosophical and theological study. By 1256 he attained the name ‘Doctor of theology’. Thereafter he lectured on theology in Rome and Paris. For nine years he lectured, taught and wrote for the Papal Court as its theologian. The study of Aristotle and the literature of the Fathers of the Church deeply engrossed him. At Pope Urban’s IV solicitation, Aquinas moved to Rome in around 1261. In Rome and Bologna Aquinas lectured during the year 1268. Aquinas engaged himself, throughout these years, in the continual business of the Catholic Church.

Aquinas was once more active in Paris from 1269 to 1272, where he lectured, advised the King, Louis VIII, on the affairs of state and also managed affairs of the Catholic Church. In 1272 King Charles II recalled Aquinas to Naples. Aquinas preached each day, wrote disputations and lectures, and worked hard on his most famous work the Summa Theologica.

In 1267 the first part of his masterpiece, the Summa Theologica was accomplished. Between 1269 to 1272 the Second Part of the Summa Theologica was accomplished and the Third Part begun again and completed. ‘I can do no more’ he declared on the 6th December 1273. While

18 ibid
19 http://www.stac.viv.edu/A_Brief_Life_of_St_Thomas_Aquinas.htm
21 ibid
22 ibid page 422-423
23 ibid
24 ibid
28 http://www.stac.viv.edu/A_Brief_Life_of_St_Thomas_Aquinas.htm
29 ibid
Aquinas was on his way to attend the Council of Lyons, he died on March 7th 1274 at Fossanuova in Northern Italy.30

2.2 Epistemology-What is Natural Law? (Lex Naturalis)

Aquinas distinguishes between four types of law: Lex Naturalis, Lex Aeterna, Lex Divina and Lex Humana. Lex Naturalis, Natural law is a mystical doctrine guided by moral precepts. ‘Natural Law’ is described as ‘the law as determined by man’s human, spiritual and, specially, moral nature, as opposed to the positive law: hence a theory of law which emphasizes the connection of law to morality.’31 Natural law ‘…provides a name for the point of intersection between law and morals’32. Theories of the Natural law attempt to resolve what is and what ought to be, this is its principal thesis. In Cicero Stoic’s statement in De Re Publica there are three main homogeneous elements of the natural law philosophy ‘True law is right reason in agreement with nature: it is of universal application unchanging and everlasting…it is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish entirely…[God] is the author of this law, its promulgator, and its enforcing judge.’33 Natural law is humans’ participation in the Eternal law through reason and will. The Eternal law of God is that which humans actively participate, by using reason which conforms to the Natural law to discern what is good and what is evil.

Gratian stated in about 1140 in his Decretum, customs and constitutions are overridden by Natural law. Usage or written laws are void and ineffective if they should contradict with the Natural law. Aquinas himself declared that laws which conflict with the demands of the Natural

30 ibid
A Comparative Analysis Of Approaches Of St. Thomas Aquinas V Legal Positivism

law lose their authoritative power to bind one morally. According to Aquinas we all possess a ‘‘separate intellect’’ which causes us to become inclined to act in certain manners. This purported inclination is not grasped by any kind of knowledge but by ‘‘all those things to which man has a natural inclination, one’s reason naturally understands as good (and thus ‘‘to be pursued’’) and their contraries as evil (and thus ‘‘to be avoided’’)’’. These are precepts of the Natural law.

The acquiring of knowledge through thought, expression and the senses (non-cognitivism) and the rise of legal positivism, contributed to the decline of the Natural law theory. Nevertheless its decline was irrefutable when its revival resurfaced. This came about after the World war II, where declarations such as the European Convention on Human Rights, The Universal Declaration of Human Rights, The Charter of the United Nations and the Declaration of the Delhi on the Rule of Law were all promulgated. In this context Natural law silently but profoundly set boundaries which positive law could not abrogate. Moreover, the judgment in the Nuremburg War Trials, which determined crimes against humanity, suggested that, Natural law was and did play a fundamental role, when it was purported that sometimes the written law (positive law) is not necessarily correct or apposite.

There is a natural inclination in man because the rational soul is the proper form of man. Man acts according to virtue and reason. Natural law contains all acts of virtue, so everyone’s act of

---

34 St Thomas Aquinas. Summa Theologica I-II Question 94, 2nd Article, Volume 2, Published by Christian Classics 1981 page 1009
35 ‘Noncognitivism is the view that there is no rational procedure by which we can objectively know what is morally right and wrong.’ Legal Philosophies Second Edition by J.W. Harris LexisNexis UK 2003.
36 The European Convention on Human Rights 1950
37 The Universal Declaration of Human Rights 1948
38 The Charter of the United Nations 1945
40 The Nuremburg War Trials 1945-1949
reason must dictate that he should act virtuously\textsuperscript{41}. Natural law is a universal law prescribed and promulgated by the will of God upon nature, reason or other absolute principles.

The ancient Romans believed that the Natural law was taught by nature to all animals. This was observed by people such as The Preachers of the French Revolution, Medieval authors, the Puritans and the modern authors. Thus all believed that Natural law was determined by the very virtue of nature\textsuperscript{42}. “Natural law is nature revealing itself to human reason as willed by God”\textsuperscript{43}. In the words of Aquinas, Natural law is ‘a dictate of reason commanding something’\textsuperscript{44}.

Since the Decalogue and the Mosaic law, human’s have been directed to follow certain standards of behavioural capitulary\textsuperscript{45}. H.L.A. Hart agreed that the development of the law has been influenced by morality\textsuperscript{46}.

Aquinas states that ‘all things partake somewhat of the eternal law insofar as…it being imprinted on them they derive their proper acts and ends’\textsuperscript{47}. He continues, ‘it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called ‘Natural Law’\textsuperscript{48}. Aquinas refers to this ‘imprint’ on us as the ‘Divine Light’. Thus Natural law is really nothing more than the rational creature’s participation of the Eternal law. Thus the

\textsuperscript{41} St Thomas Aquinas in Thomas Aquinas Selected Writings. Penguin Classics by Ralph McInerny 1998 pp.646
\textsuperscript{42} Interpretations of Modern Legal Philosophies: Essays in honour of Roscoe Pound:’ Positive and Natural law and their correlation’ by Max M. Laserson page 434.By Paul Sayre, New York Oxford University Press 1947
\textsuperscript{43} God and the Natural Law a Rereading of Thomas Aquinas by Fulvio Di Blasi. St Augustine’s Press 2006.
\textsuperscript{44} St. Thomas Aquinas, Summa Theologica, I-II, Question 92, 2\textsuperscript{nd} Article, Volume 2, Published by Christian Classics 1981, page 1002
\textsuperscript{45} Meaning: a code of laws
\textsuperscript{46} Law, Liberty and Morality, HLA Hart, Stanford University Press, 1963 page 1
\textsuperscript{47} St. Thomas Aquinas, Summa Theologica I-II, Question 91, 2\textsuperscript{nd} Article, Volume 2, Published by Christian Classics 1981, page 997
\textsuperscript{48} Ibid
foundational or first precept of the Natural law according to Aquinas is that ‘good is to be done and promoted and evil to be avoided’{

2.3 Lex Aeterna (Eternal Law)

Augustine states ‘that law which is the Supreme Reason cannot be understood to be otherwise than unchangeable and Eternal’\textsuperscript{50}. Thus because law is unchangeable this type of law is Eternal. Divine Providence rules the World. The Whole cosmos is thereby governed by Divine Reason. God’s Divine Reasons for human’s and the Universe are not affected by time but are eternal, according to Proverbs viii.23\textsuperscript{51}. Therefore this type or kind of law, unchangeable and immutable, embedded in the Divine Providence, provokes an Eternal law. This is known as the Eternal law\textsuperscript{52}. ‘Divine Wisdom’ is inherited by the Eternal law. The Eternal law causes a movement in all things towards their ends. God himself does this while governing them in view of that end. He imprints a necessary movement within their very being in relation to non-rational beings and normative in man. Reason is connected to the Eternal Law which consists in the Divine Intellect, the intellect being ‘that which is ruled and measured’\textsuperscript{53}. The Eternal law exists in non-human beings, they are also governed by inclination which regulates their movements by the Laws of Nature. And in man, he also possesses a rational inclination (connaturality) ‘or normative knowledge of his practical reason’\textsuperscript{54} thus regulating the free will relating to the view of the

\textsuperscript{49} St. Thomas Aquinas, Summa Theologica, Question 94, 2\textsuperscript{nd} Article, Volume 2, published by Christian Classics, 1981, page 1009
\textsuperscript{50} St. Augustine, Summa Theologica, Question 91, 1\textsuperscript{st} Article, Volume 2, published by Christian Classics, 1981, page 996
\textsuperscript{51} St. Thomas Aquinas, Summa Theologica, Question 91, 1\textsuperscript{st} Article, Volume 2, published by Christian Classics, 1981, page 996
\textsuperscript{52} Ibid
\textsuperscript{53} God and The Natural law A Rereading of St Thomas Aquinas by Fulvio Di Blasi St Augustines Press 2006 pp.2
\textsuperscript{54} Ibid
A Comparative Analysis Of Approaches Of St. Thomas Aquinas V Legal Positivism

ultimate end. ‘Eternal law (of which Natural law is a part) means God as “that which rules and measures” directing all created things to himself as to their ultimate end. Everything must move. Eternal law, through its efficacy, ensures that this is so, the movement of these things operate in accordance to their specific and proper end. Thus the origin of natural inclinations and ends become enforced. Natural inclinations are deeply embedded and occur in the very existence of Eternal law. Thus Eternal law operates (as Natural law) through inclination. One might say that the Eternal law is known through prudence, practical wisdom and moral science.

‘“The very idea of the government of things in God the ruler of the Universe”, also has the nature of a law. Because God is not subject to time, his law must be called Eternal’.

God thus activates all beings by his intellect and will which he acts upon, Divine Providence is hereby derived. Divine Reason thus guides the entire cosmos. The entirety of created beings is governed by God, which he applies judgment and command of the practical reason to govern a unified community. ‘Eternal law is one with the eternal wisdom of God and the divine essence itself’. Aquinas defines this eternal law as ‘nothing other than the exemplar of divine wisdom insofar as this wisdom directs all actions and movements of things’.

56 God and The Natural law A Rereading of St Thomas Aquinas by Fulvio Di Blasi St Augustines Press 2006 pp 5
57 ibid
58 God and The Natural law A Rereading of St Thomas Aquinas by Fulvio Di Blasi St Augustines Press 2006 pp 71
59 http://www.drbilllong.com/Jurisprudence/AqII.html
60 Natural Law. Reflections on Theory and Practice, Jacques Maritain.St Augustine’s Press 2001 pp40
61 ibid
2.4 Lex Divina (Divine Law)

‘Besides the natural and human law, it was necessary for the directing of human conduct to have a Divine law’\(^{63}\). Through the divine law, or biblical law, God expresses to us a supranatural law to guide us throughout life to our supernatural ‘end of eternal happiness with him’\(^ {64}\). The Eternal law is whence the divine law is derived which has appeared to humans throughout history by means of the Old and New Testaments as divine commands by God. The Old Testament refers to the Ten Commandments, whereas the New Testament refers to the teachings of Jesus Christ. In the content of the Old law (contained in the Pentateuch\(^ {65}\)) humans were induced to act through fear, whereas, the New law commands through love and promises of heavenly rewards. Thus the Old law had an external element which contained earthly promises. Whereas the New law had and still has an internal element promising eternal life.\(^ {66}\)

Divine law thus reaches human beings through revelation. The divine law or the Mosaic law of the Old Testament is divided into moral, civil and ceremonial precepts. The civil aspects duty was to regulate the people, under the command of God, concerning their relations among themselves and their neighbours. The ceremonial aspect induced the importance upon the people concerning matters of religion and the worship of God. And the moral aspect contained a set of principles concerning right and wrong and how people should behave (ethics). Thus the Mosaic law of fear was replaced by Christ’s attractive and influential precepts which contained a law of love as opposed to a law of fear\(^ {67}\). The divine law was necessary for four reasons. Firstly, for humans to perform proper acts they require divine guidance. As Aquinas states ‘first because it

\(^ {63}\) St. Thomas Aquinas, Summa Theologica, I-II, Question 91, 4\(^{th}\) Article, Volume 2, published by Christian Classics, 1981, page 998
\(^ {64}\) http://www.jcu.edu/philosophy/genster/ms/aquina00.htm
\(^ {65}\) The first 5 books of the Old Testament: Genesis; Exodus; Leviticus; Numbers and Deuteronomy.
\(^ {66}\) http://www.wku.edu/~jan.garrett/302/aquinlaw.htm
\(^ {67}\) http://www.newadvent.org/cathen/09071a.htm
A Comparative Analysis Of Approaches Of St. Thomas Aquinas V Legal Positivism

is by law that man is directed how to perform his proper acts in view of his last end. He continues, ‘But since man is ordained to an end of eternal happiness which is inproportionate to man’s natural faculty therefore it was necessary that besides the natural and the human law, man should be directed to his end by a law given by God’.

Secondly, because of the uncertainty of human judgment, it was important for man to be directed by a law given by God so that man may be in no doubt of what he ought to do and what he ought to avoid without doubt.

Thirdly, divine insight is necessary because man is not competent to judge, for example: the interior movements of the mind as Aquinas states ‘But man is not competent to judge of interior movements, that are hidden, but only of exterior acts which appear…consequently human law could not sufficiently curb and direct interior acts: and it was necessary for this purpose that a Divine law should supervene.

Lastly, because ‘Human law cannot punish or forbid all evil deeds… in order therefore that no evil might remain unforbidden and unpunished, it was necessary for the divine law to supervene, whereby all sins are forbidden.

Thus not only is Natural law a derivation of the Eternal law but so too is the Divine Law.

---

69 ibid
70 ibid
71 ibid
‘Human laws derive their legal quality, their power to bind in conscience from the Natural law’. Human law can be described as positive laws. These are written and enacted. If these laws are deficient or corruptive they are not true laws at all, according to Aquinas.

Aquinas’ views on human laws are those which are devised by human reason and thus adapt to social, geographical and historical circumstances. The common good is the objective of what the human law should strive to achieve.

Human laws can be described as just or unjust. Just laws have the capacity of binding our conscience from the very notion that they are derived from the Eternal law. As Augustine says ‘an unjust law does not seem to be a law at all’. Therefore unjust laws cannot bind the conscience unless such laws may avoid disturbance or scandal, thus may cause one to give way to his right. As Jesus Christ said ‘and if someone wants to sue you and take your tunic, let him have your cloak as well’, if someone forces you to go one mile, go with him two miles. All human laws have the same ends, as long as they are not perversions of law, the ends being contained in the Natural law which is an expression of the Eternal law. The promotion of virtues are instrumented by human laws, this is necessary for the common good. Fear of the law prevents people from committing crimes according to Aristotle. Aquinas agrees, and adds that

73 http://www.wku.edu/~jan.garrett/302/aquinlaw.htm
74 http://www.fordham.edu/halsall/source/aquinas2html
76 Matthew: 5:41 Ibid page 1092
77 http://www.wku.edu/~jan.garrett/302/aquinlaw.htm
even those individuals who are evil could adhere in the direction of fulfilling virtues by coercion\textsuperscript{78}. The ‘common good’ doctrine should and must be the main core of human laws.

Aquinas points out, that human law is not necessarily present to repress all vices. It is enacted and written for those whom may be distant from virtues. Such laws are promulgated for grievous vices, such as murder and theft. People would become hostile towards the law if the legislators attempted perfection\textsuperscript{79}.

‘Everyone is subject to human law and ought to obey the human law’\textsuperscript{80}. All those who legislate and enforce the law will be judged by God and held accountable by him\textsuperscript{81}.

According to Aquinas, human laws are always subject to change, but this should not be acted upon lightly. Change may occur through the development or improvement through which experience has witnessed. Any rapid change of a human law could undermine developed customs and habits\textsuperscript{82}.

Aquinas refers to Natural law in order to define human law. Aquinas says that the natural law precepts develop the human reason which proceed to certain particular determinations of the laws. These determinations, which are devised by human reason, are called ‘human laws’\textsuperscript{83}.

In defining human law’s, the ‘human practical reason moves from the general principles implanted in Natural law to the contingent commands of human law’\textsuperscript{84}. Natural law not only holds moral content but it is more perfect than human law, this is because human laws are more
variable. Natural law causes human laws to be applied, and human laws cannot deviate from this fact (‘the spirit of the natural law’). Any deviation from a human law, which is a true law holding the principles of Natural law, would be viewed as a perversion of law and would thus be a law in name only\textsuperscript{85}.

As Augustine says ‘there never seems to have been a law that was not just’ because an unjust law is no law at all (\textit{lex injusta non est lex})\textsuperscript{86}. A law holds its force as long as it is just. For a law to be just it must be in accordance with the rule of reason. Natural law is the first rule of reason. ‘Thus every human law has the nature of a law insofar as it is derived from the Natural law’\textsuperscript{87}. If there is any conflict between a human law and Natural law, then that human law is not law but merely a corruption of it.

Origin from the Natural law can occur in two ways, in one way as a conclusion from a premise\textsuperscript{88}. And the second mode is known as determination. The first mode we may illustrate by example: ‘‘you must not kill’’ possibly concludes from the precept ‘‘you must do harm to no one’’. This is a conclusion belonging to Natural law. The mode of determination, Aquinas states that these precepts ‘have their force only by human law’\textsuperscript{89}, for example: ‘the law of nature requires that he who sins should be punished, but that he be punished by this or that punishment is a determination of the law of nature’\textsuperscript{90}. Both modes of derivation are found in human law. The

\textsuperscript{85} ibid
\textsuperscript{86} ‘Lex injusta non est lex’ :Meaning an unjust law is not law
\textsuperscript{87} http://www.fordham.edu/halsall/source/aquinas2html
\textsuperscript{88} The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 94
\textsuperscript{89} The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 97
\textsuperscript{90} http://www.fordham.edu/halsall/source/aquinas2html
former derives its strength from legal enactment and the Natural law. Determinations derive their strength only from the human law\textsuperscript{91}. We will now lead on to the dissection of Natural Law.

\textsuperscript{91} http://www.fordham.edu/halsall/source/aquinas2html
Chapter three:

Natural law dissected

3.1 The Connatural Element of Natural law

Connaturality is a notion which declares that we all possess knowledge innately. The notion of knowledge through connaturality is described as knowledge not produced by virtue of conceptual connections or demonstrations but instead it is by knowledge produced in the intellect.92

Connaturality plays a considerable role in this kind of knowledge in the existence of human beings because it compels us to assert ‘in a deeper manner the analogous character of the concept of knowledge.’93

In the Thomist school the notion of knowledge through connaturality is classical. Aquinas states that there are two ways to judge things that belong to a moral virtue.94 Firstly, an individual can possess in their mind moral science, ‘the conceptual and rational knowledge of virtues, which produces in us a merely intellectual conformity with the truths involved’95. For example, thus if one was to ask someone a question about fortitude they would consult the intelligible and conceptual substance established therein.

Secondly, the virtues in question can be possessed by our own will and desire. These may be embodied in ourselves, thereby we act according to such virtues that we are co-natured with. These are in our very being96. Through inclination, by studying and consulting what we are, and how we determine things, we connect to our inclination, which through this connaturality is

92 Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 page 13
93 Ibid page 14
94 Ibid page 14
95 Ibid page 14
96 Ibid page 15
born. For example, through connaturality, if we are asked a question about fortitude, we do not use science but rather we use our inclination and by consulting our inner propensities of our inner or innate being\(^97\). This is known as connaturality through inclination.

Connaturality is not knowledge that plays alone. It contains affective inclinations and dispositions of the will and connaturality is the result of the guidance and direction of such affective inclinations and dispositions.

Connaturality is not conceptual knowledge but rather it is knowledge through undiscoverable and unknown means. It cannot give ‘account of itself or be translated into words’\(^98\). ‘The spiritual man knows things through connaturality, not only because he has learned them as the Pseudo-Dionysius put it, but because he suffers them’.\(^99\) Knowledge through connaturality is a part of the fundamental features of Natural law.

\[3.2 \text{ Mystical Aspect}\]

The Christian contemplatives, according to Bergson, witnessed and developed their theory of knowledge through connaturality. It is the mystical experience which developed the theory of knowledge through connaturality. Thus the knowledge of mystical experience stems from the connaturality ethos of Christian contemplatives. These Christian contemplatives believed that as God inhabits the soul we receive from him a special inspiration, this causes in us a mystical contemplation or supernatural contemplation.\(^100\) Our own concepts or ideas cannot direct us to a fruutive experience of God. A fruutive experience of God allows one to know divine things. Thus such a supra-conceptual knowledge is derived by way of connaturality. Connaturality plays a

\(^{97}\) Ibid page 15  
\(^{98}\) Ibid page 15  
\(^{99}\) Ibid page 15  
\(^{100}\) Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 page 16
fundamental role in God’s love between him and man. According to John of St. Thomas (a commentator of Aquinas) this love ‘grows into an objective means of knowing, *Transit in Conditionem Objecti*, and replaces the concept as intentional instrument obscurely uniting the intellect with the thing known, in such a way that man not only experiences his love, but through his love, that precisely which is still hidden in faith, the *still* more to be loved, and to be tasted in love, which is the hidden substance of faith’\(^1\).

God infinitely transcends, through love, any human knowledge. We are aware of God as unknown ‘*tanquam ignotus cognoscitur*’ as Aquinas puts it.\(^2\)

One other kind of mystical experience is natural mystical experience which happens when one forces one’s own intellect inwards ‘against the grain of nature, and in obliging it to empty itself of any particular representation’.\(^3\) This natural mystical experience depicts one beyond physical matter or metaphysical reality. Thus the self is in its pure ‘metaphysical actuality’. All images, recollections, ideas, any passing phenomena and any distinct consciousness are swept away by a supreme effort of voluntary and intellectual concentration.\(^4\)

### 3.3 Exploring Moral Experience

The most widespread instance of knowledge through connaturality is offered to us by way of the moral experience. Aquinas witnessed the first examples of knowledge through connaturality in

---

\(^1\) Ibid page 16-17.
\(^2\) Ibid page 17
\(^3\) Ibid
\(^4\) Ibid
the experiential, and not philosophical, moral virtues\textsuperscript{105}. Moral consciousness attains a kind of knowing, inexpressible in words and notions, by way of connatural
ity\textsuperscript{106}.

Natural laws’ genuine conceptive identity is that it is something which is known through inclination or connatural
ty, and not through any conceptual knowledge or by way of reasoning. Thus it expresses also the functioning of human nature which is naturally known by way of inclination\textsuperscript{107}.

Natural law does not proceed from any rational exercise of reason, discursive or conceptual knowledge but rather it proceeds from connatural
ty\textsuperscript{108}.

Essentially all our animal instincts are human and reason permeated inclinations. Over time these inclinations of Natural law have developed and continue developing\textsuperscript{109}. Thus there has been a division, through morality, of the ‘essential inclinations of human nature from the accidental, warped or perverted ones’\textsuperscript{110}. This has occurred through history, whence the moral conscience has played a fundamental role in such divisions\textsuperscript{111}. Historically regulations have been shaped by morality since the era of the oldest social communities\textsuperscript{112}.

Connatural
ty, through these genuine inclinations has not only been responsible ‘for the regulations which, recognized in the forms of dynamic schemes from the time of the oldest social communities, have remained permanent in the human race’\textsuperscript{113}.

\begin{thebibliography}{9}
\bibitem{105} Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 page 19
\bibitem{106} ibid
\bibitem{107} ibid
\bibitem{108} ibid page 20
\bibitem{109} ibid
\bibitem{110} Ibid page 21
\bibitem{111} ibid
\bibitem{112} ibid
\bibitem{113} ibid page 21
\end{thebibliography}
Natural law is not connected to positive laws prescriptions nor is it a part of it\textsuperscript{114}.

Principles immediately known, are primarily dealt by Natural law, these are inclinations that do not contain rational medium or conceptual knowledge in relation to human morality. Natural law precepts are known through inclination and in an undemonstrable manner.

Rational human reason or conceptual knowledge does not intervene in its knowledge of Natural law, but human reason is aware of natural law and yet plays no role to cause it to exist or cause it to be known\textsuperscript{115}.

Divine reason is that which only natural law depends on. For the characteristic element of Divine reason is possessed by a naturally sacred element which binds man in conscience and is ‘the prime foundation of Human law’\textsuperscript{116}.

**3.4 Natural laws’ Ontological and Epistemological Elements**

Natural law has two very distinguishable elements: the Ontological and the Gnoseological. We shall firstly focus on the Ontological\textsuperscript{117}.

By the very virtue of human nature, there is a distinct order which is discoverable by the human reason. Furthermore, it is according also to the will of the human being, in that he must act to attune himself to the essential and necessary ends of his being. Thus considered in its Ontological aspect, the unwritten law or Natural law is just that. Natural law directs every being, just as that being possesses its own essence\textsuperscript{118}. For example, all those things that human industry produces, possess their own Natural law. Confronted with any unknown gadget it must be

\textsuperscript{114} ibid
\textsuperscript{115} Ibid page 21-22
\textsuperscript{116} Ibid page 22
\textsuperscript{117} Meaning, ‘the branch of philosophy concerned with existence’. Collins Gem English Dictionary 2004 page 406.
\textsuperscript{118} Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 page 27
discovered how it is to be used, therefore a specific law is searched for that object without questioning the existence of that inner law.\textsuperscript{119}

Since man freely disobeys or obeys Natural law, it is considered, by man, to be a moral law. In addition ‘human behavior pertains to a particular privileged order which is irreducible to the general order of the cosmos and tends to a final end superior to the immanent common good of the Universe’\textsuperscript{120}.

The ideal order of Natural law that relates to human actions causes a separation between the correct or incorrect in relation to the ends of the human nature or essence\textsuperscript{121}. For example, murder is incompatible with the first precept of Natural law. Its incompatibility rejects the ‘general ends and innermost dynamic structure of the rational essence’\textsuperscript{122}.

Grounded on the human essence and on its unchangeable structure, ‘and the intelligible necessities it involves’\textsuperscript{123}. Natural law boasts ontological and ideal aspects and brings forth the human essence into an ontological reality, not existing separately but existing in every human being. Natural law dwells there as an ideal order in man’s very core\textsuperscript{124}.

The whole field of Natural moral regulations and natural morality are inevitably co-extensive with Natural law. ‘The slightest regulations of natural ethics mean conformity to Natural law’\textsuperscript{125},

\begin{itemize}
\item \textsuperscript{119} Ibid page 28
\item \textsuperscript{120} Ibid page 29
\item \textsuperscript{121} Ibid
\item \textsuperscript{122} Ibid page 30
\item \textsuperscript{123} Ibid
\item \textsuperscript{124} Ibid page 31
\item \textsuperscript{125} Ibid
\end{itemize}
these include the primary and fundamental regulations. Rights or natural obligations, which we may or may not be aware of, may be in conformity to the Natural law.\textsuperscript{126}

\section*{3.5 Natural laws Gnoseological Element}

‘Natural law is not a written law by man’\textsuperscript{127}. The gnoseological element, which is the second element encompassed in the Natural law measures human practical reason which is the measure of human acts. The first precept of Natural law is that we must do good and avoid evil. Man’s knowledge of the Natural law has increased by way of man’s moral conscience development as time has passed\textsuperscript{128}.

‘Only when the gospel has penetrated to the very depth of human substance will Natural law appear in its flower and its perfection’\textsuperscript{129}.

There are two different aspects of the law. On the one hand is the law, on the other there is the knowledge of the law. Promulgation of a law enforces its force. Natural law only has the force of law insofar ‘as it is known and expressed in assertions of practical reason’\textsuperscript{130}. Thus the gnoseological element is fundamental in the arena of Natural law.

‘Through the guidance of the inclinations of the human nature’\textsuperscript{131}, the regulations of Natural law are discovered by human reason, according to Aquinas. Therefore, Natural law is identified as

\begin{flushright}
\textsuperscript{126} Ibid page 31\textsuperscript{127} Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 page 32\textsuperscript{128} Ibid\textsuperscript{129} Ibid page 33\textsuperscript{130} Ibid\textsuperscript{131} Ibid
\end{flushright}
knowledge through inclination and not by any type of rational knowledge. Thus the human reason recognizes Natural law through inclination\textsuperscript{132}.

Knowledge through inclination was largely developed by Aquinas\textsuperscript{133}. Connaturality appears to be a knowledge that is unclear. ‘Knowledge by inclination or by connaturality…is obscure, unsystematic, vital knowledge, by means of instinct or sympathy’\textsuperscript{134}.

Moulded and shaped by inclinations of human nature, has vastly encouraged Natural law to progress. The knowledge of the Natural laws’ primordial aspects may not have been expressed in personal judgements, but rather expressed in social patterns\textsuperscript{135}. ‘This knowledge has developed from inside, within the double protecting tissue of human inclinations and human society’\textsuperscript{136}.

\subsection*{3.6 Natural law and its connection betwixt Other kinds of law}

Natural law is given its authority from the Eternal law, and it is to this law that we must have recourse in search of the Natural law. Aquinas, on the basis of theological arguments, insisted that the Eternal law exists. God is the first cause of being and he activates everyone and everything. It is from the act of his will and intellect that we obtain the notion of Providence. Divine Reason governs the entire Universe. The reality of what we call ‘law’ derives from the one who governs [God] all created beings. Thus, judgment and the ordering of the practical reason is laid down in order to govern a unified community\textsuperscript{137}. Eternal law as defined by

\begin{flushright}
\textsuperscript{132} Ibid pages 33-34  \\
\textsuperscript{133} Ibid pages 34-35  \\
\textsuperscript{135} Ibid page 35  \\
\textsuperscript{136} Ibid pages 35-36  \\
\textsuperscript{137} Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 page 40
\end{flushright}
Aquinas is ‘nothing other than the exemplar of divine wisdom insofar as this wisdom directs all actions and movements of things’\(^{138}\).

Aquinas explains ‘law is a measure and a rule, and hence is found in him who rules, and also in that which is measured and ruled, for a thing is ruled and measured insofar as it participates in the measure and rule existing in the one who rules. Now since all things are ruled and measured by the Eternal law we must conclude that they participate in this law insofar as they derive from it the inclinations through which they tend naturally toward their proper operations and ends’\(^{139}\). Thus in any creature, it possesses a natural inclination in accordance with the participation of the Eternal law. Thus the creature is drawn towards the end to which it is suited.\(^{140}\) ‘It is this participation in the Eternal law enjoyed by the rational creature which is called the Natural law’\(^{141}\).

Participation of the Eternal law is inherent in all human beings thus for all human beings there is a Natural law. The Natural law is an active participant, in the rational creature, of the Eternal law\(^{142}\).

Aquinas helps us to recognize\(^{143}\) that the human will in all its goodness is that which is dependent on reason, and by viewing Natural law as its immediate measure is even more dependent upon the Eternal law which is thus the Divine Reason. The Divine Reason is the


\(^{140}\) Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 pages 40-41

\(^{141}\) Ibid page 41

\(^{142}\) Ibid page 41

A Comparative Analysis Of Approaches Of St. Thomas Aquinas V Legal Positivism

orchestrator of Natural law from which Natural law emanates. It should be noted that the Natural law, with its characteristics of the authority and the ways in which human acts are measured are not essentially rooted in God nor guaranteed by him. The Divine Reason possesses the causal effect of law to exist, thus causing it to be known if it is the cause of human nature and its vital inclinations

In effect the law is an ordinance of Reason (ordinatio rationis) thus no law can exist without an ordering reason. In relation to Natural law, human reason plays no part in establishing the law by way of initiating it, forcing it to exist or by making it known. Divine Reason is the author of the law as Aquinas says: ‘Natural law is a participation in the Eternal law. It is the Divine Reason which is involved’. "

The Divine Reason, through the element of inclination, imprints a light upon human reason. Knowledge through inclination is paramount to one’s understanding of the Natural law. It sweeps away any intervention by human reason, in the creativity of the Natural law.

A general definition of law was given by Aquinas: ‘a certain ordinance of reason for the common good, promulgated by him who has care of the community’. Aquinas does not express any will in his definition, only references to intelligence and reason. For example ‘in order to kill it is not a matter of having the will to kill’. There must be some presence of will in law because without it there is no order. Because of this order, law is defined by reason and

---

144 Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 pages 41-42
145 Ibid page 43
146 Ibid
147 Ibid
149 Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 pages 44
intelligence. Reason creates order which in itself is order. An ordination of reason is presupposed by law for the common good\textsuperscript{150}.

Laws are promulgated by those who have care for the community to promote its common good, without such a responsibility there would be no authority to make laws. This God-given authority allows one to legitimately legislate and impose duties or responsibilities on others through the vessel of law. ‘There would not be any power to oblige, if the reason from which the law emanated was not the divine reason\textsuperscript{151}.

Jus Gentium, otherwise known as the Law of Nations, comprises the common law of civilization. This type of law differs from the Natural law when we relate it to the gnoseological element of Natural law. Jus Gentium is known through conceptual exercise of reason, unlike the Natural law which is known through inclination. Thus, Jus Gentium belongs to the arena of positive law. When human reason intervenes as an orchestrator we enter the World of the positive law as Aquinas believed\textsuperscript{152}.

Consequently with the Jus Gentium we have a formal juridical order. These regulations comprise rational, logical and conceptual exercise of the common reason, beginning from the primary and profound principles of Natural law\textsuperscript{153}.

There is a necessary distinction to be made with regard to jus gentium. Firstly, there may be regulations that pertain to the Natural law which are included in jus gentium. Such regulations which are not only upon human nature but are connected to the first principle of Natural law ‘do good and avoid evil’ may be known through inclination, which makes them belong to the Natural

\textsuperscript{150} Ibid page 44
\textsuperscript{151} Ibid page 45
\textsuperscript{152} Ibid page 47-48
\textsuperscript{153} Ibid page 49
law, but on the other hand they may be known through conceptual exercise of reason which makes them belong to the family jus gentium\textsuperscript{154}.

Thus bound up with the first principle of Natural law, the common law consists of duties which pertain to Natural law’s first principle. Human reason establishes this necessity. Because the regulations of the social life are instrumented by human reason, we have been driven to believe that Jus Gentium is more intrinsically attached to the social and international domain\textsuperscript{155}. Universally valid norms of conduct, known to common consciousness by virtue of deducement of human reason are a part of Jus Gentium\textsuperscript{156}.

3.7 The Requirement of a Solid Foundation for Human Rights

From a philosophical standpoint, the foundation of the rights of man is Natural law\textsuperscript{157}. Natural law binds the conscience because an order of reason manifests by way of nature and its inclinations\textsuperscript{158}. Historically the rights of man is embedded in the Natural law. Because positivism discredited the idea of Natural law, this inevitably led to the discredit of the rights of man\textsuperscript{159}. Even though Natural law theories can be overthrown, Natural law itself cannot be. Similarly, as some theory of law may be overthrown that law itself may not be. Thus, even after the ‘victory’ of judicial positivism in the XIXth Century in relation to the doctrine of Natural law, this did not imply nor crystallize the death of Natural law. This was proved by the fact that the ‘renaissance

\textsuperscript{154} Ibid page 49
\textsuperscript{155} Ibid page 50-51
\textsuperscript{156} Ibid page 51
\textsuperscript{157} Ibid page 53
\textsuperscript{158} Ibid page 60
of natural law’ had been proclaimed at the end of that century\textsuperscript{160}. Our most fundamental duties are laid down by Natural law making every law binding, similarly this very law assigns to us our most fundamental rights\textsuperscript{161}. It is in the Universal order of which we are enmeshed and in the regulations and the laws of the cosmos, and thus connected to and being a part of an immense family of created natures, playing a part also in the order of creative wisdom, at the same time we share in the spiritual aspect thus causing us to possess rights ‘vis-à-vis other men and all the assemblage of creatures’\textsuperscript{162}. ‘Every right possessed by man is possessed by virtue of the right possessed by God, who is pure justice, to see the order of his wisdom in beings respected, obeyed and loved by every intelligence’\textsuperscript{163}. We shall now move on to Positive Law and Legal Positivism.


\textsuperscript{162} Natural law Reflections on Theory and Practice, Jacques Maritain. St Augustine’s Press 2001 page 59.

\textsuperscript{163} Ibid page 60
Chapter four:

Positive Law and Legal Positivism

4.1 Positive Law

“Positive” law is defined as “formally laid down or imposed, arbitrarily or artificially instituted; proceeding from enactment or custom, conventional; opp to Natural.” Thus it is law which is “laid down” and “arbitrary”. As the term ‘positive’ is used in two ways, one that it is “enacted” and the other that it is “lacking in intrinsic moral force” this causes the discourse in that positive law suggests that there is a necessary connection ‘between what it enacted and what lacks intrinsic moral force’.

An important question must be asked, is the law a combination of laws pertaining to discrete precepts which one divided into their very own classes of positive, customary and natural precepts? Moreover, is it time that every legal norm in any practice and institution possesses natural, positive and customary dimensions?

Aquinas, while referring to the Mosaic precepts which possess intrinsic moral force he calls “natural” or moral law, such as “you shall not murder”, but on the other hand Mosaic precepts that lack intrinsic moral force such as “you must not wear clothing of wool and linen woven together”, he calls the “positive” or “ceremonial” laws. According to Aquinas, within every

---

165 Ibid page 19
166 Ibid page 19
valid positive law we are able to recognize the law of nature and he insists that there is an interlocking quality of legal and moral obligations.\textsuperscript{169}

Aquinas states that within statutory human law (\textit{leges scriptae}) we discover both \textit{ius positivum} and \textit{ius natural}.\textsuperscript{170}

Finnis states that judgments, legislation and custom are all “posited” laws thus being positive law.\textsuperscript{171} Aquinas refers to positive law as statutes, imposed by the subjects of a governing authority, the law which emerges from the decisions of judges or from custom is arguably not properly described as imposed.\textsuperscript{172}

According to Aquinas positive law is law that is authoritatively imposed (\textit{legem ponere}). Aquinas’ view also stipulates that positive law lacks moral necessity and contains moral force only ‘because of the contingent facts surrounding its enactment (\textit{ius positivum})’.\textsuperscript{173} Aquinas also states that law’s positivity is also apparent with regard to numerous matters that are morally indifferent until they are legally prohibited or enjoined: “it is here that positive law has its place” (\textit{ius positivum}).\textsuperscript{174}

\begin{itemize}
\item\textsuperscript{169} The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 20
\item\textsuperscript{170} Ibid page 62 and St. Thomas Aquinas, Summa Theologica, II-II, Question 60, 5\textsuperscript{th} Article, Volume 3, published by Christian Classics, 1981, page 1444
\item\textsuperscript{171} The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 72
\item\textsuperscript{172} Ibid page 72-73
\item\textsuperscript{173} Ibid page 73
\item\textsuperscript{174} Ibid page 80
\end{itemize}
4.2 Natural Law and Positive Law-The Relation of Natural Law to Positive Law

Aquinas famously states that “every human law has just so much of the nature of law, as it is derived from the law of nature”\(^{175}\). One way to interpret what Aquinas means here is captured in the words of Christopher St. German: “in every law positive well made is somewhat of the law of reason and the law of God: and to discern the law of God and the law of reason from the law positive is very hard. And though it be hard, yet it is much necessary in every moral doctrine, and in all laws made for commonwealth” \(^{176}\).

Human law is characterized as neither wholly natural nor wholly positive, rather encompassing a mixture\(^{177}\). Finnis and St. German believe that human law is a combination of positive and natural components, bearing ‘morally neutral externals animated by an intrinsic moral purpose’\(^{178}\).

Human laws possess two types of combinable moral force which answer to the twofold necessities with reference to the common good. There is a generic moral force behind the content of a law, this moral force derives from a rational connection towards a principle of morality\(^{179}\).

Due to the fact of the enactment of the law, a delivery occurs via ‘a specifically legal moral force’\(^{180}\) which stems from the necessity to have a unique and authoritative scheme of coordination\(^{181}\).

\(^{175}\) The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 91. 118 omnis lex humanitus posita...habet de ratione legis inquantum a lege naturae de-rivatur and St. Thomas Aquinas, Summa Theologica, I-II, Question 95, 2nd Article, Volume 2, published by Christian Classics, 1981, page 1014
\(^{176}\) The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 91
\(^{177}\) Ibid
\(^{178}\) Ibid page 92
\(^{179}\) Ibid
\(^{180}\) Ibid
\(^{181}\) Ibid
A Comparative Analysis Of Approaches Of St. Thomas Aquinas V Legal Positivism

4.3 Positive Law derived from the Natural Law

From the time of Cicero, legal philosophers espoused the notion that the civil law emanates or proceeds from Natural law. Aquinas defends the notion that the imposed laws content must be ‘justified and rationally grounded in the Natural law’. On the Nicomachean ethics of Aristotle Aquinas states that positive or legal right “arises” (oritur) from natural: “the just, legal or positive, always arises from the natural...origin from the Natural law can occur in two ways: in one way as a conclusion from a premise.” The second method from which positive law arises from natural is the mode of determination: “And thus all positive or legal justice arises from natural justice”. The first mode Aquinas refers to we can illustrate by way of example “you must not kill” possibly concludes from the precept “you must do evil to no one”. This is a conclusion, which strictly speaking, belongs to Natural law. The precept “you must not kill” is positive in the sense that it has been laid down by law, but it is not positive in content. According to Aquinas, precepts which are derived from the Natural law by way of

---

181 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005. Page 92 ‘Finnis notes that both the enactment of a law and its content have a distinctive and normally concomitant moral force: once “a law has been made, its directiveness derives not only from the fact of its creation by some recognized source of law (legislation, judicial decision, custom, etc) but also from its rational connection with some principal or precept of morality” Finnis, Aquinas pg 267.’

182 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 93. ‘Indeed, Aquinas cites ( I-II, 95.2c) from Cicero’s famous statement in the de invention (II, 53:CF:II,22).”The first principles [of justice] proceed from nature: then certain ones, by reason of their usefulness, come into custom: afterwards both the things proceeding from nature and those approved by custom are sanctioned by religion and the fear of the law.” Hugh of St Victor recall, said that positive justice arises out of Natural justice’.

183 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 93

184 Aquinas, in Ethicorum, V,12, Sec 1023

185 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 94

186 Ibid

187 Ibid page 96

188 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 97. ‘McInerny observes: “we are faced with the peculiarity that the example St Thomas gives of deriving human law from natural law is actually a conclusion which pertains absolutely to Natural law” (citing I-II, 100.1). See Ralph McInerny, “The Basis and Purpose of Positive Law,” in Lex et Libertas, Studi Tomistici, Vol.30, p.143.’
A Comparative Analysis Of Approaches Of St. Thomas Aquinas V Legal Positivism

conclusive element of derivation “are contained in human law not as emanating therefrom exclusively, but have some force from the Natural law also”\(^{189}\). Thus not only do these laws possess a moral force because they were imposed, but in addition their content has moral force which is responsive to the requirement of the common good\(^{190}\).

“Determination” is regarded as the second mode of derivation. For example, this mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape\(^{191}\). Aquinas states that these precepts “have their force only by human law”\(^{192}\). According to Aquinas, the determination of positive laws “do not bind from the dictate of reason itself, since, considered in themselves, there is no rational duty positive or negative; their binding force arises from some enactment divine or human”\(^{193}\).

Aquinas refers to the ceremonial precepts as positive law and the moral precepts as Natural law\(^{194}\). Included in the human law there are distinct classes of precepts. These were labelled by Aquinas as *ius gentium* and *ius civile*, or *ius naturale* and *ius positivum*\(^{195}\).

---


\(^{190}\) The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 97

\(^{191}\) St. Thomas Aquinas, Summa Theologica, I-II, Question 95, 2nd Article, Volume 2, published by Christian Classics, 1981, page 1014

\(^{192}\) The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 97

\(^{193}\) The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 101 ‘I-II, 104.1c. this strong disjunction of generically moral from specifically legal moral force seems to apply only to the determinations of the ceremonial precepts, for, of the judicial precepts, Aquinas goes on to say: “they have their binding force not from reason alone, but [also] from enactment”. ‘

\(^{194}\) The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 109. ‘On his comparison of the ceremonial precepts to “positive law” (ius positivum) See cs, Vol. 3,d.37,q.1,a.3,ad 2, and ST, I-II, 99.3 ad 2 (where both ceremonial and judicial precepts are compared to human positive law) it is revealing that when Aquinas refers to the arbitrary content of Mosaic law he uses the
4.4 Reduced to or Derived from Natural Law

Aquinas espouses that from the Natural law all human law is derived but in addition the Eternal law is from which all just human law is derived, and the entire judicial, moral, and ceremonial Mosaic law pertains to the derivation from the Decalogue. Aquinas believed that positive law can be “led back” to *ius naturale* and that the Mosaic law’s moral precepts ‘can be reduced to the Decalogue.

4.5 What is Legal Positivism?

Legal Positivism, for some positivists, espouses that law is not derived from any higher guiding principle, such as God, as the naturalists espouse, but rather that the law is something which is developed by the people for their benefits. Jeremy Bentham articulated legal positivism, and the doctrine has been developed further, in more recent times, by H.L.A Hart. In the early years of legal positivism the positivists were opposed to the doctrine of Natural law. One of these reasons, compelling their repudiation of Natural law, was founded upon the notion that Natural law was being used ‘to support and justify the English legal system’ because it seriously required reform. Bentham profusely rejected that the English legal system was not founded on Natural law principles.

---

expression *ius Positivum*: it would make no sense to describe the ceremonial precepts as *leges positae*, because the whole of the old law is statutory.’

195 *The Philosophy of Positive Law Foundations of Jurisprudence* by James Bernard Murphy, Yale University Press 2005 page 109. ‘ in ST, I-II, 95.4 c, *ius positivum* is divided into *ius gentium* and *ius civile*; in ST, II-II 60.5c, human written law is divided into *ius naturale* and *ius positivum*.

196 *The Philosophy of Positive Law Foundations of Jurisprudence* by James Bernard Murphy, Yale University Press 2005 page 113. ‘ for these claims, respectively, see ST, I-II, 95.2c: 93.3c:96.4c:99.4c:100.11 ad 2.’

197 *The Philosophy of Positive Law Foundations of Jurisprudence* by James Bernard Murphy, Yale University Press 2005 page 113

198 ibid page 114

199 [http://www.kevinboone.com/lawglos_LegalPositivism.html](http://www.kevinboone.com/lawglos_LegalPositivism.html)
A Comparative Analysis Of Approaches Of St. Thomas Aquinas V Legal Positivism

Legal Positivism presupposes a law that is deficient of moral ethics. In Professor Hart’s Essay “Positivism and the Separation of law and Morals” he espouses five views that are generally aligned with legal positivism. Firstly, ‘that laws are commands of human beings’, secondly, ‘that there is no necessary connection between law and morals’, thirdly, ‘that the analysis of legal concepts is (i) worth pursuing, (ii) distinct from (though not hostile to) sociological and historical enquiries and critical evaluation’. Further, ‘that a legal system is a “closed logical system” in which correct decisions may be deduced from predetermined legal rules by logical means alone’. Lastly, ‘that moral judgments cannot be established, as statements of fact can, by rational argument, evidence, or proof (this is known as “Non-cognitivism in ethics”)

Hart and Kelsen whom were both legal positivists, supported the view that there must be a continual detailed examination betwixt morality and law, betwixt what ‘is’ and what ‘ought’ to be. ‘Ought’ refers to all those things which are morally desirable and ‘is’ refers to all those things which actually exist. Thus a clear distinction must be drawn between the former and the latter.

Modern legal positivism consists of the following claims about law’s nature. Firstly, the ‘Separability thesis’ (which is rejected by Raz and Coleman) denies the fact that there are no necessary moral constraints on the content of law. Secondly, the ‘Pedigree thesis’ espouses

---

200 http://www.kevinboone.com/lawglos_LegalPositivism.html
201 (1958) 71 Harvard Law Review, 601 n.25. See too H.L.A Hart The Concept of law
203 Ibid page 68
205 According to Jules Coleman and my contact with him, he stresses that both hard and soft positivists can reject the Separability Thesis because hard and soft positivism has nothing to do with the Separability Thesis. This is because the Separability Thesis questions whether the law can possess necessarily moral properties.
206 I make this assertion from the fact that it has been confirmed to me personally by Jules Coleman himself.
207 This approximates to what is often called the “social thesis”: that law may be identified as a social fact, without reference to moral considerations. See J. Raz, ‘the Authority of law’, 37 ff. For his own positivist triad, See 4.5.
legal validity on ‘the manner, form and source of promulgated norms’\textsuperscript{208}. It also holds the assumption that law is a human created doctrine through the vessel of official acts. In Austin’s view, what makes them official is by virtue that they were performed by the sovereign, and in Hart’s view, since they met the procedural requirements of the rule of recognition, this ascribed to them their legal validity. It should be noted that both Raz and Coleman reject the idea that a rule of recognition exists.\textsuperscript{209} Lastly, the ‘Discretion thesis’ presupposes that the decisions of judges, with respect to hard cases, are reached by making new law\textsuperscript{210}.

\textbf{4.6 Inclusive and Exclusive Legal Positivism}

Inclusive positivism, which was invented by Jules Coleman in 1981, espouses that political morality, which is that type of morality one uses to evaluate, criticize or justify social institutions, their activities and laws, can play a part in the determination of the content and meaning of valid laws\textsuperscript{211}.

Exclusive legal positivism, according to Raz’s view, excludes morality, espousing instead a logical and conceptional view as grounds to determine the existence or content of valid laws\textsuperscript{212}.

\begin{flushright}
\textsuperscript{208} Understanding Jurisprudence, An Introduction to Legal theory by Raymond Wacks, Oxford University Press 2005 page 69.
\textsuperscript{209} I make this assertion from the fact that it has been confirmed to me personally by Jules Coleman himself.
\textsuperscript{210} Understanding Jurisprudence, An Introduction to Legal theory by Raymond Wacks, Oxford University Press 2005 page 69.
\textsuperscript{211} W.J. Waluchow ‘Inclusive Legal Positivism’ Clarendon Press Oxford 1994 page 2: I do not wish to become embroiled in any conflicts there might be as to the nature and objectivity of moral standards, nor in any controversies concerning whether there is an important and viable distinction between political and personal morality, where the latter constitutes the standards of morality appropriate for judging private, individual behavior. We will merely assume that people do appeal to standards like the principles of equality, liberty, fairness, and justice in assessing social institutions and their products: that these activities are not totally nonsensical as some radical moral nihilists might argue, but are open to at least some degree of rational argument and assessment; and that it is these kinds of standards that we have in mind when we ask about the possible role of political morality in determining the existence and content of valid laws’.
\textsuperscript{212} W.J. Waluchow ‘Inclusive Legal Positivism’ Clarendon Press Oxford 1994 page 3
\end{flushright}
The grounds of law, as suggested by legal positivists, are a limited set of rules which are validated by the Sovereigns will (Austin and Bentham). They encompass a chain of validity which culminates into a presupposed “Grundnorm”\(^{213}\) (Kelsen) or a master rule of recognition (Hart)\(^{214}\). According to Hart, (who not only denies that law is necessarily connected to morality, while other positivists make no such assertions\(^{215}\)) law is made possible by the existence of a certain kind of social fact, existing in the practice amongst officials whom set out criteria of legality or validity. Thus we arrive at the Rule of Recognition: ‘the signature of a legal system’\(^{216}\). The rules of recognition, in Hart’s early thesis, may be identified as power-conferring social rules of a secondary nature. Primary and secondary rules are thereby distinguished from those which impose duties and those which ‘create and regulate powers’\(^{217}\).

The Rule of Recognition, according to the Hartian concept, underpins and is fundamental to the foundations of Legal Positivism. The rules are described as Conventions\(^{218}\). They comprise both primary and secondary rules. ‘The primary rules require that we act or forbear from acting whether we wish to or not…secondary rules are “parasitic”…for they provide that people may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidents or control their operations’\(^{219}\).

There are two schools of thought on the notion of the rule of recognition existing either as a constitutive convention\(^{220}\) or a co-ordination convention\(^{221}\). All positivists who accept the rule of

\(^{213}\) Ibid page 9  
\(^{214}\) Ibid  
\(^{215}\) I make this assertion from the fact that it has been confirmed to me personally by Jules Coleman himself.  
\(^{216}\) Jules Coleman ‘Hart’s Postscript Essays on the Postscript to the Concept of Law page 115  
\(^{218}\) J. Dickson Oxford Legal Journals 2007 ‘Is the Rule of Recognition really a Conventional Rule?’  
\(^{220}\) Constitutive Conventions: The Constitutive conventions are not solutions to problems, with regard to structural features of human action, but instead help define, characterize, or create practices and institutions while shaping
recognition, accept that the criteria of legality are conventional and that the rules of recognition
are conventions\(^{222}\).

‘The key claim that all legal positivists share is this: only social facts—facts about behaviour and
attitude (what people do and believe and feel about what they do) contribute to determining the
content of the law: that is, what the law requires’\(^{223}\).

On the other hand, the fact that law and morality are connected requires one to acknowledge that
this reality is no simple accident. According to Natural law, law is a vessel which expresses and
enforces moral law, or some part of it. This very nature of law expresses moral demands and
affirms moral rights. These rights may be rights of political morality (Dworkin) or rights which
have been derived from God’s Eternal law (Aquinas)\(^{224}\).

Some legal positivists espouse that any connections between law and morality depend on the fact
that the correct kinds of laws have been created in the correct ways. This view which is
expressed by some positivists is indicative of the separation of law and morals\(^{225}\).

In recent times some positivists, when delving into the possibility of a connection between law
and morals, have accepted that this connection is possible\(^{226}\), whereas other reject this notion

\(^{221}\) The Rule of Recognition is a co-ordination convention that creates reasons for acting in the way in which the co-ordination conventions generally do. This is by creating a system of reciprocal legitimate expectations. The internal point of view is part of the causal explanation of how such a rule creates stable reciprocal expectations. Acceptance from an internal point of view is exhibited in public behaviour. Jules Coleman ‘Hart’s Postscript Essays on the Postscript to the Concept of Law page page 17

\(^{222}\) J. Dickson Oxford Legal Journals 2007 ‘Is the Rule of Recognition really a Conventional Rule?’ page 1

\(^{223}\) I make this assertion from the fact that it has been confirmed to me personally by Jules Coleman himself. In addition, both Jules Coleman and Joseph Raz believe that such a view is compatible with law having necessary moral properties or consequences.


\(^{225}\) Ibid page 81
A Comparative Analysis Of Approaches Of St. Thomas Aquinas V Legal Positivism

entirely\textsuperscript{227}. The connection between law and morality which might be acceptable to a positivist is that a valid rule, as well as the content of that rule and how it ‘bears’ on any legal case, may depend on moral factors\textsuperscript{228}.

Joseph Raz is an exclusive positivist who holds the view that a valid legal rule is merely the function derived from sources in legislation, social custom, judicial decisions and those matters which contain social fact, from which he espouses their independence from any moral factors\textsuperscript{229}. His strong ‘social thesis’ indicates that the content of a legal rule can be established without the use of moral argument. Nevertheless, Raz does not deny ‘that legislation can be both motivated and justified by moral principles and values’\textsuperscript{230}.

Inclusive positivists claim that ‘sometimes the identification of some laws turns on moral arguments’\textsuperscript{231}. They also accept that law and morals are related\textsuperscript{232}, and yet, according to Waluchow, inclusive positivists insist that moral validity and legal validity should be ‘conceptually distinct from one another’\textsuperscript{233}. Further they insist that, with regard to the concepts

\begin{itemize}
  \item \textsuperscript{226}In my communication with Jules Coleman he says that both he and Raz believe that necessarily law is connected to morality or that it can be.
  \item \textsuperscript{227}W.J. Waluchow ‘Inclusive Legal Positivism’ Clarendon Press Oxford 1994 page 81-82
  \item \textsuperscript{229}It should be noted that Raz refuses to distinguish between the existence and validity of legal rules. If a legal rule exists it is valid and if it is valid, then it exists. So in talking of what is necessary to establish the existence of valid law we are referring to what is necessary for the very existence of law itself. There are no invalid laws according to Raz. See on this, The Authority of Law, Ch.8. W.J. Waluchow ‘Inclusive Legal Positivism’ Clarendon Press Oxford 1994 page 82.
  \item \textsuperscript{230}W.J. Waluchow ‘Inclusive Legal Positivism’ Clarendon Press Oxford 1994 page 83
  \item \textsuperscript{231}The Authority of Law, 49 (Oxford Clarendon Press 1979) Joseph Raz’ W.J. Waluchow ‘Inclusive Legal Positivism’ Clarendon Press Oxford 1994 page 83
  \item \textsuperscript{232}According to Jules Coleman and my contact with him he tells me that positivists can also believe that the content of law is connected to the good, the right or to God’s will. ‘They believe the connection is ‘causal’ if there is one’ Jules Coleman.
  \item \textsuperscript{233}W.J. Waluchow ‘Inclusive Legal Positivism’ Clarendon Press Oxford 1994 page 87
\end{itemize}
of morals and law, it is both unnecessary and impossible for ‘moral validity to serve as a condition of legal validity’\(^\text{234}\).

Philip Soper notes ‘the question is not whether it would be a good thing if morality and law were connected: the question is whether they are connected’\(^\text{235}\).

By allowing legal validity to depend upon moral validity this may cause (as Raz believes) anarchist thinking, thus one may wish to insist that formal sources alone be present within our legal system\(^\text{236}\).

Exclusive positivism may presuppose a ‘law-is-law’ stance, this may influence moral ideas, thereafter may reinforce the law \(^\text{237}\) which could be detrimental to those norms which morality has already instituted. Positivists believe that legal validity ‘fails to entail moral validity’\(^\text{238}\). If legal validity was not considered by the positivists as conceptually independent of moral validity, then it may be said that it is the positivist thesis that threatens moral deliberation\(^\text{239}\).

An evil system of law, such as the Nazi Regime, under the positivistic view, could exist and have no moral constraint upon their legal validity\(^\text{240}\).

However, the inclusive view recognizes that tests for legal validity contain moral dimensions\(^\text{241}\).

Any attempt to separate law and morality (as the exclusive positivists contend) is incorrect and

\(^{234}\) Ibid
\(^{236}\) W.J. Waluchow ‘Inclusive Legal Positivism’ Clarendon Press Oxford 1994 page 90
\(^{240}\) W.J. Waluchow ‘Inclusive Legal Positivism’ Clarendon Press Oxford 1994 page 102
misleading. Inclusive positivists espouse that sometimes moral considerations do play a part in the state of valid law.

According to Raz, exclusive positivism ‘reflects and explicates our conception of law’. A question on law is settled when the solution is provided by legally binding sources. Hence judges apply the law, due to the fact it is source based, the application requires both legal and technical skills in reasoning provided by those sources, and is deficient of any moral acumen.

However, questions of legal validity do sometimes depend on moral considerations. Inclusive positivism accepts that moral argument may at times be required to evaluate and determine the very existence of valid laws. Due to the fact that laws possess an authoritative stance, this does not mean that laws ‘can and must be established independently of dependent moral considerations’, nor that they must be excluded from certain determinations of law. Inclusive positivism, therefore presupposes that moral argument does and can at times introduce itself when determinations of law are being made, on the other hand, exclusive positivists espouse that this is impossible, and this stance is deficient of any moral acuity. Thus the former introduces a ‘soft’ positivist approach, whereas the latter is indicative of a ‘hard’ positivist approach in questions relating to legal validity being connected somehow to moral considerations.

---

242 Ibid page 103
243 Ibid page 105. Additionally, interestingly, soft positivists, like Jules Coleman say that moral as well as social facts can contribute to legal content.
248 Ibid page 129
249 Ibid
250 Ibid page 165
4.7 Natural Law v Legal Positivism

Natural law is defined by Aquinas as ‘every human law has just so much of the nature of law, as it is derived from the law of nature’. On the contrary positivists claim that laws are ‘posited’ and underived from Natural law but are enshrined by people for their mutual benefit. ‘Hard’ legal positivists not only repudiate Natural law but they remain espoused to the separation of laws and morals, and they refute any reference to a higher guiding principle of law [God].

‘Soft’ positivists acquiesce that morality may play a part in the determination of what is ‘law’. Natural law, as opposed to positive law, ‘…emphasizes the connection of law to morality’. Hart himself agrees that the development of the law has been influenced by morality.

Positive law and the doctrine of legal positivism may be important in the formulation of moral laws because they may help to crystallize laws which are derived from the law of nature. This may be because connaturality and by the very virtue that the Natural law contains all acts of reason which must dictate that one should act virtuously, thus, with reference to positive laws the Natural law may bind the conscience mind of all humans. Laws, thus may not be man-made as the positivists claim. ‘Human laws derive their legal quality, their power to bind in conscience from the Natural law’.

Just laws have the capacity of binding our conscience from the very notion that they are derived from the Eternal law. Natural law is implanted with general principles which the human practical reason proceeds from. Aquinas states law’s positivity is also apparent with regard to numerous

---

251 118 omnis lex humanitus positi...habet de ratione legis inquantum a lege naturae de-rivatur St. Thomas Aquinas, Summa Theologica, I-II, Question 95, 2nd Article, Volume 2, published by Christian Classics, 1981, page 1014
253 Law, Liberty and Morality, H.L.A.Hart, Stanford University Press, 1963 page 1
254 St. Thomas Aquinas in Thomas Aquinas Selected Writings, Penguin Classics, by Ralph McInerny 1998 page 646
matters that are morally indifferent until they are legally prohibited or enjoined: “it is here that positive law has its place”\textsuperscript{256}. Thus positive law plays a fundamental role during its enactment of norms which relate to matters that are morally indifferent. Positive law emanates or proceeds from the Natural law\textsuperscript{257}.

The positivists espouse that laws are commands of human beings and that there is no necessary connection between law and morals. Hard or exclusive positivists exclude morality, espousing instead a logical and conceptional view as grounds to determine the existence or content of valid laws\textsuperscript{258}. Further, the positivists insist that with regard to the concepts of morals and law it is both unnecessary and impossible for ‘moral validity to serve as a condition of legal validity’\textsuperscript{259}.

Positivists believe that legal validity ‘fails to entail moral validity’\textsuperscript{260}. Any attempt to separate law and morality may be incorrect and misleading\textsuperscript{261}. Which now leads us to our conclusion.

\textsuperscript{256}The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 80
\textsuperscript{257}The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 93. ‘Indeed, Aquinas cites ( I-II, 95.2c) from Cicero’s famous statement in the de invention (II, 53:CF:II,22).”The first principles [of justice] proceed from nature: then certain ones, by reason of their usefulness, come into custom: afterwards both the things proceeding from nature and those approved by custom are sanctioned by religion and the fear of the law.” Hugh of St Victor recall, said that positive justice arises out of Natural justice’.
\textsuperscript{258}W.J. Waluchow, Inclusive Legal Positivism, Clarendon Press, Oxford 1994 page 3
\textsuperscript{259}W.J. Waluchow, Inclusive Legal Positivism, Clarendon Press, Oxford 1994 page 87
\textsuperscript{260}W.J. Waluchow, Inclusive Legal Positivism, Clarendon Press, Oxford 1994 page 99
\textsuperscript{261}W.J. Waluchow, Inclusive Legal Positivism, Clarendon Press, Oxford 1994 page 103
Chapter Five:

Conclusion

Legal positivists’ rendition of the Natural law thesis of Aquinas is irrefutable and continues to be a matter of discourse in the jurisprudential arena. The Thomist school of thought brings forth a thoroughly indepth argument in favour of the Natural law thesis, existing as our most fundamental source of law. Whereas, some legal positivists insist that with regard to the concepts of morals and law, it is both unnecessary and impossible for ‘moral validity to serve as a condition of legal validity’ 262. They may also claim that there are no necessary moral constraints on the content of law 263.

Aquinas made it quite clear that within every valid positive law we are able to recognize the law of nature, and he insisted that there is an interlocking quality of legal and moral obligations 264. It may be the case that human law can be characterized as neither wholly natural nor wholly positive, rather an all encompassing mixture 265. It should be noted that not all positive laws contain Natural law precepts 266. Aquinas argues that from the Natural law all human law is derived and that all just law is derived from the Eternal law 267. Some legal positivists espouse that laws are commands of human beings and that there is no necessary connection between law

---

263 This approximates to what is often called the “social thesis”: that law may be identified as a social fact, without reference to moral considerations. See J. Raz, ‘the Authority of law’, 37 ff. For his own positivist triad, See 4.5. Understanding Jurisprudence, An Introduction to Legal theory by Raymond Wacks, Oxford University Press 2005 page 69.
264 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 20
265 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 91
266 My reference located at 164 demonstrates this fact. See 4.1 above
267 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 113. ‘for these claims, respectively, see ST, I-II, 95.2c: 93.3c:96.4c:99.4c:100.11 ad 2.’
and morals. Aquinas clearly rejects this notion, thus positive law emanates or proceeds from the Natural law. Aquinas also stated that law’s positivity is also apparent with regard to numerous matters that are morally indifferent until they are legally prohibited or enjoined: ‘it is here that positive law has its place’. According to Aquinas, we all possess a natural inclination or a connatural ability to discern what is good, and thus to be pursued, and what is bad, and thus to be avoided. Thus here we recognize the precepts of Natural law.

H.L.A. Hart himself agreed that the development of the law has been influenced by morality and yet some positivists continue to claim the thesis of the separation of laws and morals.

We espouse that the Natural law is indeed the most fundamental part of our legal system, which encompasses both Natural and Positive laws. Positive laws, execute, through the morals bound up in the conscious mind of man through inclination or connaturality, the moral demands of the Natural law. Thus law and morality may not be strictly separable, and human laws may indeed be derived from the Natural and Eternal law.

---

268 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 93. ‘Indeed, Aquinas cites ( I-II, 95.2c) from Cicero’s famous statement in the de invention (II, 53:CF:II,22).’

269 The Philosophy of Positive Law Foundations of Jurisprudence by James Bernard Murphy, Yale University Press 2005 page 80


271 Law, Liberty and Morality, HLA Hart, Stanford University Press, 1963 page 1