ARE UNJUST LAWS LAWS?

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According to John Finnis, just law is a central case of law. To put it differently, the focal meaning of 'law' is just law. In one of his writings he explicitly claims that a consequence follows from this: *Unjust laws are not laws*[1]. This is a traditional idea defended by natural law theory against legal positivism. However, apart from the longstanding controversy between those schools of legal thought, I consider the idea to be somewhat puzzling. What does it mean to claim that unjust laws are not laws?

It means that unjust laws are a sort of "failure", according to Finnis's thought[2]. Like lethal medicines or contracts void for illegality: lethal medicines are not medicines, illegal contracts are not contracts, etc. One might *prima facie* agree on this, but I suspect that that claim does not resist a serious logical analysis. It collapses either into a contradiction or into a tautology, depending on the way we read it.

On a first reading, it means that (quantifying universally) for every law, if a law is unjust then it is not a law. Which is a patent *contradiction*, for it claims that something might be and not be a law at the same time. We face the same problem if we assume that (quantifying existentially) there exists something which is a law, which is unjust and, because of its being unjust, is not a law. The Italian philosopher Benedetto Croce called it the "internal contradiction" of philosophy of law, namely to claim that there is, or might be, some law which is not law, as is the case of "unjust laws" if you follow the dualism between positive and natural law[3].

On a second reading, you might think that the claim wants to say something different, namely that some *positive* laws are not just. Fine, but then the claim simply means that unjust positive laws are not just laws, or, straightforwardly, that unjust positive laws are unjust. Which is a *tautology*. This cannot be the correct reading of the claim either.

If we take the claim seriously and think about Finnis's suggestion (an unjust law is a "failure" of law) we have to reflect on the concept of law which is at work there. Perhaps the idea of a "failure" commits us to think that this concept of law can be "fully" applied to some circumstances that include a law's being just, and only "partially" applied to some circumstances that don't include it. We don't need to specify here what these further circumstances are (they presumably include enactment and other public acts, or social facts). The important point is this: something is fully a law if, *inter alia*, it is just, and something is only partially a law if, *inter alia*, it is unjust. Thus the concept of law admits of a partial application. This is in my opinion the only reasonable reading of the idea of a "failure" of law. For a stronger reading of "failure" will bring us back to the first horn of the opening dilemma, that is the contradiction of claiming that something is a law and, because of its being unjust (its "failure"), it is not a law.

On the weaker reading of "failure", instead, the claim means that unjust laws are not laws in the full sense of the word 'law', or, if you want, that they are something like "half-laws", or rather "not really laws" or "not truly laws". The concept of law only partially applies to such circumstances which include a law's being unjust. This implies that the concept of law is susceptible of both a full and a partial application[4]. (More correctly, what is partial is the satisfaction of the relevant application conditions; for short we will talk about partial and full application). One might wonder

[1] Finnis (2003, p. 114). Cf. Finnis (1980) and (2011). For a critical assessment of his views see e.g. Dickson (2009) and Shapiro (2011, chap. 14).

[2] See Finnis (2007, p. 37). Cf. MacCormick (2007, p. 264 ff.).

[3] Croce (1907). He thought the paradox solution to be in the understanding that law is essentially reducible to (the subject of) economics and different from (the subject of) morality, though they can contingently coincide. The dualism between positive and natural law is nothing but the difference between law and morality.

[4] This might be true of many of our concepts and is probably reflected by the use of 'true' as a qualifier (a true friend, a true law, etc.). If one says 'This is a true law', he might mean that the concept of law fully applies to it. On this use of 'true' cf. White (1971, pp. 3-4) and Künne (2003, p. 106).

if this is a tenable position, but it is in my view the only reasonable way to interpret the anti-positivist claim.

Actually there is an easier way out, namely to claim that that old saying uses two concepts of law[5]; law_1 is a positivist concept referring to social facts alone, whereas law_2 is a natural law theory concept including a reference to justice. (To put it differently, for the latter morality is a necessary condition of legality, for the former it is neither a necessary nor a sufficient condition). So the claim should be understood like this: *Unjust $laws_1$ are not $laws_2$*. Which is all right, but this understating merely dissolves the problem into a conceptual difference. On the contrary the old saying seems to claim that the same concept of law is at stake. But then the only way to avoid the above contradiction or tautology is to claim that the same concept of law is susceptible of both a full and a partial application.

Along the above lines Julie Dickson has claimed that there are two senses in which Finnis uses 'law'[6]: *a*) a *general* sense including both central and peripheral cases and according to which law necessarily has a moral point which it should try to achieve (and which in some cases, the central ones, it does in fact achieve); and *b*) a *particular* sense corresponding to the central cases and according to which law necessarily achieves its moral point. I would rather give an alternative account of the issue, to avoid that sort of conceptual split: the concept of law admits of a full application in Finnis's central cases and of a partial application in peripheral cases.

The reading I suggest may be philosophically puzzling because we are used to think of concepts as having a set of necessary and sufficient application conditions, but it is more in line with the psychology of concept application and with some findings of linguistics.

Starting from concept application, we need to remark that our practice of concept application does not necessarily require a subjective grasping and an objective satisfaction of a set of necessary and sufficient conditions[7]. Assume that the necessary and sufficient conditions for the application of (the concept expressed by) 'friend' are being 1) faithful, 2) sincere and 3) generous. Now imagine a person who is faithful to you and sincere, but not generous. Would you say that 'friend' does not apply to that person? If you say so, you apply the concept as philosophers traditionally think. But if you are disposed to say that that person, despite being a friend, is not a "real friend", or is not a "true friend", and in general you think that ungenerous friends suffer from a kind of "failure", you apply the concept as some psychologists point out, namely totally when the set of necessary and sufficient conditions is satisfied (central cases) and only partially when just a subset of them is satisfied (peripheral cases). Let us go back to our issue now. Assume that the application conditions of 'law' are 1) enactment by parliament, 2) enforcement by officials, and 3) justice. Of a law which satisfies conditions 1) and 2), but not condition 3), you would properly say (if you agree with Finnis) that it is not a law in the full sense of 'law'. For it fails to achieve justice.

That is a general trait of our practice of concept application (a lie for the good is not a "true lie", a paper chair is not a "real chair", etc.) and I think it is revealed by the linguistic usage of such qualifiers like 'true' and 'real' among others[8].

Some works in linguistics focus on those expressions that, for our purposes, help understand why phrases like 'Unjust laws are not laws' are not contradictions. Oswald Ducrot called such expressions "derealizing modifiers", in that the complex expressions which include them have a minor argumentative force than the same expressions without them, or even a contrary force[9]. In our case, for instance, to say 'This is an unjust law' is different from saying 'This is a law' not only semantically but also pragmatically, because the argumentative consequences of the former are

[5] For this reason Finnis's idea is taken to be equivocal by Dickson (2009, p. 164).

[6] Dickson (2009, p. 172).

[7] See e.g. Lalumera (2009, p. 43 ff.). I leave to one side the issue of our grasping of such sets (when they exist); but it is obvious to me that we use words and apply concepts without such sets being transparent to us (again, when they exist).

[8] As to 'true', I call this use "eidetic" in Tuzet (2012, chap. 11); it is clearly different from the use of 'true' in correspondence talk and theories and, among others, in the semantic conception of truth discussed by Tarski.

[9] Ducrot (1995). Cf. Ducrot (2002).

different from those of the latter. (It is possible to make the same point using Grice's vocabulary of implicatures, as far as I understand). In a given context, 'This is an unjust law' may mean that I am not committed to comply with it, while 'This is a law' may mean that I am. The former would be a case of contrary argumentative force of the complex expression. As a case of minor argumentative force, instead, imagine the situation in which I say 'This is a bad law' with the intention of relaxing the enforcement of it: I am still committed to that law, but not to the kind of straightforward enforcement evoked by uttering 'This is a law'[10]. So the word 'law' can be part of various complex expressions ('unjust law', 'bad law', etc.) which point to different features and trigger different practical and argumentative consequences that can be made explicit in an exchange of reasons[11].
The moral of the story is that concept-expressing words (and possibly words in general, according to Ducrot) usually have application degrees. In semantics and elsewhere, continuity is the rule and discontinuity is the exception. By the way this should not be surprising for those who are familiar with the issue of vagueness. Predicates have application degrees in our linguistic usage, and concepts have a scale of application conditions. In my opinion, this explains why it is possible to claim that unjust laws are not laws without falling either into a contradiction or into a tautology. But I am not sure that natural law theorists would recognize themselves in this sort of picture.

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Abstract
I claim that the natural law theory saying that unjust laws are not laws amounts (unless properly qualified) to either a contradiction or a tautology. To avoid this it can be understood as pointing out a "failure" of law, but then one is committed to say that that concept of law admits of both a full and a partial application. This is by the way a general trait of concept application, pointed out by psychology and linguistics.

Keywords
Natural Law Theory, Legal Positivism, John Finnis.

[10] The inverse phenomenon is that of "realizing modifiers", which give the complex expression a stronger argumentative force. Compare 'He is a friend' with 'He is a true friend'. See Ducrot (1995, p. 147).
[11] I make reference to Brandom (2000). See also Canale & Tuzet (2007).