

CLASSICAL NATURAL LAW LEGAL THEORY

- I. Classical Natural Law Legal Theory is a species of Natural Law Legal Theory. Here are the specific characteristics of *Classical* NLLT as distinguished from NLLT, generally:
 - A. *Natural Law Ethical Theory*: A specific moral theory according to which moral rules are inherent in the nature of the universe and are discoverable by human reason in just the same ways that scientific laws are.
 - B. All natural law legal theories hold that there is a necessary connection between law and morality. *Classical* Natural Law Legal Theory holds that this necessary connection holds at the level of *individual* rules. There are two primary ways this has been interpreted.
 1. “*Bold*” *Classical* NLLT: On this view, a rule’s being morally permissible is a *necessary* condition for it being (human) law and a rule’s being morally required is a *sufficient* condition for it being (human) law. Aquinas suggests this, saying: “Nothing stands firm with regard to practical reason, unless it be directed toward the last end which is the common good. Now whatever stands to reason in this sense has the nature of law” (p. 52). But this is not Aquinas’s considered conception of human law.
 2. “*Modest*” *Classical* NLLT: A rule’s being morally permissible is a necessary condition for it being law. That is, a rule is a rule of law only if it is compatible with moral rules. Aquinas’s explicit definition of law says: “Law is nothing else than an ordinance of reason for the common good, promulgated by him who has care of the community” (p. 52).
 - a) Ambiguity:
 - (1) *Weak Requirement*: The content of the rule of law must be compatible with the content of moral rules.
 - (2) *Strong Requirement*: It must be consistent with moral rules that a rule with the content in question be a rule of law.
- II. Aquinas’s Theory
 - A. *Background: Voluntarism v. Rationalism*. Is law a product of reason or of will?
 1. *Code of Justinian (Justinian the 1st, Code published in 529 A.D.)*: “Whatsoever pleaseth the prince, has the force of law”—interpreted to mean ‘*is* law’.
 - a) Aquinas was endorsing Rationalism against this sort of voluntaristic theory.
 - B. Assumptions:
 1. It is the essence of law that it binds in conscience (is morally obligatory). He claims that ‘lex’ (law) is derived from ‘ligare’ (to bind).
 2. Only God can bind in conscience (moral equality of human beings).
 3. Thus, we can be bound in conscience to a political authority only if this bindingness is somehow derived from God.

- a) Ruler as Divine—ruled out
- b) Rule by Divine Right: possible, but not Aquinas’s answer, I don’t think.
- c) Human law is law only insofar as it is derived from the natural law (which reflects or exemplifies the eternal law, God’s law). Humans cannot *create* law (in the genuine sense) because we cannot create bindingness.

C. *Plausibility*: Aquinas is attempting to deny political absolutism (absolute and unlimited duty to obey the sovereign) within a framework that conferred authority on the dictates of the sovereign in virtue of their being derived from God’s law.

- (i) One must obey the law because it is derived from God’s will. (It only looks as if it comes from a human ruler.) [Theory of Political Obligation]
- (ii) God wills nothing unjust.

Therefore (iii) That which the ruler decrees that is unjust is not derived from God’s will (which is why one doesn’t have to obey it).

Therefore (iv) That which the ruler decrees that is unjust is not law.

Natural Law Legal Theory seems more plausible when we understand it in this context.

D. *Aquinas’s Definition of Human Law*: “Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community.”

III. Criticisms of Classical Natural Law Legal Theory:

A. Criticisms of Aquinas’s Specific Theory:

1. *Account of ‘the common good’*: Aquinas owes us a careful account of ‘the common good’. There are many conflicting understandings of individual good and, furthermore, many conflicting understandings of how individual good is aggregated into a “common good.” Without such an account, we do not have a useful criterion for legal validity.
2. *Theory of Legal Authority*: Aquinas needs to tell us in virtue of what one “has care of the community.” What gives a person the right to make law in accordance with the natural law?
3. *Confusion of Descriptive with Prescriptive*: Aquinas confuses ‘law’ in a descriptive sense with ‘law’ in a prescriptive sense:

“Accordingly under the Divine Lawgiver various creatures have various natural inclinations, so that what is, as it were, a law for one, is against the law for another: thus I might say that fierceness is, in a way, the law of a dog, but against the law of a sheep or another meek animal. And so the law of man, which, by the Divine ordinance, is allotted to him, according to his proper natural condition, is that he should act in accordance with reason: and this law was so effective in the primitive state, that nothing either beside or against reason could take man unawares. But when man turned his back on God, he fell under the influence of his sensual impulses: in fact this happens to each one individually, the more he deviates from the path of

reason, so that, after a fashion, he is likened to the beasts that are led by the impulse of sensuality.” (*Summa Theologica*, First Part of the Second Part, Question 91.)

4. *The Variety of Laws*: If all human law is derived through the principles of practical reason from the same natural law, then human law should be everywhere the same. But it is not.
 - a) *Aquinas’s Reply*: Aquinas distinguishes two forms of “derivation”: *conclusion from principles* and *determination from common notions*. The former is like deductive derivation. The criticism might be correct if human law needed to be derived from the natural law in this sense. But it does not. The principles of practical reasoning are not as narrowly rigid as this. Their application requires judgment and tailoring to specific purposes and interests. Human laws must be derived from natural law in the second sense of being determined from common notions. Just as good houses, which must be constructed on sound architectural and engineering principles, can differ from one another, so can the laws of different countries.
 5. *The Necessity of Promulgation*: It would seem that human law does not need to be promulgated (published). All human law is derived from the natural law and the natural law is promulgated by God in the hearts of humans.
 - a) *Aquinas’s Reply*: Because human law can vary (see above), human promulgation of human law is necessary.
- B. *Criticisms of Classical NLLT Generally* (Remember, these are criticisms of *atomistic* NLLT theories.)
1. *Putative Counterexamples*: The most compelling objection to Classical Natural Law Legal Theory is that it appears to be open to clear counterexamples. Speaking as the CNLLT theorist would have us speak requires us to *change* our conception of law. For example, on the CNLLT usage, there never were laws against slavery.
 - a) *Danger of Revisionist Usage*: Austin cautions about revisionist language as follows: “If we [unnecessarily redefine terms] we must engage in the toilsome struggle with the current of ordinary speech; and shall often slide unconsciously, notwithstanding our efforts to the contrary, into the ... customary meaning” (John Austin, *The Province of Jurisprudence Determined*, Lecture 1). Even CNLLT theorists fall prey to this problem when they say that “an unjust law is no law at all.” In order to avoid contradiction, this has to be re-interpreted to mean: an unjust *so-called* “law” is no law at all.
 2. *Inability to Account for the Moral Obligation to Obey Unjust Laws*: This sounds like a strange criticism. Why would it be a problem for a theory that it failed to account for an obligation to obey an *unjust* law? The critic holds that there is, in fact, such an obligation and CNLLT cannot account for it because CNLLT attempts to ground the obligation to obey the law solely in the *content* of the law.
 - a) The Voter’s Dilemma