

James Tekkipe

Spring 2008

Instructor: Madaline Herlong

The Search for Natural Law

By James Tekkipe

In any form of government, it is necessary for the government to uphold its positive laws as the overall governing power. In colonies especially, this pattern of governments can be seen clearly. Colonies, though, have not proved to be a permanent endeavor, usually ending in rebellion. This rebellion incites because colonial governments operate under a system of legal positivism, thereby trying to destroy the colony's idea of natural laws. So, although colonial governments rest on positive law, legal positivism cannot exist alone in societies because humans are innately drawn to subscribe to a form of natural law that is superior to positive law. Through fictional and historical depictions of colonies, one can see this human characteristic of believing in natural laws over positive laws.

Before discussing why legal positivism cannot exist without natural law, it is necessary to know the difference between these two forms of legal philosophy. Legal positivism is a form of legal philosophy that rests on the idea that positive law is the only form of law that is to be followed. John Austin, the father of legal

positivism, defined positive law as a law given by political superiors to men (Austin 25). In a society run by legal positivism, positive law is given to the society by a designated sovereign. This sovereign is a person, or group of people, whom the society is in the habit of following. Through commands, which are orders with an underlying threat of violence, the sovereign expresses to the society how they should act (Green). If someone in the society other than the governing sovereign gives some kind of command, this will not be regarded as law because the sovereign did not give the command. Even if millions of people follow the commands of a person who is not the sovereign, the commands will still not be a law ("Legal Positivism"). Therefore, under legal positivism, a law is a law if the sovereign commands that it is a law.

Another form of legal philosophy important for this discussion is that of natural law. Natural law, as opposed to positive law, is law that is given to man by God, or some other divine entity (Himma). In a society run by natural law philosophy, all positive laws of the state must be in accordance with natural laws of "morality, religion, and justice" ("Legal Positivism"). These natural laws are seen as a basis to judge human actions as reasonable or unreasonable (Himma). So, natural law can be viewed as giving humans a sense of what is right and wrong on which to base society's positive laws. Proponents of the natural law theory argue that natural law is over and above positive law (Murphy). One supporter of natural law, Henry David Thoreau, stated that "Whoever can discern truth has received his commission from a higher source than the chiefest justice in the world who can discern only law" (Thoreau). By making this statement, Thoreau suggests the superior nature of natural law over positive law. Natural law

theorists go even farther to claim that positive law needs natural law and that positive law cannot exist without natural law (Rommen 24).

These two forms of legal philosophy stand in clear conflict with each other. On the one hand, legal positivism says that only the law of the sovereign is considered law (Austin 29). On the other hand, natural law says that laws given by God exist and that all positive laws must be in accordance with these natural laws (Rommen 24). In addition to these differences, the existence of morality in laws shows a difference between legal positivism and natural law. In legal positivism, no laws are based on morals. A law may uphold a moral standard, but this moral standard does not validate the law. John Austin makes this claim when he said, "[t]he existence of law is one thing; its merit or demerit is another" (Swartz). Therefore for Austin, positive law is law if a sovereign says it is law. Positive law is not a law because it upholds some moral standard. Natural law theorist, though, do believe in a necessary connection between law and morality (Murphy). This connection between law and morality is what makes law valid. Therefore, for a positive law to be valid, it must be grounded in some form of natural law that is based on morals or ethics (Swartz). For example, in our society, we have the positive law that says murder is illegal. Natural law theorists would argue that underneath this positive law, there exists a natural law that says murder is morally wrong that gives this positive law its validity.

With these two contrary philosophies, the question becomes which philosophy is better suited for humans to follow. Although legal positivism is popular among many governments (Swartz), people cannot live in a society without subscribing to some form of moral natural law. Natural law is an ideal that all humans strive for and actually

need in a society. "[N]atural law is part of a human psychological need to believe in a just and ordered universe" (Swartz). So it seems that humans are hardwired to think and believe that natural law does exist in the world. A prime example where this human tendency can be seen is in Albert Camus's "The Guest."

"The Guest" is a short story that takes place in colonial Algeria right before the Algerian war for independence. "The Guest" shows the tension between the French and Algerians that had existed between the two sides since France first colonized Algeria. France first took Algeria as part of their African colonies in 1834 (Algeria stayed a French colony until 1962 when Algeria won its war for independence). From the beginning of France's occupation, Algerians were not content with their new occupiers. Resistance continued until the early 1870's, when France finally gained secure power over the country, thus becoming the sovereign of Algeria. From this time on, the Algerians remained a vast, underprivileged majority. The Algerians were subjected to harsh regulations by the French and were only able to become French citizens if they renounced Islam, a religion followed by most Algerians. Therefore, most Algerians remained French subjects rather than citizens. During World War II, after years of being denied equality, Algerians began to become restless. Rebel leaders began to form anti-French militant forces to fight for their rights. Once the 1950's arrived, this rebel force grew large enough to begin fighting for independence ("Algeria" 1, 2). Camus's "The Guest" takes place during this time of intense fighting and rebellion by the Algerians.

The story tells of a French school teacher in Algeria, Daru, who is caught in a moral struggle between following French positive laws or upholding morals standards. In the beginning of the story, Daru is

brought an Arab prisoner. This Arab is a prisoner because the Arab killed his own cousin. Daru is given a command that he must bring this prisoner to the jail in the next town of Tinguit. Daru is initially angered by this command and refuses to comply. Daru feels so angry against this command because it causes him to be in a battle of morals. On the one hand, Daru knows that what the Arab did was wrong, murder is not justified. However, Daru feels as though the French are not morally justified to be the rulers of the Algerians (Palmisano). And, turning in the Arab will cause Daru to side with the French whose sovereignty he questions. Daru does not know how to end this conflict between French law and his human morals.

Throughout the rest of the story, Daru continues to struggle between these two sides. Unfortunately for Daru, this decision becomes increasingly difficult as Daru begins to form a deeper relationship with the Arab, a kind of human connection. Daru gives the Arab tea, dinner, and a warm place to sleep. Through this interaction, Daru and the Arab share a bond of friendship (Palmisano). In the back of Daru's mind, though, he knows that not following the French law will cause him to be a traitor to the French. So Daru feels that he has to follow French law. Therefore, the next day, Daru and the Algerian leave for the jail in Tinguit. On the way, Daru feels the moral weight of the decision he has made and decides that following French law is not the side he wants to take. Therefore, Daru decides to let the Arab choose whether to go to jail or not. Daru gives the Arab money, food, and a choice of two paths. The first will lead the Arab to the jail and unfortunately death. The second will take the Arab to nomads who will shelter him and give him freedom. In the end, the Arab takes the road

to prison, leaving Daru looking like a traitor to both the French and Algerians because he chose to believe in natural law over positive law.

It is necessary for a colonial government to rule under legal positivism because the laws of the colonial government must be the highest law. In a colonial government, it is necessary for the colonizers to assert their positive laws as the supreme laws of the society so that they can remain in power. The French, like all other colonial governments, attempted to run Algeria by the system of legal positivism in order to stay in power. In this society between the French and Algerians, the French were the sovereign. The French had an overwhelming majority supporting them in Algeria and their laws were written and followed because of the fear of violence, necessary aspects to be considered the sovereign of a society (Austin 33). So in French run Algeria, the commands of the French were the laws of the society.

Under a strict legal positivist theory, then, Daru should have never questioned whether or not to follow the French law in this colonial society run by legal positivism. Under legal positivism, only the law of the sovereign can be followed. The French laws then, under legal positivism, should have been the clear choice for Daru. Daru, though, did not go straight into following French law. Instead, Daru questions the morality of the French law. This questioning shows the inability of legal positivism to work in human societies. By questioning, Daru expresses his human tendency to believe in some sort of higher law above positive law. For Daru, this law had to be natural law because it was based on a moral standard and no positive laws are based on moral standards. Thus, Camus's "The Guest" shows through fiction this human tendency to believe in natural law. History can reveal this tendency as well. This whole question of whether natural

laws exist above positive laws is at the basis of the American Revolution (Swartz).

Throughout most of colonial rule of America by England, England acted more indirectly, allowing Americans to practice almost total self rule. After the end of the French and Indian war, though, King George III of England decided to start imposing more and more taxes on Americans to help pay war debts.. For the first time in years, the King began showing a more forceful rule over the colonies. The colonies did not like the idea of having to be subjected to intense rule again. After this, the colonies began the steps towards independence, starting the American Revolution ("Insane King George").

At the heart of all this distaste for the King's rule rested the idea that certain unalienable rights based on natural laws exist for all men. The Founding Fathers believed that these unalienable rights of "life, liberty, and the pursuit of happiness" were rights given to man by God and the state should always protect these rights. The King broke these laws by imposing these taxes on the colonies. Therefore, the colonies were morally justified in breaking away from England and forming their own nation (Swartz). As in "The Guest," the American colonies showed human nature to evoke some form of moral natural law that stands above positive law. The King of England decided to rule the colonies by legal positivism by insisting on the idea that his commands were the law, no matter what. In this society run by legal positivism, ideally the American colonies should have followed the laws without questioning them. There should have been no resistance to paying the taxes set by the King. Instead, because of this human tendency to believe in natural law, the Founding Fathers fought for these

unalienable rights as natural laws that are over and above positive law set by men.

Under legal positivism, no positive laws can be viewed as unlawful if the law is given by the sovereign. This is because everything that the sovereign says is law, no matter what. Even if the law is something atrocious, it must be followed. As humans, we do not stand for this kind of injustice of having to follow exactly what a sovereign says. Instead, humans look to a form of natural law as being a basis for positive law. Therefore, humans cannot live in a society run just by legal positivism because as humans, we subscribe to some form of natural law that is over any positive law.