

# *Once More unto the Breach, Dear Friends, Once More.* The Puzzle of Unjust Law between Theoretical and Practical Realities: A Brief Comment on *The Long Arc of Legality*

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## Abstract

The present work is a commentary on the idea of “Puzzle of Unjust Law” that David Dyzenhaus uses as a starting point of the initial discussions of his book, *The Long Arc of Legality*. The main argument of the commentary is that the traditional ways of understanding the puzzle, notwithstanding their importance for traditional legal theory, are almost irrelevant for legal practice, especially when we are talking about adjudication. It will be argued that so-called “very unjust laws” are dealt with by judges in a non-puzzle-like way and, on the contrary, mere unjust laws result in more complicated cases for judges, cases that demand more argumentation than the very unjust laws that legal theory tends to worry about.

**Keywords:** Unjust Laws. Legal Theory. Legal Practice. Non-cognitivism. Legal Argumentation.

## 0. Introduction

On 2023, David Dyzenhaus (“DD” from now on) published his last book, *The Long Arc of Legality*. This most excellent and interesting work was discussed at length in a workshop held at the master’s programme on *Global Rule of Law and Constitutional Democracy* of the University of Genoa during July of 2023.

One of the main arguments of the book is that of the role of the so-called “Puzzle of Unjust Law”, which is analysed by DD from a myriad of perspectives, particularly those of H.L.A. Hart, Ronald Dworkin and, last but not least, that of the Grandfather of Legal Positivism himself, Thomas Hobbes.

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I’m indebted with Lisandro Gómez for his comments on the draft of this work and to Ignacio Colombo Murúa for pointing me in the direction of Fallos: 347:1137. I also wish to express my thanks to Giovanni Battista Ratti and Luca Malagoli for inviting me to participate in the workshop about *The Long Arc of Legality*.

What follows is an attempt to present in a more systematic approach my comments on the way in which DD deals with the problem of the Puzzle of Unjust Law (“PUL” from now on) that were presented at the aforementioned workshop, especially those regarding the practice of adjudication by the judiciary of cases regulated by unjust laws as opposed to the theoretical elucubrations of legal academics and professors regarding the Puzzle.

My conclusions, if those can be spoiled, are that the centrality to the Puzzle of Unjust Law as a practical problem is practically non-existent. Notwithstanding it’s theoretical centrality in “legal positivistic” discussions on how to proceed in cases where unjust laws are present, judges do not seem to see a real problem in when manifestly unjust laws regulate said cases. On the contrary, such cases, for most judges, fall between the categories of so-called “easy cases”. Judges have more problems in dealing with cases that are regulated by not-quite-so-unjust laws.

To that end, I will proceed in the following way: first, an attempt at reconstruction of what the PUL can mean will be attempted and a formulation of it will be offered (section 1). Then some consideration on what we may call “unjust law” will be attempted, from the perspective of the PUL and in general (section 2). After that, proceeding by examples, I’ll try to show that the cases that academia usually refers to when mentioning the PUL are mostly unproblematic for judges and, on the contrary, they “suffer” more when dealing with not-quite-so-unjust laws (section 3). The present work will end with some conclusions (section 4).

## 1. The Puzzle of Unjust Law. A Brief Account of an Unclear Problem

### 1.1. Clarification of What “Puzzle of Unjust Law” Could Mean

DD begins his book with an obvious truth. The so-called PUL has been discussed ad nauseum since time immemorial<sup>1</sup>. And probably all kind of jurist worth his salt has discussed it, either in public, in private or in writing, at least once in her life.

It is a recurring problem, probably *the* recurring problem of legal philosophy<sup>2</sup>. One is tempted to say, along with Shakespeare, «Once more unto the breach, my dear friend once more!»<sup>3</sup>.

Notwithstanding how many times this problem has been pronounced uninteresting or trivial, it refuses to die.

It resists all the attempts to consign it to the dustbin of problems of legal theory because the problem in itself seems simple but, in reality, it is quite a confusing one.

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<sup>1</sup> Dyzenhaus 2022: introduction and 41-48.

<sup>2</sup> Specially for the legal philosophy of philosophers, as Bobbio would say it.

<sup>3</sup> Henry V, Act III, Scene I.

The fact that a subject or a problem has been discussed by everyone does not mean that said problem is a clear one or that its formulation is clear. The case of PUL is, I am afraid, one of such cases for there can be several formulations of it<sup>4</sup>.

For instance, one could frame it as such:

- i) Is a very unjust law part of the Law?
- ii) What is the duty of a judge regarding very unjust laws?
- iii) Does the duty of a judge to adjudicate cases regulated by the Law includes the duty to apply very unjust laws in such cases regulated by them?
- iv) Do very unjust laws really regulate cases or due to their property of being unjust they must be excluded from the category of laws that regulate cases?
- v) *Ad infinitum, ad nauseum*.

Just to mention a few *possible* formulations of the problem.

Other problems of the PUL as a problem is to determine if it is a legal problem or a moral problem.

For example, take formulation iii). One could answer the following to the question it poses and remain none the wiser:

Why, yes. Legally speaking, the duty of a judge of adjudicating cases regulated by Law includes the duty to apply very unjust law in such cases that are regulated by them. That does not mean that a judge, morally speaking of course, ought to do so.

That answer both from a legal and a moral point of view is a correct one, but it does not resolve the PUL in the slightest. This is also, famously, Hart's 1958's answer to the PUL<sup>5</sup>.

It is interesting that when DD refers to the question that if is there a PUL he does not give a clear-cut formulation of the PUL, instead referring to a family of problems that all could be grouped under the umbrella of "PUL".

This, in some cases, can be a wise decision. It is not uncommon for some academics (Radbruch comes to mind<sup>6</sup>) to give a particular formulation of the PUL not out of intellectual curiosity but with the intent and purpose of using it a battering ram against an "enemy" position, school or theory (his attempts to battle legal positivism after the second world war). That is, more times than not, PUL formulations follow an ideological agenda instead of a theoretical one.

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<sup>4</sup> During his sketch of the importance of the PUL for legal positivism some overly broad considerations of what the PUL could be taken to be are put forward (mainly in the form of almost historical reconstructions of several debates), but no clear-cut formulations are given. See Dyzenhaus 2022: 48 ss.

<sup>5</sup> Hart 1983: 77-78.

<sup>6</sup> For an excellent reconstruction of Radbruch so-called formula and his general philosophy see chapters 5 through 7 of Paulson 2023, an Italian collection of several of his essays on the matter of Radbruch. Of course, valuations of Radbruch so-called formula as a mere ideological ram against positivism are my own.

There is no such thing as a PUL but a possible family or a set of PULs. There are many things and problems, from a legal, moral, theoretical and ideological point of view that deals with laws considered unjust and very unjust.

So, a clarification, at least from the point of view of the present work is in order.

In what follows I will understand PUL under the following formulation:

*What judges must do when they identify an unjust law? Must they use it to adjudicate cases or must they disapply it?*

This formulation of the PUL is judge-based. It deals with the duties of a judge as an adjudicator. It does not deal with ontological questions, such as formulation “i)” above, as I consider such a question an uninteresting one. It is a reading of the PUL in the Hartian tradition of 1958, tradition that DD discusses at length. That is my main reason for adopting it.

## 1.2. Two Readings of Our Formulation of the PUL

A formulation of the PUL such as the one given at 1.1 has two possible (and obvious!) readings: a legal and a moral one.

From the legal point of view, that of legal obligations the answer to a set of questions such as

- i) *What judges must do when they identify a unjust law?*
- ii) *Must they use it to adjudicate cases or must they disapply it?*

Are for i) “yes” and for ii) “also yes.”

As I have argued recently<sup>7</sup> the *legal* duty to apply valid positive law is constitutive of the concept of “judge”, at least since the French Revolution up to today. Legally speaking, the PUL is not a puzzle at all but a puzzling question instead.

Interestingly, the Corte Suprema de la Nación of Argentina (“CSJN” from now on) recently issued a ruling in which it shares, quite vehemently, the opinion expressed here. The CSJN says in Fallos: 347:1137<sup>8</sup> that a case in which the Cámara de Casación (“CdC” from now on) decided to disapply a law that it considered unjust is contrary to the duties of a judge because it implies a violation of

<sup>7</sup> Calzetta 2024: 42-43.

<sup>8</sup> This is the traditional way to reference and to quote legal rulings from the Argentinian CSJN. “Fallos” is the name of the total collection of rulings issued and also published by the CSJN. The whole name of the compilation is *Fallos de la Corte Suprema de la Nación Argentina* (“Sentences or Rulings of the Supreme Court of the Argentine Nation” would be an accurate translation). The numbers represent the volume and the page in which the ruling is published. So, in this case we are referring to the legal ruling published in volume 347, page 1137. *Fallos* began being published in the 1860s.

the constitutional mandate to recognize the supremacy of the laws above the individual criteria of the magistrates<sup>9</sup>.

Here the CSJN is clear. The duty of a judge is to apply valid positive law, his own criteria be damned... at least from the legal point of view<sup>10</sup>.

From a moral reading the thing changes.

From a moral point of view, it is not so clear cut how one must answer questions such as i) and ii).

It depends on our moral considerations and how we value the role of the judge and the action of the adjudication of cases according to positive law how we will answer those two questions.

That is a truly interesting problem and a real puzzle. So, I will be preferring the moral reading of the aforementioned formulation of the PUL instead of the legal one.

In a way, the moral reading of a PUL such as the one I formulated in 1.1 is the Hartian reading of the problem, as DD argues so well in the initial pages of his book.

In section IV of his 1958 Holmes Lecture, Hart deals head on with a variant of the PUL similarly crafted as the one in the present work. The problem was that of the applicability of nazi law, particularly if judges ought to consider these laws as duty imposing during the time they belonged to the German legal system and if they must take them into account while adjudicating.

Hart reconstructs this challenge as a moral version of the PUL:

The third criticism of the separation of law and morals is of a very different character; it certainly is less an intellectual argument against the utilitarian distinction than a passionate appeal supported not by detailed reasoning but by reminders of a terrible experience. For it consists of the testimony of those who have descended into Hell, and, like Ulysses or Dante, brought back a message for human beings. Only in this case the Hell was not beneath or beyond earth, but on it; it was a Hell created on earth by men for other men<sup>11</sup>:

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<sup>9</sup> Fallos: 347:1137, vote of Justice Rosenkrantz, paragraph 11 *in fine*. In the ruling the CSJN expands at length why the ruling of the CdC decision (204/21, especially the vote of judge Mahíquez) is a mistaken one from the legal – and I emphasize *legal* – point of view. The CdC is the highest appellate court on penal matters in Argentina at federal level, just below the CSJN. The CSJN is highest court of the land both for ordinary matters and constitutional judicial review. Constitutional judicial review in Argentina is not centralized. The translation from that portion of Fallos: 347:1137 is mine.

<sup>10</sup> Some people, mistakenly, would say that this is “a positivistic ruling.” There is no such thing as that, at least there isn’t if we interpret “positivism” as what Bobbio called “methodological positivism” (Bobbio 1996: section 2, ch. 1 & 7) and I call “positivistic attitude” (Calzetta 2024: 43-45). In reality this could be construed as a formalistic ruling. “The judge must follow the letter of the law and just the letter of the law” is the common formalistic creed. That this ruling is a formalistic one is not surprising, considering that the current majority of the CSJN (3 out of 4 justices, the fifth post being vacant right now) are of a formalistic bent.

<sup>11</sup> Hart 1983: 72. Hart’s choice of language is interesting. Referring to Dante’s hell and how this particular problem does not constitute an intellectual argument. It is clear to me, that in this point, Hart

And concludes, together with Bentham and Austin, that there is not a duty to apply such unjust laws<sup>12</sup>.

So, it is the moral reading of the PUL which poses a real puzzle to legal academia and judges alike (although both of them treat the problem in quite different ways).

Of course, the problem of the PUL presupposes another problem, that if one can determine objectively when a law is just or unjust.

I do not think that that problem can be resolved satisfactorily.

## **2. Just and Unjust Law in the Eye of the Beholder**

### **2.1. Some Brief Initial Considerations**

The problem of determining the justice of a thing, or its lack thereof, is as old as time. As old as the PUL itself. I will not pretend to resolve it here, far from it. I'm just going to espouse my position regarding its probable impossibility of satisfactory resolution. For questions of space and time I'm not going to make a reconstruction of all possible metaethical positions in existence that impinge on the matter, and I'll assume that the reader knows them and what we understand "metaethics" to mean (broadly).

I'll confess right away that my metaethical posture is something between ethical scepticism and subjectivism (which are *not* the same thing), without a clear decision between the two.

From a personal ethics perspective, I have a predilection for utilitarianism in its classical sense. I do not consider it to be objectively true, just the best possible ethics that we have built so far, and I choose it consciously. This will maybe influence what I'm going to say here, maybe not.

### **2.2. The Just and the Unjust before the Bench**

Dealing with the PUL, especially in the formulation chosen above, tends to involve dealing with judges. Is at the judge's bench where the PUL becomes a real puzzle but in more ways than it usually referred to.

Most often than not, the PUL is treated as the problem of unjust laws and, in my formulation, the problem of the applicability of said laws.

But that problem presupposes another one: the problem of determining the lack of justice of a law or a set of laws.

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frames the whole problem as a moral one. See, also, Dyzenhaus 2022: 59-61 where Hart's approach to a solution to the PUL involve some considerations of what I would call Hart's moral ideology of the application of the law, which involves what he calls "natural procedural justice" and "principles of objectivity and impartiality" in the application of the law. In another work I call this sign of a kind of Ideological Positivism in Hart's part. See, Calzetta 2024: 38, note 24.

<sup>12</sup> Hart 1983: 73.

In theoretical discussions the problem of determination tends to be ignored. Maybe it is to be expected. What the theoretical minded person (Hart, Dworkin, Bentham, Austin, Shapiro, and maybe DD himself)<sup>13</sup> cares about are what the judges must do when confronted with unjust laws. That is their problem, and it is understandable.

On the other hand, the judge has first to argue that a law is unjust in order to then decide what to do with it. The PUL, from the point of view of the judge, is a double-edged problem.

Judges *must* argue in favour of the interpretations that they offer qua judges<sup>14</sup>. In the case of the PUL said argument must do the following: a) determine that the relevant law of the case is either just or unjust; b) apply it or disapply it accordingly to the results of “a”).

While doing that, the judges often produce the most unexpected results. Take, for instance, the CSJN leading case *Saguir y Dib*<sup>15</sup>.

A person was in a dire need of an organ transplant. The only possible donor was his sister, who was underage. She was 17 years and some months old, almost 18 years old. The law that regulated organs transplants at the time stipulated that the coming of age for organ donation was 18 years old. The CSJN justices, arguing from the point of view of a systemic interpretation of said law<sup>16</sup>, determined that the law in question was an unjust law for *that case in particular*, because it did not contemplate a more holistic view of the concept of “coming of age”. Therefore, the CSJN decided that the 17-year-old girl was mature enough to be considered an adult *for the purpose of the transplant* and, therefore, they decided to authorize it<sup>17</sup>. The case was decided with incredible expediency. Less than a day from presentation to CSJN ruling.

This case is interesting for our purpose for many a reason.

Firstly, the law that was declared unjust was one that almost no one, before the case, would have considered it so. It not the same as the classic examples that legal theory tends to offer when we talk of unjust laws (i.e. the nazis). It was a law about coming of age, something that tends to be a number almost chosen at random between 18 and 25 (at least in most jurisdictions)<sup>18</sup>.

Secondly, the law was not considered unjust *erga omnes* but unjust for said case and *due to the facts of the case*. It was a relative “unjust”, not an absolute. If not for

<sup>13</sup> Just to mention people mentioned by DD while framing the problem of the PUL.

<sup>14</sup> See, again, Calzetta 2024: 42-43.

<sup>15</sup> Fallos: 302:1284.

<sup>16</sup> That is, an interpretation of the transplant law in accord with the rest of the legal order. Doing such a thing in its totality is, of course, an impossibility (*Hercules be dammed!*), but that is what judges who indulge in systemic interpretations tend to claim.

<sup>17</sup> Saguir and Dib ended in tragedy. Both siblings died.

<sup>18</sup> This whole idea of unjust laws and what they are typically considered to be (something akin to nazi law) could be read as a typical case of underinclusion in Schauer’s sense (see Schauer 1991). At least in the ideology and beliefs of legal theorists. I thank Lisandro Gómez for the pointer.

said facts, the law in question would probably have not been considered unjust at all. The case was composed by such a particular set of facts that rendered unjust (for the case) a thing so innocuous as a coming-of-age regulation.

Thirdly, the determination of injustice is not just a gut-determination of injustice, such as the one described by Hart when referring to nazi law<sup>19</sup>. It is a more complex and subtle one that requires a lot of arguing in order to be demonstrated. Basically, this is an unjust law for this case because its application (rejecting the donation) would result in the death of a person that could otherwise be saved.

That is the point of departure of the CJSN, their gut-feeling.

But, in order to demonstrated and to defeat the law, the CSJN built a systemic interpretation that completely reframed, for the case, the notions of coming-of-age and of the *de facto* capacity of legal persons, just to name a few.

It is important to remark that cases like this one are quite common. Not always judges adjudicate cases just by legal reasons<sup>20</sup> (as Fallos: 347:1137 demonstrate) alone but also from personal moral considerations that they try to frame into the law by way of legal argumentation such as *Saguir y Dib*.

The PUL is mainly a problem of legal interpretation and argumentation<sup>21</sup>, it deals with mainly determining when a law is unjust in very subtle and specific ways and just for particular cases only.

Mostly this is due to the facts of the case than by “just” or “unjust” properties of the law in itself. Cases such as this happen every day and what can be considered just or unjust varies due to the interpreter of the case, and that means also the interpreter of the facts of the case.

Justice is in the *Eye of the Beholder*, and not only in regarding substantive laws.

Take, for instance, a case adjudicated by Eugenio Bulygin when he was an appellate judge at the Cámara de Apelaciones en lo Civil y Comercial de la Nación. (“Cámara” from now on)<sup>22</sup>.

An Old Lady was a passenger on a bus in the city of Buenos Aires. The bus got itself in a traffic collision with other vehicles. The Old Lady got injured as a result. She hired a lawyer to obtain some compensation for her injuries. Sadly, for her, her

<sup>19</sup> I believe we can all agree, at least I hope that we do, that nazis were evil and their laws were also evil and, therefore, unjust. Even Sceptics or Subjectivist can agree to that. For more arguments on the matter see Chapoutot 2018.

<sup>20</sup> I’m using “reason” in very lax way. By no means I’m referring to so-called “reasons for action”.

<sup>21</sup> The terms “legal interpretation” and “legal argumentation” tends to be considered as synonyms by lawyers and jurists alike. That is mistaken. “Legal interpretation” is the discovery (if you are a cognitivist) or the adscription (if you are a realist) of a meaning (sometimes a set of meanings) to a legal provision or text. “Legal argumentation”, on the other hand, means the offering of reasons to support or not to support a given interpretation of a legal provision of text. See Guastini 2014: 31-53 & 261-299 for more.

<sup>22</sup> Sadly, I wasn’t able to find the sentence, but the facts of the case and Bulygin’s solution to it was told to me several times by different persons that I trust. Notwithstanding that we can say *se non è vero, è ben trovato*.

lawyer was so stupid (Bulygin's words) that everything that can be done wrongly in a lawsuit was perpetrated by him.

Obviously, the Old Lady lost the case. The stupid lawyer filed an appeal, and it eventually reached Bulygin's desk. Bulygin, while reviewing the file of the case, reached the conclusion that nothing could be done to reverse the decision under appeal.

The stupid lawyer was so bad at his craft that nothing could be done. At least not regarding the substantive law of the case. Regarding procedural laws something could be achieved.

There is a law in the procedural code that establishes that the party that loses a legal proceeding has to pay the expenses of the proceedings. Bulygin ruled that, due to the sheer idiocy of the stupid lawyer, something that the old lady couldn't have known beforehand, it was unjust for her to pay for the expenses of the proceedings.

So, he said, he was going to *create* a new norm for the case: *in situations of sheer stupidity of the lawyer who represents one of the parties in a legal case said lawyer will have the obligation to pay for expenses of the proceedings from his pocket if the case is lost due to his stupidity.*

This involved the defeat of the original legal expenses law.

What Bulygin did is similar but different from what the CSJN did in *Saguir y Dib*. Between the both of them I believe that we cover the whole of possible approximations of the PUL from the bench.

Both approaches involve defeasibility and a great deal of legal argumentation. The judge, after deciding that a norm or a law is unjust for a specific case can and often will do two possible things.

The first will be to defeat the legal norm that governs the case, changing the result completely from what was originally legislated, as in *Saguir y Dib*.

The second would be to accept the result that was originally legislated but to modify or disapply (both involve norm-creation from the bench) a subsidiary norm in order to bring some relief to the party that must suffer the injustice, as in the case of the Old Lady.

### 3. How Very Unjust Laws Are Dealt with in Practice

"This is all fine and good but what about the real important cases?" one may be tempted to ask, "what about the cases involving very unjust norms? Morally repugnant norms? What about them?"

Paradoxically, notwithstanding the perspective of some legal theory, those are the cases in which the PUL is practically irrelevant.

In practice judges tend to deal with very unjust laws in a very swift manner, the kind of arguments that they must offer to justify their decisions tends to be poorer in the cases of very unjust laws that in those cases were the justice or lack thereof is

a matter of subtlety or opinion.

This could be easily explained. It is due to the way in which we are educated since childhood to consider some things just, other unjust and some very unjust.

Let's expound on that.

### 3.1. An Operative System of Morality

The following two propositions, I believe, could be considered true enough to be taken as a set of common-sense assertions about men and morality<sup>23</sup>.

- i) Humans in a society tend to have very different opinions regarding the morality of certain actions.
- ii) Notwithstanding that, there seems to be some general agreement regarding the morality of some actions in particular such as consider them very unjust.

The truth of both of these propositions can be considered paradoxical. That it's not the case. The paradox is just a result of appearances, and it does not run deep in our moral makeup.

A way of explaining this is Mackie's<sup>24</sup>. Since childhood we are exposed to what by way of metaphor, we may call a formatting of our minds that shapes our general outlook on moral issues, especially in those cases that a society consider to be extremely egregious, like the nazis for instance.

That moral education could be said to consist of – again, by way of metaphor –, in the installation of a sort of Moral Operative System that conditions our opinions and beliefs in the most extreme cases of moral misconduct, while leaving sufficient space of us to form the rest of our moral opinions.

That Moral Operative System could be defined as a set of beliefs shared by (almost all) the members of a given community which are inculcated in said members from a very early age. It is akin to learning grammar during the school years.

That system predisposes us to respond to certain conducts, labelled extremely immoral or very unjust, in a certain way and to demand little proof or argumentation from those that claim that said conducts are very unjust.

It is not the case that proof or argumentation are never considered, but that we

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<sup>23</sup> This is a very brief detour made just to briefly explain a point. I cannot expound fully on these matters due to space constraints. To those that consider these explanations insufficient I can only say that I'm sorry.

<sup>24</sup> Mackie 1977: 42-46. Nowadays, in which moral objectivity (at least in academia) seems to be more forceful than ever, quoting Mackie could be considered something *démodé*. While I acknowledge that I do not share in such an opinion. The truth or falsity of a proposition does not depend on *doxa* nor academic fashion. That is specially the case when we are dealing with philosophical questions. In such cases the "truth" is something that is almost impossible to ascertain. At most we must conform ourselves with the power of the arguments behind the assertion. In cases such as this I believe that Mackie remains unchallenged.

lower our standards of evidence and argumentation before those situations. This is something that happens matter-of-factly, and here it's not the place to consider if this fact is a "good" or a "bad" one.

Judges, being human, also have the same Moral Operative Systems as (almost all) the rest of the members of the community from where they belong. Therefore they, more often than not, respond to the "very unjust" in the same way as the rest of the community.

Of course, not all judges and not all persons react this way. Some would require more proof and more arguments that what is required by the Moral Operative System, but they are in the minority.

### 3.2. Very Unjust Laws in the Practice of the Courts

An interesting case in which to show this is the CJSN "*Simón*" case<sup>25</sup>. In that case, the CSJN declared both the Law of Due Obedience and the so-called Full Stop Law unconstitutional. Both laws were dictated to limit and to put an end respectively to the prosecutions of crimes committed during the Argentinian military dictatorship of 1976-1983.

The Law of Due Obedience limited the responsibility of said crimes to just the heads of the military and other security agencies, excluding from prosecution officers of inferior rank, other subalterns and the like.

The Full Stop Law put an end to the prosecutions of said crimes altogether<sup>26</sup>.

In "*Simón*" the CSJN argued at length what to do with said laws, that were (and are) considered very unjust by almost all the Argentine population. At that time the CSJN consisted of nine justices. Seven of them voted in favor of declaring the laws unconstitutional, one against, and one refused to vote.

Interestingly the arguments of both the majority and the lone dissenter are not moral arguments but legal ones and both dealt with the same issue: the existence of or nonexistence of norms of international law that impose the duty on Argentina of breaking the principle of legality and to retroactively prosecute the criminals from the dictatorship.

The arguments of the majority were mere enunciations of the existence of said norms and of the duty of Argentina, after the reform of the Constitution in 1994, to conform with the mandates of the international community. Several references to *Ius Cogens* norms were made but not a clear clarification of them was offered.

On the contrary, the dissenter affirmed that said norms of international law could only be applied if they conform with the Constitution, quoting article 27 of

<sup>25</sup> Fallos 328:2056.

<sup>26</sup> There were two exceptions: forging the identity of a minor and forced disappearance of minors.

said legal document, and therefore they cannot bend the principle of legality consecrated in article 18. He also quoted article 31 which, in his interpretation, puts norms of international law below the Constitution itself.

Notwithstanding the fact that I share in the opinion that said laws were unconstitutional I cannot help to acknowledge the weakness of the arguments offered from the majority. Merely enunciating the existence of *Ius Cogens* norms does not make them real and, also, by itself does not defeat the arguments of the dissenter justice. Said arguments are legally relevant and ought to be refuted. It does not happen here because the judges are quite sure of the gross injustice of said laws and they do not feel that that fact requires additional proof or argumentation.

Therefore, dealing with laws such as these is not a PUL for them. It something that can be dealt with matter-of-factly. Almost like a nuisance, as most people share in the opinion that said laws are very unjust and do not merit obedience. Of course, the motivation of the majority is moral, it is based in their Moral Operative System, but as judges they must justify it by legal means. They do so, but in an extremely weak manner.

This way of dealing with what the judges consider very unjust law is not new. The same happened, in a way, during the trial of king Louis XVI, just to mention a historical example.

As Rosler puts it, the French Revolution, who was quite proud of the insertion of the principle of legality in the Declaration of Rights of Man and Citizen, was more than willing to cast it aside when prosecuting Louis<sup>27</sup>. And that not only was the case of the prosecutor but that of judges as well during that process. Once they detected something that, according to their Moral Operative System, could be considered as “very unjust” the demands for strong evidence and strong argumentation tends to go down.

Judges tend to use their moral criteria more than their legal criteria in order to adjudicate said cases.

The case that we saw in section 2, when the CSJN – in Fallos 347:1137 – squashed the ruling from the Cámara, do not usually happen in cases of extreme injustice, or very unjust law.

The way that the courts tend to deal with such cases is, if the wording can be allowed, unpuzzle-like. In a way, we can say, cases of *very unjust law* are akin to easy cases for judges, and cases of mere unjust law are, due to the demands of careful argumentation on the judges, akin to hard cases<sup>28</sup>.

<sup>27</sup> Rosler 2022, p. 161.

<sup>28</sup> Raz said one time that the distinction between easy and hard cases was more or less useless. There are some cases that are considered hard by legal theory that are extremely easy for judges to resolve, and vice versa.

#### 4. An Attempt at a Conclusion

Given the two preceding sections of the present work, it seems to me that the obsession, in a way, of legal theory with *very unjust laws* and the PUL is misguided.

Cases of very unjust laws could appear difficult in theory, specifically because of the moral issues involved in them and how those could be considered to be some sort of challenge to legal positivism<sup>29</sup> and the like. But in practice, in real life, judges do not seem to really fret about them. On the contrary, it is with cases of mere injustice that they tend to be more fussy, more careful in argumentation. I believe that this opens a new way of understanding the PUL.

An approach closer to legal practice and one who follows more closely the demands of legal interpretation and argumentation is “the new way” that I think that we must pursue regarding this problem. A way that has been neglected because the pull of gross injustice is more notorious than mere injustice in our laws.

Given the fact that mere unjust laws are more prevalent than very unjust laws and that the former seem to be more puzzle-like than the latter, at least to judges, I believe that, regarding the ways in which the PUL is studied, legal theory must course correct. That is all<sup>30</sup>.

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<sup>29</sup> I do not share the view that said issues could be considered as a challenge in any way to legal positivism. Said view, seems to me, is rooted in a misunderstanding of what legal positivism is. I cannot expound on my views here, but I dealt a bit with this issue in Calzetta 2024.

<sup>30</sup> DD begins the first chapter of his book quoting Dworkin on why the PUL has no practical importance (Dyzenhaus 2022: 41). DD considers that Dworkin is wrong on the issue. He is right, of course Dworkin is wrong. But he is not wrong for saying that the PUL is merely a verbal dispute. It is not. He is wrong for not taking into proper account what judges do when confronted with unjust laws. As I have tried to show, they do different things to different kinds of unjust laws. Some of them pose a problem to the practice of law, others do not.

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