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Law, Truth, and Reason

A Treatise on Legal Argumentation

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Chapter 10
Natural Law Philosophy: Law as Subordinate to Social Justice and Political Morality in Society

10.1 The Evolvement of Natural Law Philosophy

Analytical legal positivism seeks to maintain a sharp distinction between the formal validity of law and its moral censure or merit and dismerit, as John Austin put it.[1] The legal system consists of formally valid legal rules, as issued by the sovereign ruler in the form of the parliamentary legislation and other institutional sources of law, while it is a task for the legal profession to determine the content of law with respect to different fact-constellations according to the intentions of the sovereign legislator. Any value-laden judgments as to the censure of the law were to be left for those engaged in moral philosophy, religious studies, political philosophy, and natural law philosophy – but not in technical legal analysis – to ponder upon.[2] Similarly, *analytical legal realism* sees the law as the totality of individual decisions reached by the courts of justice and other officials, with reference to the legal rights and legal duties that enjoy effective protection by the courts and other officials. For the positivists and realists alike, the law is accordingly a *social fact*, not a social value or ideal.

Natural law philosophy seeks to distance itself from legal positivism and legal realism alike. It defines the law as subordinate to criteria of (absolute) *religious*, *social*, or *political justice*. With the notion of law so defined, any questions concerning the validity and the moral worth of law are deeply intertwined.

In placing the emphasis on the non-positive, a priori qualities of law that logico-conceptually predate positive law, and on the value-laden, morals-bound qualities of law at the cost of the institutional will-formation of the legislator or courts of justice, natural law philosophy bears affinity to two other schools in modern legal thinking. For the first, the German *Begriffsjurisprudenz* at the late nineteenth and the early twentieth century underscored the inherent logico-conceptual and systemic qualities

[1] "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the from the text, by which we regulate our approbation and disapprobation." Austin, *The Province of Jurisprudence Determined*, p. 157.

[2] Kelsen, *Reine Rechtslehre* (1960), p. 1 et seq.

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of the legal phenomena, as argued by Georg Friedrich Puchta in terms of the genealogy of legal concepts (*Genealogie der Begriffe*) and the hierarchical, pyramid-like structure of the system of legal concepts (*Begriffspyramide*). For the second, *legal phenomenology* in the twentieth century equally stresses the a priori, self-evident tenets of law, like the "inherent object-specific structures" of legal phenomena that define the essence and nature of law (*die immanente sachliche Wesensstruktur*),[3] irrespective of any institutional will-formation of the legislator or courts of justice.

Historically, natural law philosophy can be divided into four phases:[4]

(1) *classical* natural law in the Antique Greece and Rome;
(2) *scholastic* natural law in the Middle Ages;
(3) *rationalist* natural law in the seventeenth and eighteenth centuries; and
(4) *modern* natural law since 1950s.

Alternatively, the tradition of natural law philosophy could be divided into two categories of *classical* and *modern*, where the former covers the Antique and the Middle Ages and the latter comprises the time from the mid-seventeenth century to the present times. John Finnis dates the birth of modern natural law in 1660, when Samuel Pufendorf's *Elementorum Jurisprudentiae Universalis Libri Duo* saw daylight.[5]

The idea of an absolutely right normative order for the human community with which all positive law ought to be aligned was known already in the Antique Greece. There, the natural order of things referred to the Aristotelian idea of good life in the Greek *polis*. The conflict between the rights of an individual and the collective interest of the community as a whole that has proven so crucial for modern political theory was not known in Aristotle's times. According to Aristotle, man by his nature is a *zōon polītikon*, a social or political animal for which the preconditions of a good, reasonable life were defined as the virtues of a community-based social ethics and duties owned by each to the Greek *polis*. In consequence, it was the task for the legislator to arrange the social matters in a *polis* so that the citizens could lead their lives virtuously, i.e. taking an active part in the communal matters.

In Aristotle's sharp-eyed insight into the essence of the law and the human nature, general laws are always more or less imprecise and therefore unable to take all the

[3]The term "inherent object-specific structures (of law)", being an approximate equivalent of the German expression *die immanente sachliche Wesensstruktur (des Rechts)*, refers to Hans Welzel's legal phenomenology. Larenz, *Methodenlehre der Rechtswissenschaft*, p. 111. – On legal phenomenology, Pallard and Hudson, "Phenomenology of Law"; Minkkinen, *Thinking without Desire*, chapters "In an Orderly World" (pp. 48–65) and "Right Things to Come" (pp. 66–82).

[4]There can be no post-modern natural law philosophy, due to the denial of any Grand Theory of Law under the distinctively post-modern premises of social analysis, and the idea of (absolute) social justice is of course a prime example of a grand theory in law.

[5]Finnis, "Natural Law: The Classical Tradition", p. 5.

idiosyncratic tenets of an individual case fully into account, necessitating recourse to case-aligned *equity*. Aristotle compares good law to the flexible lead rule adopted by the builders on the Lesbian Island, to the effect that the rule could be bent and moulded so as to fit with the shape of the object measured:[6]

> When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice – not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the lead rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts.

In the Middle Ages, Thomas Aquinas (1225–1274) created a remarkable synthesis of *scholastic* natural law philosophy. According to Thomas, there are four normative orders that govern all the creation, viz. (a) *lex aeterna*, or "eternal law", (b) *lex naturalis*, or "natural law", (c) *lex humana*, or "human law", and (d) *lex divina*, or "divine law".[7]

Lex aeterna comprises the great world order by God, the omnipotent Creator, with reference to the all-encompassing "order of things" that is imposed upon all the living creatures and inanimate things alike. Thomas made no essential difference between the inanimate heavenly bodies, the realm of living creatures, and the human kind, all of which were all equally subject to the order of creation. Anachronistically one could say that Thomas failed to distinguish between the *mechanistic*, or *causal*, laws that determine the movement of inanimate heavenly bodies, like the stars and planets, and the *normative*, or *deontic*, laws that seek to steer the conduct of human beings. *Lex naturalis* is that part of the *lex aeterna* that determines the duties of man among the living creation. The commands of the *lex naturalis* are situated higher in Thomas' hierarchy of normative orders than any decrees of the *lex humana*, i.e. positive laws issued by the sovereign ruler for the benefit of the community. The fourth normative order, i.e. *lex divina*, consists of the express revelations and commandments by the omnipotent God for the mankind in Bible and other holy scriptures.

For Thomas Aquinas, the supreme principle of natural law is that of *doing good and avoiding evil*. Moreover, the precepts of natural law are *self-evident*

[6] Aristotle, *Nikomachean Ethics*, p. 1796 (Book V, lines 20–32).

[7] Thomas Aquinas, (Extracts from) *The Summa Theologica*, Question 91 ("Of the Various Kinds of Law"), p. 137 et seq.

(*per se nota*) and cannot be validated by reference to any other, still higher principles of religious or social ethics.[8] In all, he defined the concept of law as follows:[9]

> Thus from the four preceding articles, the definition of law may be gathered; and it is nothing else than *an ordinance of reason for the common good, made by him who has care of the community, and promulgated.*

The ordinances of positive law, as issued by the sovereign ruler, are binding only on the condition that they fulfil the criteria of being an ordinance of reason in fostering common good, and having been duly promulgated so as to be publicly known. An *unjust law* is not binding and will not even qualify as a law proper, being no more than a "corruption of law" (*legis corruptio*),[10] i.e. mere violence or brutality by the worldly ruler. What is more, Thomas pointed out that detailed knowledge of the contents of natural law could be gained by human reason. Thereby he significantly paved the way to the breakthrough of a rationalist natural law thinking in the seventeenth and eighteenth centuries.

According to *rationalist* natural law philosophy, the precepts of natural law could be inferred from the immutable nature of man by means of the faculties of human reason. Hugo Grotius (Huig de Groot, 1583–1645), though himself a devout Catholic, placed so much faith in the power of human reason that, as he boldly claimed, the precepts of natural law would be binding even under the "highly unreasonable premise" that almighty God did not exist or that He did not care for the humans. The resulting system of reason-based law culminated in the *ultimate*

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[8]Thomas Aquinas, (Extracts from) *The Summa Theologica*, Question 91 ("Of the Various Kinds of Law"), Second Article ("Whether the Natural Law Contains Several Precepts, or One Only?"), pp. 156–157: "*I answer that*, As stated above (Q. XCI., A. 3), the precepts of the natural law are to the practical reason, what the first principles of demonstrations are to the speculative reason; because both are self-evident principles. (. . .) Consequently the first principle in the practical reason is one founded on the notion of good, viz., that *good is that which all things seek after*. Hence this is the first precept of law, that *good is to be done and ensued, and evil is to be avoided.* All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.' (Italics in original.) – Cf. Finnis, *Natural Law and Natural Rights*, p. 33: ". . . Aquinas asserts as plainly as possible that the first principles of natural law, which specify the basic forms of good and evil and which can be adequately grasped by anyone of the age and reason (and not just by metaphysicians), are *per se nota* (self-evident) and indemonstrable."

[9]Thomas Aquinas, (*Extracts from*) *The Summa Theologica*, Question 90 ("Of the Essence of Law"), Fourth Article ("Whether Promulgation Is Essential to a Law?"), p. 137. (Italics added.)

[10]"*I answer that*, As Augustine says (*De Lib. Arb. i. 5*), *that which is not just seems to be no law at all*: wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule reason is the law of nature, as is clear from what has been stated above (Q. XCI, A. 2 *ad* 2). Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law." Thomas Aquinas, (Extracts from) *The Summa Theologica*, Question 95 ("Of Human Law"), Second Article ("Whether Every Human Law Is Derived from the Natural Law?"), p. 166 (Italics in original.) – Cf. Finnis, *Natural Law and Natural Rights*, pp. 351–368, where the author gives a profound analysis of the issue.

principle or principles of law from which all other rules and principles of natural law could then be inferred.

Since geometry was the leading scientific ideal at the early modern era, the study on law, too, sought to pursue axiomatic scientificity in its methodology and the results attained. The legal system was conceived as an *axiomatic*, *systemic*, and *hierarchical* normative order. By means of logical deduction a detailed set of rules and principles could be derived from the few abstract principles postulated from the nature of man and society. For Grotius, the ultimate principle of natural law was the celebrated maxim *pacta sunt servanda*. Besides Grotius, Samuel Pufendorf (1632–1694) and Christian Wolff (1679–1754) were among the major representatives of rationalist natural law thinking. Such a systemic disposition of law by the reason-based natural law greatly paved the way for the law codifications at the end of the 18th and the beginning of the nineteenth century. Moreover, it provided a source of inspiration for the systemic efforts of the German conceptualists (*Begriffsjurisprudence*) at the latter half of the nineteenth century. The legal systematics by Christian Wolff, in specific, served as the model for Georg Friedrich Puchta's genealogy of legal concepts (*Genealogie der Begriffe*).

The patent predicament with a rationalist conception of natural law, based on the immutable nature of man, has to do with the essential arbitrariness of the ultimate premises of philosophical analysis. Is man by nature a violent creature, inclined to end up in a destructive civil war, if there is no sovereign ruler that could enforce the peace, as Thomas Hobbes (1588–1679) argued? Or is man by nature a peaceful creature, capable of a prolific and fruitful cooperation with others of his kind, if only the rules of contract law and legal means for their due enforcement are provided for, as both Hugo Grotius and John Locke (1632–1704) thought? There is no simple answer to that question, as the true nature of man would seem to lie somewhere in the mid-category "between the angels and the devils".

Modern natural law philosophy refers to a host of post-war intellectual currents that all share the conviction that the force of law cannot be based on its source of origin only, as the legal positivists would have us believe; nor on the effected "law in action" at the courts of justice and other legal officials, as the legal realists see it. Rather, the normative character of law depends on the content of law and the sense of approval it enjoys in the legal community. The impact of modern natural law thinking can most strikingly be seen in the breakthrough of the *human* and *constitutional rights* in the Western legal systems, giving individuals protection against any malpractices by the state officials.

> Treaties for the protection of human rights include for instance the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; and the European Convention on Human Rights and Fundamental Freedoms, with the annexed authority of the European Court of Human Rights. Such conventions, and the European Convention on Human Rights and Fundamental Freedoms in specific, have greatly strengthened the protection of human rights in the post-war Europe.

Arguments based on human and constitutional rights of the individual have gone through a radical transformation from weak, moral arguments to genuinely legal

ones and, perhaps, even ones that often *trump* in the legal deliberation of the judge, in Ronald Dworkin's sense of the term, to the effect that the international or transnational system of human rights protection may effectively curb the infringements of human rights on a national level.[11]

10.2 "*eine wertfreie Beschreibung ihres Gegenstandes*" – The Challenge of Hans Kelsen's *Pure Theory of Law* for Natural Law Philosophy

Hans Kelsen's *Pure Theory of Law* is based on extremely rigorous criteria concerning the *epistemology* and *methodology* of the science of law, to the effect of restraining the legitimate task of legal doctrine and legal analysis to *a value-free description of its subject matter*,[12] with reference to the valid norms of a legal system. A legal scholar, if he wishes to retain his scientific integrity, is not allowed to add any evaluative judgments of his own to the value-free description of the legal norms in force, nor even present any kind of preference order among the semantically possible interpretation outcomes vis-à-vis those norms, since that would have the effect of turning value-free legal *science* into value-laden legal *politics*.

In the preface to the second edition of *Reine Rechtslehre*, Kelsen even boasted of the proven value-neutrality and openness of his conception of law vis-à-vis any feasible social and political ideologies: the very fact that the pure theory of law had received – in Kelsen's mind equally misplaced – critique from a host of mutually exclusive political ideologies was the best proof of the fact that it had accomplished the objectives set for it. Kelsen pointed out that in the various critical reviews the pure theory of law had been labelled as expressive of conflicting ideological positions, to the effect of being a liberal, fascist, social democrat, bolschevist, catholic, protestant, atheist, or even anarchist conception of law, depending on the ideological preferences or aversions of the reviewer.[13] To Kelsen's mind, such labels were all

[11] On the notion of rights as "trumps" in legal argumentation, Dworkin, *Taking Rights Seriously*, pp. 82–84, 364–366.

[12] "Obgleich die Rechtswissenschaft Rechtnormen und sohin die durch sie konstituierten Rechtswerte zum Gegenstand hat, sind doch ihre Rechtssätze – so wie die Naturgesetze der Naturwissenschaft – *eine wertfreie Beschreibung ihres Gegenstandes*." Kelsen, *Reine Rechtslehre* (1960), p. 84. (Italics added.) Cf. Kelsen, *Pure Theory of Law*, p. 79. The translation of Kelsen's main work into English is notoriously less than perfect. Notably, the key term "Rechtssätze" (i.e. legal sentences) is translated as "the rules of law", which is certain to lead the reader astray, unless she knows enough German to be able to consult the original version of the text.

[13] Kelsen, *Reine Rechtslehre* (1960), p. V; Kelsen, *Reine Rechtslehre* (1934), pp. XII–XIII. – Kelsen of course was of a Jewish origin and had to emigrate from Germany first to Austria in 1933 and, then, from Austria to the United States in 1940, following the annexation of Austria to Germany in 1938. In 1945, Kelsen published *General Theory of Law and State*, i.e. an English translation of two of his earlier books *Allgemeine Staatslehre* (1925) and the first edition of *Reine Rechtslehre* (1934). Kelsen died in 1973.

equally misplaced, since the pure theory of law was expressly intended to be – and, so it seems, had succeeded in being – entirely neutral vis-à-vis all social, political, and religious ideologies. The diversified and mutually self-refuting character of the critique collected by the pure theory of law from the critics of the theory proved his conception right, Kelsen concluded.

Patently, Kelsen's open-ended, value-free legal normativism could not fill the legal, moral, and political void that had been left wide open in the havoc of legal positivism and the formal rule of law ideology in the atrocities committed by the *Dritte Reich*. Gustav Radbruch's (1878–1949) intellectual conversion from a neo-Kantian legal philosopher into a full-fledged natural law philosopher in the aftermath of the World War II is illustrative of the intellectual turn of the tide. Now, supra-positive justice (*übergesetzliches Recht*), as advocated by natural law philosophy, would take priority over any "legalized wrongs" (*gesetzliches Unrecht*) that might be committed by the legislator, Radbruch wrote in 1946.[14]

In a sense, Radbruch represents the older layer of natural law philosophy, as he attaches the criteria of law in the traditional, substantive notion of natural law. Since the 1950s, the focus in modern natural law philosophy has to a great extent been laid on the *institutional* or *procedural* means for effectively restraining the discretion of the legislator, courts of justice, and other law-applying officials. The contributions to legal philosophy by Lon L. Fuller, Ronald Dworkin, and partly even H. L. A. Hart are illustrative of such a *non-positivist* approach,[15] evading the patent excesses of older natural law philosophy. Alternatively, the emphasis has been placed on the basic values or basic goods at the back of legislation and legal adjudication, as in John Finnis' legal philosophy. The challenge of Kelsen's analytical and positivist account of law still remains the solid reference against which any non-positivist theories of law are to be judged. Whether the entirely value-free character of Kelsen's pure theory is a blessing or a curse for the legal science depends on the basic choice of legal analysis: is law a social fact, as legal positivism and legal realism both have it, or is a social value, as natural law philosophy has it?

[14] Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht"; Radbruch, "Fünf Minuten Rechtsphilosophie". – "There are accordingly grounding legal principles that are stronger than any legal decrees of positive law, so that an enactment that is in conflict with such a principle is void of legal validity. One calls such basic legal principles natural law or law of reason." (Translation by the present author.) Cf. "Es gibt also Rechtsgrundsätze, die stärker sind als jede rechtliche Satzung, so daß ein Gesetz, das ihnen widerspricht, der Geltung bar ist. Man nennt diese Grundsätze das Naturrecht oder das Vernunftrecht." Radbruch, "Fünf Minuten Rechtsphilosophie", p. 328.

[15] Ronald Dworkin's legal philosophy was considered at length above in the context of legal coherence, so I will not re-enter that line of discussion anew. Ronald Dworkin's philosophy of law and the notion of legal principles has been coined the "third theory of law" by J. L. Mackie, since elements drawn from both legal positivism and natural law philosophy are present in it. Thus, the two criteria by means of which Dworkin depicts legal principles, i.e. *institutional support* and *sense of approval* in the community, are linked to the basic ideas of analytical legal positivism and natural law philosophy, respectively.

10.3 The Internal Morality of Law by Lon L. Fuller

Can a criminal law provision be retroactive in effect so that a punishment might be inflicted on someone for committing, or failing to commit, some act, if such conduct had not been formally declared a crime at the time of his committing it? Can the legal system contain secret laws, to the effect that the citizens who are subjected to them have no means of getting to know or becoming acquainted with what it is that is required from them? Can laws require the kind of conduct that, when judged by objective standards, cannot possibly be achieved by the human effort? Can laws require contradictory conduct from its addressees, prohibiting some conduct while at the same time requiring it from the citizens? Can there exist an irresolvable conflict between the "law in the books", as articulated in legislation, on the one hand, and the "law in action", as brought into effect in the actual court practice, on the other? Can the content of law be volatile and in constant flux to such a degree that the laws of yesterday are today completely legal history, and the same goes for the laws of today when looked upon tomorrow?

Lon L. Fuller (1902–1978), an American legal philosopher with a preference for natural law philosophy, answered each of the above questions in the negative in his *The Morality of Law*. To Fuller's mind, law is an inherently *purpose-oriented* and *community-aligned* phenomenon, and not a predominantly linguistic or semantic fact, as H. L. A. Hart and other proponents of legal positivism had argued. As with Thomas Aquinas's naturalist philosophy of law, the origins of Fuller's inherently purposeful, community-based notion of law can be traced back to Aristotle's philosophy. Contrary to what H. L. A. Hart had argued, not even the parliamentary legislator is free in its legal discretion, but any institutional authority endowed with either legislative or judicial powers is bound in its discretion by what Fuller called the *internal morality of law*, or the morality that makes law possible.[16]

Fuller puts forth the argument to the effect that the lawgiver ought to observe no less than eight rules that constitute the internal morality of law and the violation of which would result in a *failure* of the legislative act intended. Fuller's set of criteria is as follows:[17]

(1) *Generality*: legal rules must be general in character, and not drafted on an ad hoc basis for one particular case only, so as to qualify as law.
(2) *Due Promulgation of Laws*: failure to make legal rules publicly known to those affected by them will make it impossible for the norm addressees to obey the law.
(3) *Non-Retroactivity*: retroactive rules cannot guide future action and even undercut the integrity of rules with a proper prospective effect, since it puts them under the constant threat of a retroactive change.

[16] Fuller, *The Morality of Law*, p. 33 et seq.

[17] Fuller, *The Morality of Law*, pp. 33–94, and p. 39 in specific. In Fuller's dense rhetorics of law, these failures are described as "eight distinct routes to disaster". Fuller, *The Morality of Law*, p. 39. – Cf. Hart, "Lon L. Fuller: *The Morality of Law*", pp. 349–353.

(4) *Semantic Clarity*: legal rules must be comprehensible to those affected by them.
(5) *Non-Contradictoriness*: a legal rule cannot require the kind of conduct from its addressees that contradicts what other valid legal rules of the same legal order at the same time require from them.
(6) *Laws Cannot Require What Is Impossible to Fulfil*: legal rules cannot require conduct that is beyond the powers of those affected.
(7) *Constancy of Law Through Time*: introducing frequent, unexpected changes in legal rules will have the effect that those affected cannot orient their action to them.
(8) *Congruence Between Official Action and Declared Rule*: a failure to match legal rules as officially announced with their adjudication by the legal officials will lead to a failure in the legal system.

Fuller coins such criteria as the *internal*, i.e. *institutional* or *procedural*, morality of law,[18] thereby drawing a distinction between his institutional notion of law and Thomas Aquinas's substantive notion of natural law. Fullers writes that "[a] total failure in any of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."[19] Should the legislator pass a retroactive criminal law; a secret law; a totally incomprehensible law; or some ad hoc laws that would each be enforced only once, for one fact-constellation only, before being derogated; the end result would not be a valid law but an inherent failure in an effort of legislating.

There is one slightly unexpected tenet in Fuller's account of the internal morality of law, however. Though Fuller, being an American legal philosopher, was of course well acquainted with the American case law tradition, the very criteria with which he described the internal morality of law are far better aligned with parliament-issued legislation of the European continental type than with judge-made common law in the United States or the British Commonwealth. In other words, Fuller's scholarly stance is better aligned with the point of view of the European legislator than that of the American judge. Moreover, precedent-based law would seem to rank rather poorly in Fuller's test for the validity of a legal system.[20]

In fact, it is only the requirement of congruence between legislation and official action by the courts and other officials (= Fuller's point 8) plus the rather obvious requirement that laws cannot require conduct that is beyond the powers of those affected (= Fuller's point 6) that concern legislation and legal adjudication with equal concern. Conversely, the criteria dealing with the required generality (= Fuller's point 1), due promulgation (= Fuller's point 2), non-retroactiveness

[18] "In my third chapter [of *The Morality of Law*] I treated what I have called the internal morality of law as itself presenting a variety of natural law. It is, however, a procedural or institutional kind of natural law . . ." Fuller, *The Morality of Law*, p. 184.

[19] Fuller, *The Morality of Law*, p. 39.

[20] Siltala, *A Theory of Precedent*, pp. 165–168, cf. Hart, *The Concept of Law* (1961), pp. 131–132.

(= Fuller's point 3), semantic clarity (= Fuller's point 4), non-contradictoriness (= Fuller's point 5), and relative constancy in time (= Fuller's point 7) of laws would seem to be match rather poorly for judge-made, precedent-based law.

Precedents and other court decisions initially concern the fact-constellation of the case at hand only, and the legal impact of the *ratio decidendi* of a case vis-à-vis the facts of a subsequent case then needs to be considered in separate terms by the subsequent court (= contra Fuller's point 1). It is but rather seldom that the prior court does try to give the *ratio decidendi* of a case some authoritative formulation, to be then acknowledged by the later courts. On the contrary, the *ratio* of a case most often needs to be reconstructed from the outcome of the prior case and the judicial reasons presented by the prior court in its support, while the outline of such reasoning is of course dependent on the particular *precedent-ideology* adopted in the legal systems concerned (= *contra* Fuller's point 2).[21] Precedent-based law is often or even in most cases retroactive in effect, due to the inherent characteristics of case-to-case reasoning (= contra Fuller's point 3). The requirement of linguistic clarity and unambiguity may need to be left rather unattended in the analysis of precedent-based law, since the *ratio decidendi* and obiter dicta elements of a case are frequently closely intertwined in the case, to be then distinguished from each other by the subsequent court only (= contra Fuller's point 4).

The systemic formality of a set of precedents is generally weaker than the respective systemic characteristics of parliamentary enactments,[22] so that the co-existence of several mutually conflicting precedents in a legal system is possible and quite often even a commonplace.[23] In such a situation, the judges need to have recourse to legal analogy and the technique of (fact-based) distinguishing in constructing and reading the law (= contra Fuller's point 5). Finally, the institutional values of relative constancy and predictability of law are far more difficult to attain in precedent-based law than in legislation, since precedents are – by force of their definition – rulings given for an individual case at hand only, to be then possibly extended to cover the facts of the novel case. Therefore, there cannot be any guarantee of the continuity of the evolved court practice or of the stability of the institutional and societal values involved in a system of precedent-based law. Moreover, there is no simple, straightforward technique of overruling the *ratio decidendi* of a case, except by stating so in explicit terms in the reasons given for some later court decision, which sometimes, but not very frequently, does occur. The methods of overruling a precedent are far more uncertain than the use of a derogation law by parliament, by means of which any outdated or otherwise unsatisfactory item of legislation can – once and for all – be made null and void (= contra Fuller's point 7).

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[21] On the notion of *precedent-ideology* and its manifestations in the Great Britain, the United States, Germany, France, Italy, and Finland, cf. Siltala, *A Theory of Precedent*, pp. 65–148. – The term "precedent-ideology" was suggested to me by Neil MacCormick.

[22] However, if the judges in some legal system were in fact committed to the coherence-seeking premises of Ronald Dworkin's *law as integrity*, that would imply endorsing a strongly systemic notion of precedents, as well.

[23] Cf. the Italian system of precedents where such systemic characteristics would seem to be hard to sustain, Taruffo and La Torre, "Precedent in Italy", passim.

As a consequence, a very different kind of catalogue of the institutional criteria of precedent-based is needed.[24]

Fuller constantly writes of the internal, *institutional*, or procedural morality that is said to structure the law, but he also makes a distinction between the two types of morality, viz. the morality of duty and the morality of aspiration. The *morality of duty* lays down a minimum standard of conduct to be observed by the citizens, officials, and the legislator alike, being of the type of a *command* ('Do this!') or a *prohibition* ('Don't do that!'). The *morality of aspiration*, by contrast, presents (no more than) an ideal that ought to be fulfilled by its addressees to as high a degree as is possible. Such an ideal might concern the strivings of an Aristotelian virtue ethics or, as is the case here, some state of affairs that is specified in legislation or jurisdiction. In line with Robert Alexy's (and Ronald Dworkin's) terminology, one might say that Fuller's morality of duty is aligned with duty-imposing legal *rules*, while the morality of aspiration is aligned with legal *principles* in Alexy's sense of *optimization precepts* or *optimization commands* (*Optimierungsgebote*). In other words, they create an obligation for the judge or other legal official to realize some social values or goals to *as great a degree as is possible*.[25] Such an ideal morality for the legislator lays down a set of precepts for a *supererogatory* morality, or a "morality for the saints", in the sense of establishing an aspiration towards fulfilling to as great an extent as is legally and factually possible the institutional and societal values at the back of the legal system.

Nonetheless, as Fuller himself argues, it is only the requirement of promulgation of laws that exemplifies the morality of duty, while the other seven precepts that make up the internal morality of law give effect to the morality of aspiration only.[26] It is only when the principles of ideal morality of law are followed by the

[24] In my earlier book *A Theory of Precedent*, I argued that the internal morality of law or its equivalent for a system of precedents might entail the following elements: (1) *appositeness* (i.e. expediency) and adequacy of normative and factual information given in a precedent, or a set of precedents; (2) fair *predictability* of outcome of legal adjudication; (3) *systemic balance* (i.e. congruence), with reference to e.g. the judges' collective stance on precedent-following, the prevalent doctrine and tradition of precedents, and the prevalent doctrine of legal sources at larger; (4) *ideological commitment* and *argumentative skills* of those involved; (5) respect for the basic conceptions of *justice* and *fairness* in society; (6) and *integrity in argumentation*. Cf. Siltala, *A Theory of Precedent*, pp. 165–175. – Looking upon the issue now, a few years later, the list seems somewhat over-elaborated. A shorter list, with reference to the two or three first items of the list might do the job, as well.

[25] Alexy, *A Theory of Constitutional Rights*, pp. 47–48: "The decisive point in distinguishing rules from principles is that *principles* are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules." Cf. Alexy, *A Theory of Constitutional Rights*, pp. 67–69, 397.

[26] Fuller, *The Morality of Law*, pp. 43, 44: "All of this adds up to the conclusion that the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of a craftsman. – To these observations there is one important exception. This relates to the desideratum of making the laws known, or at

lawgiver that – in Fuller's sky-soaring rhetoric – the ideals of *perfection in legality, legal excellence*, and *utopia in legality* may be attained, as the primary appeal of the morality of aspiration must be to *a sense of trusteeship* and *the pride of the craftsman*.[27]

Looking at the issue from the point of view of how to construct and read the law, it is only the requirement of congruence between official action and declared rule (= Fuller's point 8) that explicitly deals with the enforcement of laws by the courts and other officials. Fuller underscores the significance of mutual cooperation and interdependence of the legislator and the courts in the creation and due enforcement of legal rules, but a more profound analysis of such an interaction, and of the other elements of the theory of legal interpretation, is touched upon only in the passing in Fuller's major work, *The Morality of Law*. What is crucial is to identify the "true reason of the remedy", in the terminology of the Heydon case from 1584, and to provide the legal solution accordingly, Fuller writes.[28] Moreover, the judge needs to take into account the inherently *purpose-laden* and *community-aligned* character of law, and therefore – in stark contrast Hart's notion of law in his *The Concept of Law* – legal interpretation should not be seen as a semantic or linguistic operation only. Still, Fuller fails to provide any specific guidelines for the judge or legal scholar as to the right track and course of legal interpretation.[29]

10.4 "The Core of Good Sense in the Doctrine of Natural Law" – The Minimum Content of Natural Law by H. L. A. Hart

H. L. A. Hart passionately criticized Fuller's notion of the internal morality of law in his several writings on the issue. According to Hart, any set of such (meta-level) precepts placed on the legislator and the courts of justice do not concern morality at all. Rather, they deal with the general preconditions of any human undertaking that has a goal-oriented, purposeful character, i.e. being aligned with an effective attainment of some objectives and cut off from any genuinely moral considerations. Just as a kitchen knife is good, if its blade is sharp enough to cut bread, meat, and vegetables well, since that is the function of a kitchen knife; and just as an accurate

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least making them available to those affected by them. Here we have a demand that lends itself with unusual readiness to formalization. (. . .) With respect to the demands of legality other than promulgation, then, the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps towards truly significant accomplishment."

[27] Fuller, *The Morality of Law*, pp. 41, 43.

[28] Fuller, *The Morality of Law*, pp. 82–83.

[29] Perhaps somewhat unexpectedly, Fuller's open-ended idea of legal interpretation even brings into mind the ideological openness of Hans Kelsen's *Pure Theory of Law*, while Fuller's idea of the inherently purpose-laden character of law of course draws his theory of law miles apart from Kelsen's purely formal account of law.

watch is good, since precise time-keeping is the very function of the watch; so legislation and individual court decisions, too, can – and perhaps even ought to be – evaluated from such a technical point of view that is free from moral tint. The law in force is then looked upon from the point of view of a means–ends effectivity, the predictability of the outcomes of adjudication, and the appositeness of the instruments adopted for the goals to be so attained, evading any claims concerning the moral merits, or dismerits, of law in the moral sense.[30]

In Hart's astoundingly sarcastic counter-example Fuller's internal morality of law is likened to the contrived idea of a *morality of poisoning*. Such a misconceived notion of "morality" could similarly be formulated in a set of technical norms, such as: if you wish to effectively poison anyone, you should avoid poisons the shape, colour, or odour of which is apt to raise the attention of the intended victim.[31] Effective means for attaining the desired objective do not necessitate having recourse to any genuinely moral values. Rather, mere reference to a causal means – ends relationship among the states of affairs concerned is enough to establish the intended relation.

Yet, even Hart's own, otherwise expressly positivist and voluntarist conception of law entails a weak element drawn from the natural law tradition, known as the *minimum content of natural law*. According to Hart, a set of self-evident truths of the human nature and the human society constitute the "core of good sense" in the natural law doctrine.[32] Hart's idea of the minimum content of natural law is based on the contingent but nonetheless true presupposition that human society is not a "suicide club" that would exhibit total disinterest to the survival or loss of life of its members. Rather, we are dealing with a (meaningful) social order that aims at providing and guaranteeing the prerequisites of human life by means of legislation and legal adjudication.[33]

If the legislator were to ignore the impact of such contingent but nonetheless true preconditions of human life and human society as the basic vulnerability of human beings, their (no more than) limited altruism towards others, approximate equality of physical strength among them, limited faculties of human understanding, and scarcity of the material resources available, it could not rely on their voluntary norm-conformity and co-operation with respect to any other kind of legal regulation,

[30] On the notions of *instrumental* and *technical* goodness, cf. von Wright, *The Varieties of Goodness*, pp. 19–40. *Instrumental* goodness is related to the judgment of functionality of various kinds of tools and instruments, whereas *technical* goodness is related to a skill or talent. An accurate watch is an example of instrumental goodness, since it is accurate in timekeeping. A skilful watchmaker, on the other hand, is an example of technical goodness, as he is a competent and talented professional in the field.

[31] Hart, "Lon L. Fuller: *The Morality of Law*", pp. 343–363, and p. 350 in specific. Cf. Fuller, *The Morality of Law*, pp. 33–94.

[32] Hart, *The Concept of Law* (1961), p. 194: "The simple truisms we have discussed (. . .) disclose the core of good sense in the doctrine of Natural Law."

[33] Hart, *The Concept of Law* (1961), p. 188.

either.[34] Still, we are dealing with a *contingent* socio-cultural fact that could be otherwise, and not with a logico-conceptual necessity that would define the human condition. Among fanatic religious and political groups, suicidal behaviour is not all too rare. In non-conventional warfare and acts of terrorism, suicide bombings have been widely used as an effective tool for spreading fear and terror among civilians and military forces.

Since the terrorist plane attack against the twin towers of the WTC (World Trade Center) in New York on September 9th, 2001, and the frequently occurring suicide bombings in the U.S. occupied Iraq and other conflict areas in the world, such incidents have not been as rare as they may have been in the early 1960s, when the first edition of *The Concept of Law* came out. Still, if universalized into a general norm of conduct in any society, such suicidal behaviour would ultimately lead to the vanishing of the whole community, so in general Hart's claim of the non-suicidal character of the human society would seem to hold true.

In accord with Hart's critique of Fuller, I would argue that Hart's own conception of natural law, when read in light of his otherwise expressly positivist theory of law, does not count as a set of genuinely moral norms, either. Rather, Hart's minimum content of natural law, too, is a collection of *technical norms*,[35] to the effect of establishing an effective *means–end relation*, i.e. a causal relation, between certain social goals and the legal means necessary for attaining them.

> An example of a technical norm might be: you are in London and you want to reach Edinburgh before the nightfall. The last train from London to Edinburgh will leave in 10 minutes. If, and only if, you run as fast as you can to the railway station, you will catch the train; otherwise you will miss it. Therefore, you *must* run as fast as you can to the railway station (if you really want to catch the train). There is no moral or legal obligation entailed, but the quasi-normative *must*-clause is attached to a causal, means–end relation between the two states of affairs concerned, the act of running and that of catching the train. Similarly: a will is valid and enjoys legal protection under the Finnish law, if its authenticity is confirmed by the signature of two qualified witnesses who were both present at the occasion of the testator's undersigning the will. Therefore: if you want to make a valid will (that will be legally enforced), you *must* have on the document the signature of two qualified witnesses who were simultaneously present at the occasion and who will thereby confirm the authencity of your signature in the will. In the legal context, technical norms commonly take the form of such norms of competence.

For Hart, the ultimate – and, in fact, only – goal of the social order is the survival of an individual and of the human community. The means for attaining it are in the form of legal rules that have the ultimate effect of protecting the status quo based on the contingent fact of human vulnerability, approximate equality of human strength, limited altruism, and the allocation of scarce resources, and so on. The rules that constitute Hart's minimum content of natural law are therefore devoid of any moral content, and the same goes for Fuller's seminal idea of the internal morality of law according to Hart's vehement critique of Fuller. The minimum content of

[34] Hart, *The Concept of Law* (1961), pp. 189–195.

[35] On the notion of a technical norm, cf. von Wright, *The Varieties of Goodness*, pp. 160–162.

natural law addresses the lawgiver, i.e. the legislator, a court of justice, or other legal official, with a *technical norm* of the following kind: "if you wish to bring about an effectively functioning legal order, you should first provide adequate protection for human life, limb, and property for the members of the community concerned".[36] The only sanction (in a wide sense of the term) attached to such a collection of technical norms, outside of the sphere of morality proper, is the likely collapse of the intended legal and social order, due to a total lack of norm-observation and voluntary co-operation on part of the norm-addressees, if such guidelines are not followed in legislation and legal adjudication.

Fuller coined his notion of natural law as *procedural* or *institutional* in kind.[37] He also made the concession that – with the one exception of due promulgation of laws – the criteria that make up the internal morality of law are expressive of the *morality of aspiration* only, and not the *morality of duty* that would place stricter demands on the lawgiver. Therefore, Fuller's institutional morality of law and Hart's minimum content of natural law may both be read as a collection of technical norms, addressed to the lawgiver *sensu largo*, and the violation of which would render the intended outcome of legislation or legal adjudication more or less defective and ineffective. Therefore, the resulting outcome from a lawgiver's failure to observe the morality of aspiration is not – in contrast to what Fuller himself wrote – "something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract".[38] A less than perfect legal system, failing to fully reach some tenet(s) of Fuller's internal morality of law, would still be a *legal* system.

Except for the requirement of due promulgation of laws, a legal system burdened with any other type of institutional failure depicted by Fuller, such as criminal law with retroactive effect, a set of internally contradictory statutes or precedents, or an act of legislation with less than perfect linguistic or semantic qualities, are still perfectly valid law, if only they meet with the specific validity criteria set by the constitution or, in more general terms, the rule of recognition *sensu largo*. In fact, the state of having at least *some* mutually contradictory statutes and precedents is a commonplace situation, rather than a rare anomaly, in any fairly complex legal system, to be then solved by means of legal construction and interpretation.

Hart pointed out that a retroactive criminal law is still perfectly valid law, if it has been enacted according to the criteria specified in the constitution, but in light of criteria that are *external* to law – i.e. the ones entailed in the political morality in society, for instance – it is a prime example of bad, unfit, or corrupt legislation that ought to be avoided because the requirements of the rule of law ideology, on the one hand, and because of the intended effectiveness of law, on the other. Fuller,

[36] Hart refers to Fuller's catalogue of the eight criteria that make up the internal morality of law with the term "principles of good craftsmanship [for a conscientious legislator]". Hart, "Lon L. Fuller: *The Morality of Law*", p. 347.

[37] Fuller, *The Morality of Law*, p. 184.

[38] Fuller, *The Morality of Law*, p. 39.

in turn, would argue that such an item of legislation will run short of satisfying the criteria of the internal, institutional, or procedural morality of law and, therefore, does not satisfy the aspirational criteria of attaining the objectives of *perfection in legality*, *legal excellence*, *a utopia in legality*, *a sense of trusteeship*, and *the pride of the craftsman*.[39]

In fact, both Hart and Fuller tackle the issue of craftsmanship in legislation and jurisdiction with more or less similar criteria, while looking at the issue from a very different angle of approach each. In Fuller's terminology, Hart's minimum content of natural law gives effect to the *morality of duty*, where the point of view of the "bad man" of Justice O. W. Holmes' prediction theory of law might well serve as the point of reference. Fuller's idea of an institutional morality of law – with the one exception of the requirement of due promulgation of laws – is rather aligned with the *morality of aspiration* for the virtuous, "saint-like" legislator or judge, establishing a set of *supererogatory* guidelines for the attainment of Fuller's idea of perfection in legality and legal excellence in the pride of the craftsman. Thus, Hart defines the very *minimum* standard of legislation and legal adjudication, while Fuller gives an outline of an *ideal* state of legislation and, to a lesser degree, of legal adjudication.

Both Fuller's institutional morality of law and Hart's minimum content of natural law equally fail to pin down a frame of analysis for the construction and reading of law. Fuller's idea of the inherently purpose-oriented and societal character of law locks the frame of legal construction more strictly than Hart's open-ended model of legal discretion where the relatively unconstrained institutional will-formation of the parliamentary legislator serves as a model for the hard cases of legal adjudication. Despite the general reference to the purpose-oriented and community-aligned essence of law, Fuller, too, leaves the precise criteria for legal interpretation unspecified. Moreover, there is in fact a weakly purpose-laden element in Hart's positivist theory of law, as well. Since human society cannot claim to be a "suicide club", overly self-destructive elements cannot be part of the legal system, either.[40] Yet, despite the naturalist terminology adopted by Hart, he was not willing to make any deeper-reaching commitment to the precepts of a genuinely content-bound natural law, beyond and above positive law.[41]

10.5 The Seven Basic Values by John Finnis

Unlike Lon L. Fuller's institutional, procedural theory of law, John Finnis has defended a *substantive* conception of natural law, based on the *self-evident* tenets of law. Finnis' theory of law is a major contribution to the Thomistic tradition in

[39] Fuller, *The Morality of Law*, pp. 41, 43.

[40] Hart, *The Concept of Law* (1961), p. 188: ". . . for our concern is with social arrangements for continued existence, not with those of a suicide club."

[41] On the critique of the missing purpose-oriented element in Hart's theory of law, cf. Finnis, *Natural Law and Natural Rights*, p. 82.

natural law philosophy. Finnis analyses the issue with help of the seven *basic goods* or *basic values* that constitute the ultimate premises of all law.[42] Like Aristotle, Thomas Aquinas, and Lon L. Fuller before him, Finnis underscores the inherently purpose-laden and community-aligned character of all human action, legislation included. Human society exists for the sake of guaranteeing the attainment of certain objectives necessary for human welfare, and that obvious fact validates the superior position occupied by the seven basic goods above any formally valid acts of legislation and legal adjudication.[43]

According to Finnis, human experience teaches us that there are seven *basic values* or *basic goods* that the legislator, the courts of justice, and other law-applying officials ought to pay due respect to, i.e. *life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness*, and "*religion*".[44]

In Finnis' catalogue of the basic values, *life* refers to the factors that enhance human self-preservation and self-determination, inclusive of physical and mental health, freedom from pain, and the procreation of life. *Knowledge* as a basic value refers to the intrinsic, and not only instrumental, value of the true beliefs and theoretical understanding of the man and the world, considered as desirable for their own sake. Finnis refers to the fact that the stance of a sceptic (or a nihilist), to the effect that all human knowledge is claimed to be false and erroneous, is in the last resort self-refuting, if the sceptic (or nihilist) at the same time claims his argument to be true, as usually is the case.[45] *Play*, for Finnis, refers to the significance of various kinds of games with either ritualistic or recreational *raison d'être*, i.e. without any instrumental purpose that would render a game into something else.[46] Man is by nature a *homo ludens*, as Johan Huizinga put it, whose inherent inclination towards play, sports, and games the various forms of art, culture, and societal practices reflect. *Aesthetic experience* refers to the experience of beauty and awe when faced with impressive works of art or the similar phenomena of nature. *Sociability*

[42] Finnis, *Natural Law and Natural Rights*, p. 46; cf. MacCormick, "Natural Law Reconsidered".

[43] Juha-Pekka Rentto has written an interesting contribution to Finnis' natural law philosophy in Rentto, *Prudentia Juris: The Art of the Good and the Just*.

[44] Finnis, *Natural Law and Natural Rights*, pp. 85–99. – The exact quantity of basic goods or basic values is a conventional issue, though, devoid of any inherent meaning. A similar catalogue suggested by John Rawls entails four elements, viz. *liberty*, *opportunity*, *wealth*, *self-respect*. Finnis, *Natural Law and Natural Rights*, pp. 82–83. – Finnis also refers to Thomas E. Davitt's essay "The Basic Values in Law: A Study of the Ethicolegal Implications of Psychology and Anthropology" (1968) where the author presents different theories of the basic goods or basic values that loom large in the literature on anthropology, psychology, and philosophy. The range of theories begins from models consisting of only one or two basic values, ending up in a model with no less than 12 basic instincts and 14 basic values. Finnis, *Natural Law and Natural Rights*, p. 97.

[45] Finnis, *Natural Law and Natural Rights*, pp. 73–75. Cf. Wittgenstein, *Über Gewissheit – On Certainty*, § 115 (pp. 18/18e): "If you tried to doubt everything you would not get as far as doubting anything. The game of doubting itself presupposes certainty."

[46] Games may be one-person games, such as solitaire, or social games for two or more players, such as chess, football, or *quidditch* in J. K. Rowling's Harry Potter books.

(*friendship*) comprises to the various types of social interaction and amity among the humans.

Practical reasonableness means the ability to use one's intellectual faculties to lead a life in accordance with the demands of practical reason, taken in the same sense as Aristotle's *phronesis* and d'Aquina's *prudentia*, in various situations of human life.[47] The notion of practical reasonableness has a central position in Finnis' theory of law. He defines it with the following nine criteria:[48]

(1) a *coherent plan of life* in the same sense as John Rawls' notion of a rational plan of life, i.e. a harmonious set of purposes and orientations;
(2) *no arbitrary preferences* amongst the basic human values in life;
(3) *no arbitrary preferences amongst persons*, as the basic goods can in principle be pursued by any human being;
(4) adequate *detachment* from any specific and limited projects in life, so as to be sufficiently open to all the basic forms of good in the changing circumstances of a lifetime;
(5) adequate *commitment* to any specific and limited projects in life, so as not to abandon any of the basic forms of good lightly or without reason;
(6) the (limited) *relevance of consequences*, as efficiency in pursuing the definite goals in life and that the worth of one's actions should be judged by their effectiveness, fitness for the specific purposes, their utility, and the consequences thereby induced;
(7) *respect for basic values in every act* so that each of the basic values be respected in each and every action taken;
(8) the requirement of pursuing the *common good*; and
(9) the requirement of *following one's conscience* in the value choices taken in life.

Finally, "*religion*" (placed in quotation marks by Finnis) as the seventh basic value refers to the human experiences of the transcendental, the finitude of life, and the justification of moral choices and freedom of will by reference to the afterlife or the like idea. Finnis outlines "religion" in a wide sense, so that it comprises even Cicero's Stoic and Sartre's existential, and rather worldly, reflections of the meaning of life and death, on side with the more traditional forms of a religious ethos.

The basic goods are *self-evident* and, therefore, have no need for demonstration or external justification to add to their patently evident nature. On the self-evident character of knowledge Finnis writes:[49]

[47] Finnis, *Natural Law and Natural Rights*, pp. 88–89, 102.

[48] Finnis, *Natural Law and Natural Rights*, pp. 100–133.

[49] Finnis, *Natural Law and Natural Rights*, pp. 64–65. Cf.: "Here each one of us, however extensive his knowledge of the interests of other people and other cultures, is alone with his own intellectual grasp of the *indemonstrable (because self-evident) first principles of his own practical reasoning*." Finnis, *Natural Law and Natural Rights*, p. 85. (Italics added.) – Cf. Wróblewski, *The Judicial Application of Law*, p. 306: "Rationality is a basic value which is not further justifiable in the legal

> The good of knowledge is self-evident, obvious. It cannot be demonstrated, but equally it needs no demonstration.

Finnis' philosophical argumentation constantly verges on the threshold of *logical circularity*, as he seeks to justify the self-evident character of the basic values by their a priori character. From the point of view of logic and philosophy, that is not very satisfactory. Since the contested nature of the basic values is now at stake, one should not make an argument to the effect that the basic values are this-or-that as to their inherent character. Yet Finnis writes:[50]

> More important than the precise number and description of these values is the sense in which each is basic. First, each is equally self-evidently a form of good. Secondly, none can be analytically reduced to being merely an aspect of any of the others, or to being merely instrumental in the pursuit of any of the others. Thirdly, *each one, when we focus on it, can reasonably be regarded as the most important*. Hence *there is no hierarchy amongst them*. (. . .) Each is fundamental. None is more fundamental than any of the others, for each can reasonably be focused upon, and each, when focused upon, claims a priority of value. Hence there is no objective priority of value amongst them.

Similarly, he states concerning the value of knowledge, taken as a basic value:[51]

> It is important to see both how much such sceptics are claiming, and how precise must be their grounds for claiming it. They are claiming much, because their claim, if true, would render mysterious the rational characteristics of the principle that knowledge is a good worth pursuing. These rational characteristics can be summed up as *self-evidence* or obviousness, and *peremptoriness*. As to self-evidence I have said enough already: to someone who fixes his attention on the possibilities of attaining knowledge, and on the character of the open-minded, clear-headed, and wise man, the value of knowledge is obvious. Indeed, the sceptic does not really deny this. How could he? What he does instead is to invite us to shift our attention, away from the relevant subject-matter, to other features of the world and of human understanding.

Finnis' argument is at the strongest in respect to life and knowledge, due to the basic knowledge-oriented tenets of the modern Western culture and way of life. As to the other basic values, i.e. play, aesthetic experience, sociability (friendship), practical reasonableness, and "religion" in the wide sense of the term, his argument is open to critique, as the claimed a priori character of such values is far from self-evident.

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discourse, and respect for rationality is treated as the strength and weakness of the judicial application of law"; MacCormick, *Legal Reasoning and Legal Theory*, p. 268: "My belief that I ought to strive to be rational is not a belief which I can justify by reasoning." Cf. also Wittgenstein, *On Certainty*; von Wright, "Wittgenstein varmuudesta"; Siltala, *A Theory of Precedent*, pp. 215–216.

[50] Finnis, *Natural Law and Natural Rights*, pp. 92, 93. (Italics added.) – Cf.: "The basic values, and the practical principles expressing them, are the only guides we have. Each is objectively basic, primary, incommensurable with the others in point of objective importance. (. . .) Reason requires that every basic value be at least respected in each and every action." Finnis, *Natural Law and Natural Rights*, pp. 119, 120.

[51] Finnis, *Natural Law and Natural Rights*, p. 71. (Italics added.)

Finnis grounds his thesis of the *universal* character of the basic values on certain empirical, i.e. anthropological and historical, facts which are said to be valid in all human communities.[52] In fact, Finnis' line of reasoning comes rather close to Hart's postulates of the universal character of the minimum content of natural law. For Hart, the self-evident truisms of human physiology and psychology in society, plus the scarcity of material resources available for the humans, grounded the core of good sense in the natural law doctrine.[53] It is only on the condition that such (meta-level) norms of natural law are followed in legislation and in legal adjudication that the general functioning of the legal order can be guaranteed, as Hart argued. Notwithstanding the modest objective of mere human survival on the individual and collective level, Hart's vision does not comprise any positive agenda for the attainment of the common good or the good life, as put forth by the adherents of communitarian and virtue ethics. The outcome of Hart's analysis is, indeed, a *minimum* content of natural law.

Unlike Hart's minimalist theory of natural law, Fuller's concept of natural law carries a truly *utopian* impression on it, since it aims at no less an achievement than the attainment of good life and common good through the satisfaction of the basic values identified. For Fuller, mere survival cannot qualify as the only worthy goal for the human community, to be pursued by legislation and jurisdiction. In all this, Fuller is an intellectual heir of both Aristotle and Thomas Aquinas, and not of Thomas Hobbes, as Hart in his most cynical mode would seem to be. The seven basic values in Finnis' theory of law are based on a set of contingent but – from an anthropological and historical point of view – true claims of man and the human community. Like Thomas Aquinas's scholastic idea of law, Finnis' ultimate premises of law are *self-evident* (*per se nota*) and *peremptory*, placing them firmly out of reach of any criticism that is external to law and the stated goals of the mankind.[54]

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[52] "These surveys [in anthropological literature] entitle us, indeed, to make some rather confident assertions. All human societies show a concern for the value of human life; in all, self-preservation is generally accepted as a proper motive for action, and in none is the killing of other human beings permitted without some fairly definite justification. All human societies regard the procreation of new human life as in itself a good thing unless there are special circumstances. No human society fails to restrict sexual activity; (. . .) All human societies display a concern for truth, through education of the young in matters not only practical (e.g. avoidance of dangers) but also theoretical or speculative (i.e. religion). (. . .) all societies display a favour for the values of co-operation, of common over individual good, of obligation between individuals, and of justice within groups. All know friendship. All have some conception of *meum* and *tuum*, title or property, and of reciprocity. All value play, serious and formalized, or relaxed and recreational. All treat the bodies of dead members of the group in some traditional and ritual fashion different from their procedures for rubbish disposal. All display a concern for powers or principles which are to be respected as suprahuman; in one form or another, religion is universal." Finnis, *Natural Law and Natural Rights*, pp. 83–84.

[53] Hart, *The Concept of Law* (1961), p. 194.

[54] Finnis, *Natural Law and Natural Rights*, pp. 71–73, where the author defends his position vis-à-vis knowledge as a basic good.

Finnis even puts forth the highly challenging argument that each of the seven basic values is in the last resort of equal worth, making it impossible to establish any kind of fixed priority order among them:[55]

> More important than the precise number and description of these values is the sense in which each is basic. First, each is equally self-evidently a form of good. Secondly, none can be analytically reduced to being merely an aspect of any of the others, or to being merely instrumental in the pursuit of any of the others. Thirdly, each one, when we focus on it, can reasonably be regarded as the most important. Hence there is no objective hierarchy amongst them. (. . .) Each [of the basic values] is fundamental. None is more fundamental than any of the others, for each can reasonably be focused upon, and each, when focused upon, claims a priority of value. Hence there is no objective priority of value amongst them.

Similarly he wrote:[56]

> The basic values, and the practical principles expressing them, are the only guides we have. Each is objectively basic, primary, incommensurable with the others in point of objective importance. (. . .) Reason requires that every basic value be at least respected in each and every action.

Finnis writes that the basic values of life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and "religion" can each, one by one, be placed in the focus of contemplation, and under certain circumstances each individual basic value can be proven to have momentary priority vis-à-vis the other basic values. According to Finnis, the self-evident goodness of theoretical and practical knowledge is indubitable, since the state of understanding the man and the world is always better than the respective ignorance or uncertainty of such issues. Shifting the focus of interest and the context of deliberation will alter the value preferences, too, so that each of the seven basic values may in turn be regarded as the most important.[57]

I do not find Finnis' argument entirely convincing, though. Contrary to what he claims, *life* as a basic value is logically primary to all the other values, basic or any other kind, no matter whether we compare it to the value of theoretical or practical

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[55] Finnis, *Natural Law and Natural Rights*, pp. 92, 93. – Finnis' line of argumentation of the shifting priority order of the basic values is presented in a concise manner on pages 92–95 of his *Natural Law and Natural Rights*, under the heading "All Equally Fundamental". – Cf.: "Each [basic value] is fundamental. None is more fundamental than any of the others, for each can reasonably be focused upon, and each, when focused upon, claims a priority of value. Hence there is no objective priority of value amongst them." Finnis, *Natural Law and Natural Rights*, p. 93.

[56] Finnis, *Natural Law and Natural Rights*, pp. 119, 120

[57] Finnis, *Natural Law and Natural Rights*, pp. 92–93. – Cf. what Finnis writes on play as a basic value: "But one can shift one's focus, in this way, one-by-one right round the circle of basic values that constitute the horizon of our opportunities. We can focus on play, and reflect that we spend most of our time working simply in order to afford leisure; play is performances enjoyed for their own sake as performances and thus can seem to be the point of everything; knowledge and religion and friendship can seem pointless unless they issue in the playful mastery of wisdom, or participation in the play of the divine puppetmaster (as Plato said), or in the playful intercourse of mind or body that friends can most enjoy." Finnis, *Natural Law and Natural Rights*, p. 93.

knowledge, play in ceremonial rituals or free recreation, aesthetic experience, sociability (i.e. friendship), practical reasonableness, or "religion" in the wide sense of the term. Life as striving for survival, avoidance of needless suffering, and pursuit of individual well-being is shared by all or, at least, most humans, and everything else in human life [sic!] is ultimately conditional upon the preservation of life. For Hart, such a basic instinct inherent in the human nature is the only ground solid enough to provide the condition of possibility for social stability and existence of the legal order: a human society cannot function as a collective suicide club, showing no respect whatever for the life of its members, and still credibly claim to sustain the effectiveness and overall functioning of the legal and social order.

The justification for the present stance vis-à-vis the order of preference of the basic values is relatively simple and, in fact, in full accord with Hart's line of reasoning: without taking the inherent worth of life as the grounding premise of human society, there would be little use for anything else, whether in the form of law or some personal and social commodities. As a consequence, life in the sense of survival of the human kind and society ought to be given the status of the prime basic value, as Hart in effect argues in *The Concept of Law*. Yet, Hart was mistaken in arguing that survival would be the *only* collective value or interest that is worth taking into consideration. In this, Finnis' stance as to the variety of (basic) values in a human society is far more realistic.

Once we abandon the idea of forced deliberative equality among the basic values, Finnis' catalogue of values provides a fecund value-theoretical ground for the analysis of law in line with natural law philosophy. Some basic values are yet missing in Finnis' conception of law, however. Though Aristotle underscored the importance of the social or political values for the good life within the Greek *polis*, even depicting man as a social or political animal (*zōon polītikon*), there is no place for genuinely *political* values in Finnis' catalogue of basic values. Equally, the *procedural* or *institutional* values of law, on which Lon L. Fuller grounded his seminal idea of the internal morality of law, are all absent in Finnis' natural law philosophy.

The two basic values that are closest to Aristotle's *political* philosophy and Fuller's *institutional* tenets of legal philosophy are *sociability* (friendship) and *practical reasonableness* at Finnis' theory of the basic values at the back of law, but they do not really comprise the realm of the social, the institutional, or the political. The same goes for the notion of *human rights* and *constitutional rights* that seem to be lacking in Finnis' account of natural law, such as the right to a fair trial that is guaranteed under Article 6 of the European Convention of Human Rights and Fundamental Freedoms. Though Finnis states that the two terms of natural rights and human rights are equivalent for him,[58] he does not tackle the issue of institutionalized human rights at any depth in *Natural Law and Natural Rights*.

[58]Finnis, *Natural Law and Natural Rights*, p. 198: "Almost everything in this book is about human rights ('human rights' being a contemporary idiom for 'natural rights': I use the terms synonymously)."

Under the prevalent *institutional* premises of modern law, the relative weight accorded to the different kinds of human or constitutional rights does not seem to follow Finnis' open-ended model of situational argumentation, with each basic value possibly claiming relative primacy vis-à-vis the other basic values in some situation in the "twists and turns" of philosophical and legal deliberation. Rather, the relative weight accorded to each type of human rights, constitutional rights, or basic values at the back of such rights is determined by the level of institutional support they enjoy in society along with the sense of appropriateness they have. Some human or constitutional rights have more institutional weight than the others. The line of argument defended here is of course an adaptation of Ronald Dworkin's idea of legal principles and their mode of being in the legal community.

Still, Finnis is right when he points out that value-laden *principles* and *standards* of law cannot be locked in a fixed system or hierarchy of arguments.[59] In this, legal principles are crucially different from legal rules. According to Hans Kelsen's and A. J. Merkl's *Stufenbaulehre*, only legal rules may be part of a *static* system that is locked into a hierarchy of rules and is free from internal conflict. A set of legal principles or other value-laden, contextual standards of law may at the most constitute a *dynamic*, *open-ended* normative system (with the notion of a "system" taken in the weak sense here), always subject to be reconsidered and possibly redefined for each novel case to be judged upon. To the extent that legal principles are locked into a static system of law, they will to a similar extent obtain some of the systemic qualities of formally valid legal rules.[60]

Since the 1950s, human rights have gone through a profound transformation from the immutable, universal, and non-positive values with a religious or moral dint, firmly rooted in the reason-based natural law tradition, into a novel position where they are an integral part of the legal system, in the Western world and elsewhere. The conceptual borderline between natural law and positive law has been shifted, as well. What used to be part and parcel of immutable natural law has now been incorporated into positive law through international human rights conventions and the constitutional rights entailed in national constitutions.

10.6 A Critical Evaluation of Natural Law Theory

The greatest advantage or, depending on the personal preferences and aversions of the observer, the worst failure in natural law philosophy is the intertwinement of law and religious, political, or social morality in it. For the adherents of natural law, the subjugation of positive law to the precepts of political morality is one of the strongholds of the approach, as it is thought to effectively safeguard the public

[59] If the right to life is conceived as having primacy vis-à-vis the other basic values, it needs to be defined as a rule and not as a principle.

[60] I refer to the notion of systemic formality and other tenets of legal formality à la Robert S. Summers, as touched upon above in the context of legal formalism.

against any legal wrongs committed by the legislator or the courts of justice. For the critics of the approach, such as H. L. A. Hart, the intertwinement of law and morality is a source of conceptual confusion and has the unfortunate side effect of collapsing the distinction between the formal validity of law and its moral merit or demerit.

Natural law philosophy downplays the *institutional* virtues of legal predictability and uniformity in legal adjudication, stressing the content-bound issues of law and equity instead. Yet, there are no theoretical obstructions to combining the two issues in legal analysis, if the premises of how to construct and read the law are defined in precise enough a manner. The collection of basic values in Finnis' philosophy of law cannot provide a fixed reference ground for such combined reasoning, unless the relative weight of each basic value is locked up for good, which according to Finnis is not possible. The resulting outcome will be a free-floating system (in the weak sense of the term) of the basic values and legal principles, necessitating recourse to the act of *weighing and balancing* among them. At the same time, the objective of legal predictability is lost. Also, the justification of the *ultimate* premises of such philosophical or legal reasoning may prove to be problematic, if the self-evident character of the basic values is not taken at the face value.

Instead of locking the ultimate premises of law and legal deliberation in the self-evident, pre-given *basic values* of the type advocated by John Finnis, Lon L. Fuller's *internal morality of law*, with reference to the *institutional* or *procedural* values involved, would seem to a far better match with the value premises at the back of legislation and legal adjudication. H. L. A. Hart's idea of the minimum content of natural law, on the other hand, will not provide for any positive agenda for the construction of welfare in society. Mere survival hardly qualifies as the only worthy goal for the human community. Both Fuller and Finnis are able to provide something more productive for legal analysis, Fuller for the procedural and Finnis for the substantive sense of legal deliberation.