

Finnis' theory of natural law



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“ Critically assess the success of Finnis attempt to construct a theory of natural law based on practical reason and not on a universal view of morality as traditionally contended”. The Natural Law - Introduction. It is possible to trace Natural Law thinking from primitive stages of simple societies where there was very little distinction between the religious and the secular - the spiritual and the physical. For many of these early communities the spiritual world of gods and spirits was seen as being in control of the physical world including human society. Such communities had a variety of gods and spirits resulting in a spiritual entity associated with numerous aspects of the physical world. This gave rise to a belief that there was some higher power in control of human existence and this power was governed by a set of rules or principles which mankind could utilise in furtherance of a perfect existence.

The kernel of the theory of Natural Law holds that law derives from a higher law, which is contained in certain principles of morality. These principles are sourced in either religion (through scriptures) or reason. According to theologians, these principles are under the control and governance of a God or figure of Deity and which eternally controls all of creation. Furthermore, it is their belief that all human arrangements, including law, must conform as far as possible to these principles. Secular theorists believe that such principles originate from man's conscience - a conception of morality, which is inherent to all men, and part of their nature. Such principles or rules are discoverable through the application of human reason and form the genesis of law making, constituting the higher law from which all human laws must conform.

St. Thomas of Aquinas – 13th Century

Theorists who support Natural Law guidance assume that certain facts about humans and their society provide the correct basis for laws that guide human interaction. Regardless of the theological vis-à-vis secular opinions it is agreed between both schools of thought that 'real' laws are those, which meet a moral standard, found by using the right facts and practical reasoning. Historically, one of the most influential natural law jurists was St. Thomas of Aquinas whose teachings form the basis of the Roman Catholic natural law traditions. Aquinas integrates the rationalist and religious approaches to Natural Law. He greatly influenced Western ideals in the area of ethics, political theory but, in particular, his teachings in the field of natural law held him in the highest of esteem within the Catholic Church, prompting Pope Benedict XV to declare

The Church has declared Tomas' doctrine to be her own.

Aquinas believed that the eternal law of divine reason is wholly unknown to man as only God knows its full extent but that it is partially known not only through revelation (the Commandments, the scriptures) but also through the application of reason. He also contends that human law derived from divine law which governed the relationship between all things created by Him. According to Aquinas, God is the highest good and the reason all matter exists and that such creations exist together in a hierarchy known as the Principle of Subordination.

Aquinas divided law into four main categories –

Eternal Law

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Such law constitutes God's rational guidance of all created things and is derived from the divine wisdom and based on a divine plan. Man can never understand eternal law in its entirety but shall be guided by it as he moves through life. On the one hand such law resides with God alone, mysterious and inaccessible. En revanche as it is responsible for various complexities throughout nature, mankind can figure out certain aspects of it. Promulgated law, mentioned by Aquinas consists of practical reason emanating from a ruler or a figure of authority in a community. By the same rationale, he contends that God, as a ruler of the universe also has the nature of a law and as He is not subject to time such law is eternal.

Divine Law

Eternal law which manifests itself in the Christian scriptures - the Commandments or the will of God revealed in the Old and New Testaments. Such law, according to Aquinas, was necessary as humans require require guidance on how to perform proper acts. It was also required to keep checks on the uncertainty of human judgement and to provide divine insight on issues they are not competent to judge for themselves.

The Natural Law

According to Aquinas,

It is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them ...Wherefore it (humans nature) has a share of the Eternal Reason, whereby it has a natural inclination to its

proper act and end: and this participation of the eternal law in the rational creature is called the natural law

From this Aquinas contends that Natural Law exists among man in the world and it is as he states ...as though the light of natural reason by which we discern good from Evil. From this Aquinas gives us his definition of the Natural Law (participation of humans in Eternal Law) and the first principle of Natural Law (the capacity to differentiate good from evil).

Human Law

Is derived a combination of both the Divine and Natural Laws and must be directed toward the common good. Such law can vary in accordance with time but its essence must be just as an unjust law is not law (*lex injusta non est lex*). For Aquinas an unjust human law is one that furthers the interests of the lawgiver solely; or exceeds the power of the lawgiver; or imposes unequal burdens on the society being governed. Under this rationale therefore, Aquinas held the belief that disobedience to an unjust law becomes a duty as if the law is contrary to Divine law, man is released from obedience - we should obey God rather than man. However such disobedience should be avoided if it were to lead to social instability, which is a greater evil than the existence of an unjust law in the first instance.

Aquinas was concerned with the nature of laws primarily rather than the nature of a legal system or how laws operate. John Finnis, as will be seen later, was concerned with both equally. Law, according to Aquinas, is the use of reason for the common good made by those that care about the community and made known to this community. Aquinas believed that God

gave humans characteristics the primary of which was our capability for rationality and reason. Mankind tends to do things naturally thus mirroring God as supremely rational. Using reason and rationale we can deduce what is self-evidently good and worth pursuing or what is self-evidently bad or evil and to be avoided. In this pursuit of good things we make laws for the common good using reason and are, again according to Aquinas, participating in God's rational world order.

Aquinas believed there are numerous ways to solve a problem and acknowledges that different societies or cultures may place different restrictions on behavior - following from this there is not only one way to make law. The critical point to acknowledge is that whatever means are used are accepted by rational people. When dealing with positive/made laws Aquinas classifies them into real or defective. The former relate to reasonable standards of conduct in the pursuit of the common good while the latter refers to laws that do not meet criteria established in natural law principle or are unjust (do not meet the requirements of justice) and so these laws can be justifiably disobeyed.

The Fall and Rise of Natural Law

The secularisation of Natural Law began with the advent of the Reformation in Europe and the consequent decline of the Roman Catholic Church. This essentially resulted in Protestant theorists developing their own theories on natural law that were not based on papal teachings. Natural law doctrines faced further decline throughout the 18th century and into the 19th century where emphasis was placed on the notions of State power and State coercion. This era also saw a rise in the positivists approach to

jurisprudential theories which were promoted by Jeremy Bentham and John Austin. Such jurists sought to separate the notions of what law is as opposed to what the law ought to be. The concepts of morality and law should be kept apart and the principles of Natural Law should belong more to the former than the latter.

The 20th century saw a rebirth of Natural Law approaches to the study of law. To the forefront was the notion that there must be a higher set of principles (as distinct from positive law) which must satisfy natural law theories if law was to be regarded as valid. This revival was the result of a number of historical occurrences - Nazism (whose acts were based on Nazi laws); the development of nuclear weapons and other weapons of mass destruction; the general decline of social and economic stability worldwide.

Professor John Finnis – 20th Century

Professor John Finnis is a contemporary defender of natural law and a supporter of its resurgence in the last century. Finnis is a strong supporter of a ' neo-Aquinian' natural law philosophy which does not presuppose a divine being. Instead of making reference to the ' form' of good or seeking good, as was proposed by historical jurists he speaks of man's desire to pursue basic ' goods' in life. Finnis focuses on goods rather than a single good in what he refers to as " a theory of moral action for our day" or in other words he seeks a theory of how to live well.

Finnis – The ' Basic Goods' of Life

This theory is based on the supposition that mankind sets out to obtain things they perceive to be good for themselves. In doing so, man must

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exercise practical reason to obtain that good at any one time. Finnis isolates eight of these goods which, according to him, cannot be broken down any more and so refers to them as 'basic goods' in life. These are, he says, fundamental and do not derive from other goods - analogous to the moral equivalents of chemical elements. They are generally things which for most people make life worthwhile and according to Finnis are self-evident. They list as follows -

Life - life is the first basic value stemming from the drive for self preservation.

Knowledge - refers to the preference of man for true fact over false belief. Finnis calls

it speculative knowledge distinguishing between knowledge sought for personal sake over knowledge sought as a means of achieving power or popularity.

Play - relates to performance for the sake of it - an act or acts done for no point

but an attempt to better oneself

Aesthetic

Experience - relates simply to the appreciation of beauty but at all levels

Friendship/

Sociability - acting for the well being of a friend

Practical

Reasonableness - the main concept which relates to mankind using their own intellect to choose his paths in life

Religion - relates to the ability of mankind to reflect on universal origins and of

human freedom and reason

Marriage - a recent addition to Finnis' list of ' basic goods'. Marriage, per Finnis, is

that between a male and a female and any sexual activity between non-married persons that is not procreative is inherently immoral.

The first three (a) to (c) above Finnis calls substantive goods, which exist prior to action. The final group of these basic goods he terms reflexive goods which depend on our choices.

Finnis - The Principles of Practical Reasonableness

To achieve these goods Finnis also has nine principles of practical reasonableness that are what might be called " methods of operation" that are to be utilised in the ordering of human life and the human community and the creation of the optimum conditions to attain these ' basic goods' - such conditions equate to the common good. These ' basic methodological requirements' when taken in part or as a whole allow us the capability of figuring out the morally correct way of acting.

The first requirement of practical reasonableness is a rational plan of life. Man must have a structured set of purposes which he should commit to and which guide him through life. Despite life, being subject to many changes one should not just live from moment to moment. Any commitment to a rational life plan will require one or some of the 'basic goods' but such commitment will only be rational if it is based on ones capacities, circumstances and tastes.

Secondly, I am of no more value than others but my own well being is my concern and interest and by having a preference for my own well being I will do what is reasonable. Do unto others as you would have them done unto you; put yourself in the other mans shoes; do not condemn others for what your are willing to do yourself - these are all requirements of reason and ignoring them is being arbitrary between individuals.

Good is to be done and evil is to be avoided - a principle taken directly from Aquinian teachings and also Aquinas' basic principle of moral action. In doing so one ought to choose and will only those possibilities where willing and action are compatible with 'integral human fulfillment'. This principle gives Finnis (as we shall see further in this essay) and others committed to global human rights the most ammunition i. e. all actions that work against such fulfillment are basically wrong.

The forth and fifth principles are related to each other and that of adopting a coherent life plan. One must have a certain detachment from all specific projects that are undertakes. If failure occurs in any of these commitments or projects we must not develop an apathetic attitude thereafter to life. A

healthy balance must exist between fanaticism, apathy or refusal to participate. Thus if any commitment fails or appears to be heading that direction then one must look for a more creative or rewarding way to perform same.

A further principle relates to the requirement to bring good to the community by actions that are efficient for their purpose. Over a wide range of preferences, it is reasonable for such a community to seek the maximum satisfaction of these preferences. Related to this is the need to favour the common good of ones community or society on a macro scale.

Penultimately, no man should choose an act that would damage or negatively affect the participation of any one or more of the basic human goods - it is always necessary to weigh up ones actions. Finally the ninth requirement outlines that one should not do what one does not feel like doing so man must act in accordance with his conscience - a reiteration of a belief proposed by Aquinas.

The Concept of Law - Focal vis-à-vis Penumbra

As discussed, Finnis outlines that the human 'basic goods' must be utilised in a community or society, as only then will the conditions to achieve these exist in the pursuit of a common good. This common good requires a legal system but such systems can sometimes work against the common good Finnis acknowledges this and states that a ruler has the authority to act for the common good. If he acts in a way that appears to go against the common good or any of the principles of practical reasonableness such actions lack the authority that they should have had. Just as Aquinas

believed, Finnis says such laws lack moral authority, they do not bind the conscience of man and one is neither morally obliged to conform nor not to conform. Or put more simply unjust laws are a perversion of law and do not bind mans moral conscience.

Finnis distinguishes here the difference between the focal or core meaning of the law from the penumbral meaning. The latter relates to difficult cases and unclear meanings of law. In such cases an argument is needed to demonstrate that it is appropriate to interpret the rule of law in a particular fashion. The former relates to laws that are aimed at the realisation of the common good for a community - if such are unjust they will not be regarded as laws in the focal sense. It is in the focal sense of the concept of law that we must identify as it is in this meaning that we find a direct link between the law and moral order.

Finnis - Distributive Justice

In his book Finnis links practical reasonableness and law when discussing justice and rights. He states that the whole object of distributive justice is the common good. With regard to the ' basic goods', Finnis maintains that the main criteria are " need" followed by " function" and " capacity". Such terms relate to roles in communal enterprise together with opportunities for advancement of the individual in society. Finis also makes mention of desert based principles which relate to claims that people deserve certain economic benefits in light of their actions - making people responsible for their actions and creative in their environments.

The different desert-based principles of distribution differ primarily according to what they identify as the basis for deserving. These principles can be broadly categorised as follows -

1. Contribution - people should be rewarded for their work activity according to the value of their

contribution to the social product

2. Effort - people should be rewarded according to the effort they expend in their work activity

3. Compensation - people should be rewarded according to the costs they incur in their work activity

Finnis further suggests a requirement for private ownership as a requirement of justice when he mentions 'personal autonomy in the community' bolstering this by adding that 'rule of human experience indicates that resources are more productively exploited by private enterprise' but then diluting it by referring to the fact that common ownership and enterprise would be beneficial for all.

Finnis - Commutative Justice

Commutative justice relates to a fundamental fairness in agreements and exchanges between social groups. It demands respect for the equal human dignity of all persons in economic transactions, contracts, or promises e. g. workers owe their employers diligent work in exchange for their wages while employers are obligated to treat their employees as persons, paying them

fair wages in exchange for the work done together with establishing conditions and patterns of work that are fair and equitable.

The central or characteristic act of commutative justice, according to Aquinas, was X's act of restitution for Y for losses incurred by Y. This is based on the presupposition that X has already 'wronged' Y. Aquinas' teachings did not allow for X to do wrong to Y post restitutio so in many cases the primary focus of Aquinas' discussions on commutative justice is not the duty of recompense but the primary question of whether X's act is or is not a wronging of Y. The term commutative justice for Aquinas therefore is a wide one focusing on rights and wrongs in any interaction between individuals or 'neighbours'.

Finnis contends that Aquinas' classification of the types of justice as opposed to general justice is fragile. General justice, according to him, is one's orientation to act for the common good or toward a common rule according to all relevant laws, either divine or human. Following from this, all laws (that are adhered to) are made for the common good and everything required for such good of a particular grouping in society should conform to a rational standard. Aquinas however, according to Finnis, clarifies that 'acting for the common good [according to reasonableness]' can sometimes not mean acting 'according to a common rule'.

Finnis further makes reference to occasions where it is difficult to distinguish between rules that are intended to secure either distributive justice or commutative justice. He makes reference to the classical period in the law of torts, from mid 19th century to modern day, where such rules may be

interpreted either way. Where at one stage the issue was ' what standard of conduct is owed to a person [neighbour]' is increasingly moving toward being phrased in terms of the apportionment of risk.

Finnis - Human Rights

According to Finnis, human rights must be maintained as a ' fundamental component of the common good'. Such rights are ' subject to or limited to each other and by other aspects of the common good' - these ' aspects' can be linked to issues concerning public morality, public health or public order. Finnis believes in some absolute human rights i. e. the right not to have a life taken directly as a means to further end; the right not to be deprived or to be required to deprive oneself from pro-creative activity. Finnis turns to an explicit treatment of rights but then observes that his whole book has been about human rights, which he takes to be synonymous with natural rights - " The modern grammar of rights provides a way of expressing virtually all the requirements of practical reasonableness," the latter phrase, as discussed above, being equivalent for Finnis to the tradition of natural law.

Finnis beliefs on human rights enable him to give an alternative expression of the version of natural law he has developed in conjunction with other modern day philosophers such as Grisez and Hohfeld. In answer to the philosophical question as to what it is to have a right Finnis identifies two theories, the benefit theory and the choice theory. The choice theory arises because it regards the benefit theory as seeing rights simply as the reflex of rules which impose duties. H. L. A. Hart taught that possession of a right was to have control over other people's freedom or, what amounts to the same

thing, control over other people's duties. (duties being limits on freedom, meaning moral freedom or what a person is morally permitted to do). He emphasised this criticising a different answer to the question - what does it mean to have a right? - that having a right consists in being the beneficiary of someone else's duties. Hart argued that there are some examples where a person is the beneficiary of a duty but does not have a right. He further came to see that the choice theory was inadequate, writing that " the core of the notion of rights is neither individual choice nor individual benefit but basic or fundamental individual needs". Finnis also sees this as identical with his own notion of basic aspects of human flourishing.

Rights exist wherever a basic principle or requirement of practical reasonableness, or a rule derived there from, gives to X, and to each and every member of a class to which X belongs, the benefit of

a positive or negative requirement or obligation imposed upon Y, or

the ability to bring it about that Y is subject to such a requirement, or

the immunity from being himself subject by Y to any such requirement

In brief, Finnis is able to recast his whole theory into rights parlance. The benefit theory of rights has been shown by Hart to be only a special case of the choice theory, so we are prepared for Finnis' steady correlation of rights and duties. His treatment of the Universal Declaration of Human Rights of 1948 provides not only a keen analysis but a general acceptance of it. His attention is drawn to the specification of what can legitimately limit the exercise of a right. To say that the exercise of human rights is subject to the

common good serves no useful purpose, “ for the maintenance of human rights is a fundamental component of the common good”. Finnis, in essence, extends his contention that natural law and natural rights can be regarded as two sides of a coin – as duty on one side and the flipside as a right. The modern use of “ right” to mean something someone has turns out to be simply a restatement of the requirements of justice from the side of the recipient. According to McInerney, it is not simply that the old talk can be translated into the new, Finnis shows a preference for the new and praises it on occasion.

Finnis – A Critique of Practical Reasonableness

Practical reasonableness is the key to Finnis’s theory of Natural Law. It is the means through which people grasp what is good and what is to be pursued, as well as being a good in itself.

As discussed earlier, Finnis recognises basic forms of good, and asserts that this is an exhaustive list, suggesting that everyone who is practically reasonable will agree with it but if true must not practical reasonableness be an objective concept. Otherwise, people could discover completely different forms of good using their own subjective practical reasonableness. Finnis, however, does not agree and in his book expresses an aspect of practical reasonableness as

the requirement that one should not do what one judges or thinks or feels all-in-all should not be done.

This, he feels, expresses that

practical reasonableness is not simply a mechanism for producing correct judgments, but an aspect of personal full-being, to be respected (like all the other aspects) in every act as well as over-all - whatever the consequences

How so is it possible to have a self-evident, indemonstrable good of practical reasonableness, through which all other forms of good are recognised, if it is acceptable to follow a mistaken conscience, whatever the consequences?

Hitler, for example, may have genuinely felt he was doing a great service to the common good by ridding society of the curse of the Jews; and under Finnis's theory, he cannot be criticised for this, because he was following his conscience, and because all of the requirements are of equal value. Ironically the prosecution of these war crimes were a principal factor that led to the Natural Law revival in which Finnis took part.

Finnis regards practical reasonableness as an end in itself. He considers just that about all of the basic goods (of which practical reasonableness is just one) as being

an end pre-eminently endish

Reference is made however of a "double duty" whereby such reasonableness is a means of pursuing the ends of the other basic goods. So reasonableness is both a basic aspect of human well being and concerns one's participation in all other aspects of human well being. Can such a "double-duty" be performed? Is it actually a good, an end in itself or is it merely a method of attaining the other goods? Unlike knowledge for example, practical reasonableness cannot be pursued just for its own sake. Such a pursuit is necessarily contingent upon another end. When

participating in it, the ultimate goal is not the attainment of practical reasonableness, but the participation in and realisation of another goal.

Finnis would appear to place a higher value on the good of practical reasonableness than on the rest of the basic goods – contrary to his belief that they are all equal. If it is accepted that it is both a means and an end – that it does in fact do “double-duty” where none of the other basic goods do – this would lend credence to the suggestion that it sits atop a hierarchy à la Finnis. He suggests as much by stating that despite being free to choose which good we choose to pursue and which to ignore, we have no good reason to leave practical reasonableness out of our plan to live well. This would further introduce an Orwellian concept that the basic goods are all equal but some are more equal than others. If such a hierarchy exists should the basic good of ‘life’ not outrank all others – without which one could not partake in the rest of the basic goods. This, the author contends, unlike much of Finnis’ assertions, actually is self-evident. Next in line should then be practical reasonableness for reasons set out above followed by knowledge which bridges a gap between self-interest and a concern for the common good. Religion and all curiosity relating to cosmic order could come next although it could be linked to knowledge or a sub-category of it. Play is linked to sociability and friendship with aesthetic friendship linked to it as a sub-category. Finnis rates this as least important as it would appear to have the least interaction with the rest.

Finnis’ natural law theory asserts that the values of his self-evident basic goods are the impossible to measure. Fundamental problems are created when morality is divorced from values. Finnis, as discussed above, requires a

life plan based on these goods placed in a hierarchical format but does not outline how one should go about this. This places the morally right candidate in a unsure position as he may try to do what Finnis suggests but may never be able to achieve the required result as Finnis expects.

Conclusion

Essentially Finnis lays claim that the law is a social institution whose purpose is to regulate the affairs of people and so contribute to the creation of a community in which all people can live harmoniously while realising the fruits of the basic value system he proposes. In effect the law is a moral project where one must take the position of the person who examines the law with this person in mind. This is the practical reasonable person who grasps the basic values together with the law's purpose in helping others realise them. Whether or not a persons description of law is correct or not will depend significantly upon whether one's moral views are correct as it is these that will inform the way in which one conceives the project of law.

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