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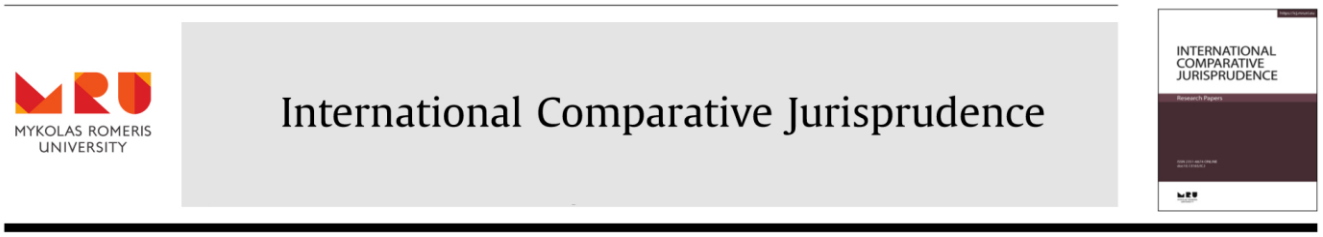

ON THE NATURE OF LAW: THE RELEVANCE OF DEONTOLOGICAL NATURAL LAW PERSPECTIVE IN MODERN TIMES[1]

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Abstract. This paper considers a perspective of the deontological approach to natural law as constituting a satisfactory opinion of the nature of law, and analyses the main features of natural law theory providing that the law and morality are interlinked. It is impractical to decide a case entirely upon codified legal rules, as judges have a duty to apply the moral value of the system. The paper acknowledges that the concept of law is prominent in the moral values of society, as if the law is exceptionally unjust it should not be applied.

Keywords: natural law, deontology, Fuller–Hart, social contract, morality

Introduction

Law is concerned with maintaining a basic order of people's conduct and affairs, laying down standards on how humans ought to behave (Veitch et al., 2007, p. 7). Lord Steyn said that '[the court] must act like a court of law and not like a court of morals. (…) What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right' (*McFarlane and Another v. Tayside Health Board* [1999], per Lord Steyn at pp. 977–978). Thus, there has been an ongoing debate in jurisprudence as to what constitutes the best character of the nature of law (Veitchet et al., 2007, p. 123). The definition of law has been the subject of many debates (Salmond & Fitzgerald, 1966, p. 12), and its notion is surrounded by philosophical perplexities (Hart, 1963, p. 6). Thus, the law can be regarded as a basic concept of jurisprudence (King, 1963); with the various theories of law advanced to what the nature of the law might be; so building up a complete and rounded picture of the subject (Salmond & Fitzgerald, 1966, p. 13). Some authors argue that there is a lack of existing connection between law and morality (legal positivism; Black, 1979), whereas others suggest that there is an interplay between law and morality (natural law; Strauss, 1968, p. 137). Presently, natural law appears to be an important weapon of political and legal ideology (Freeman, 2014, p. 75), and it is often argued that natural law forms the basis of what the law is.

This article aims to present a discussion of the deontological approach to natural law as being the coherent approach as to the nature of law, as we have witnessed an upturn of the theory of natural law, with an increased modern natural law scholarship. Natural law indeed aims at analysing the essence of moral theory, especially in times of crisis. The notion of natural law could be claimed as being as old as philosophy itself,[3] and it is presumed that its importance is still witnessed in the 21st century. The author assumes that natural law is normatively and

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[3] Natural law was first invoked by Stoicism which, in an era of a deep political transformation, provided people with a reference to morality.

objectively embodied in modern society and dependent on human nature. Natural law reflects the desire of humans to work out the best approach to lead fulfilling lives, given the nature of our lives and social environments we, as a society, settle in. Yet, it is not enough to uphold the defined concepts of natural law; what is necessary is to demonstrate that the historically defined debates are still sound and relevant in the environment of our century. Although it is beyond the scope of this paper to analyse all of the possible angles of natural law and their impacts on the conditions of our century, this article looks at the following key elements of natural law: the consistency of natural law; the immoral law is not law; the debate of Fuller–Hart; and the connection of the social contract to natural law. These particular characteristics serve as the backbone of this research as they allow us to demonstrate different kinds of natural legal theories which differ from one another regarding the role of morality in the determination of legal norms' authority. This research applies methodologies of law and philosophy as the most appropriate approach for reflecting on the relationship between law and morality. Amongst these elements explained, it becomes evident that they indicate an understandable moral criterion, necessary in an age affected by moral disagreement or ambiguities.

1. Natural Law is Consistent

The bases of natural law theories, ranging from classical times to the present day, have been shaped by the reality that law is formed from the rules of, and in conformity with, nature. Natural law could be perceived as internally consistent (Dias, 2013, Chapter 20). Positivism appears to ascertain that legal obligations are creatures of general legal rules. This means that a judge is not able to enforce an obligation when they determine a case on the foundations of their circumspection because, according to positivism, the judge's carefulness would only come into play when there is a lack of general legal rule (Salmon & Fitzgerald, 1966, p. 15).[4] This follows Dworkin's point – that the law cannot be merely a model of rules (Tur, 1977, p. 42). Therefore, it has been suggested that it is impossible to interpret any source of law accurately without taking any consideration of morality (Dworkin, 1967, p. 14). Thus, Dworkin suggested that positivism is narrow, and provides no theoretical niche for principles to be found all around us (Giudice, 2015, p. 214). Everyone who works with the law is familiar only with the principles of law (Walker, 1982, p. 34). John Stuart Mill claimed that: '[m]en may be competent lawyers without general education, but it depends upon the general education to make them philosophic lawyers, who (…) are cramming their memory with details' (Mill, 2017, p. 527). Nevertheless, judges often face the problem of moral duty in the courts. Natural law suggests that everyone has a duty to act in accordance with morality and obey the law (Benditt, 1978, p. 92). Therefore, morality is the criterium for law being law at all. John Finnis, a leading natural jurisprudence scholar, analysed the relationship between moral reasoning and the legal rules in the case *Airedale National Health Service Trust v. Bland* (1999).[5] The case resulted in the question as to whether the House of Lords' decision to remove life-sustaining treatment was morally justified, where the judge justified his decision by claiming that it was 'undoubtedly the law' (Finnis, 1993, p. 329). Thus, the argument itself resulted in the questioning of euthanasia, as stipulated by the natural law – i.e. being contrary to God's will (Wacks, 2009, p. 47). The dilemma of the case involves the clash that takes place on the ethical plateau, with the subsuming of legal reason to ethical reason, and the deontological approach to the case (Veitch et al., 2007, p. 128). Bingham recognised early that the case shared ground between both parties, in that 'profound respect for the sanctity of life is embedded in our law and our moral philosophy' (Wacks, 2009, p. 80). Both Keown and Finnis criticise the decision in *Airedale National Health Service Trust v. Bland*[6] as a misunderstanding of the concept of the sanctity of life (Keown, 1997, pp. 482–503; Finnis, 1993, pp. 329–337), as that act was clearly against Aristotle's views on the duty of value of the right to live.[7] Keown observed that Lord Keith reached the conclusion in the concern of the State, arguing that the Court adjudged Bland's life to be worthless (Keown, 1997, p. 494). Finnis argued

[4] The central notion of the natural law is that there exist objective moral principles which could be discovered by natural reason, and ordinary humans conform to these principles.

[5] In this case, Anthony Bland had suffered injuries in the Hillsborough Stadium disaster.

[6] Dworkin criticised the case as well (1997, p. 40).

[7] 'But to seek death in order to escape from poverty, or the pangs of love, or from pain or sorrow, is not the act of a courageous man, but rather of a coward; for it is weakness to fly from troubles, and the suicide does not endure death because it is noble to do so, but to escape evil' (Aristotle, 1999, pp. 13–17).

that in the 'basic good', life should not be under rationale as if it is moral or legal (McCarthy, 2015). Additionally, one of the leading positivists, Hart, was unwilling to accept the conception of the end of humanity, as it appears that he based his argument on the deontological approach to the natural law (Coyle, 2013, p. 93). Hart stipulated that each person should have a duty towards one another (Hart, 1994, p. 80). His ideas derived from five truisms of human nature, each relating to the desire of an individual to survive: vulnerability, limited resources, equality, understanding and strength of will, and limited altruism (Gommer, 2011, p. 141). As Hart, furthermore, explained: 'nothing is to be gained in the theoretical or scientific study of law as a social phenomenon' (Hart, 1994, p. 209).[8] Thus, judges have a duty to apply the 'moral value of the system' (Dworkin, 1978, p. 81). For over a decade, Dworkin developed, contrary to the positivists' insistence, upon juridical discretion in hard cases (Robison, 2002, p. 85), wherein such cases the right legal answer was nearly always determined by the natural law. Therefore, to reflect that consideration, another natural lawyer, Michael Detmold, gave an argument that there are necessary connections to the application of the moral and legal (1984, p. 12).

2. 'An Unjust Law is no Law at All'

The ordinary laws are often not ideal.[9] For natural lawyers, law consists of the rules of morality. For natural lawyers, the central determination is that the validity of law would involve engaging in moral reasoning. This would help to determine whether the law is just or unjust. St Thomas Aquinas defined the law as 'an ordinance of reason for the common good made by him who the care of the community'. Thus, St Aquinas believed that states are natural institutions, produced with the duty of elementary social needs. St Aquinas' theory was characterised by the deontological approach, placing an emphasis on the moral theories to guide to one's obligations. St Thomas claimed that when the law is unjust in respect to the end (in that the law is conductive not to the good but to the cupidity and glory of the law-giver), or in respect to the law-giver (as clearly exceeding his powers), or in respect to the community, then the law is in contradiction to the natural law, and thus is not law at all. The deontological approach of St Thomas works towards the morality of law providing better integration into society, aiming to secure what is wrong or right. This is associated with the St Augustine maxim: 'an unjust law is no law at all'. Nevertheless, the positivist lawyers criticised that tenet mainly as their views on the law itself depend on the social facts and not their merits; with Kelsen insisting that that there was no place for morality in law. Also, Hart stated that 'no one would have any reason to obey except fear and still less, of course, any moral obligation to obey' (1957, p. 596). Another positivist, Bentham, regarded the natural law as being 'nonsense on stilts', claiming that the positivist approach would contribute to the greatest happiness. However, such attacks are not well founded. Even if positive law is prescribed, it is still open for natural lawyers to contend that they describe the duty of the individuals to obey the law, imposing the obligations onto all members of society. According to naturalism, there is a close connection between the duty to obey the law and morality. The moral obligation to obey the law attaches a serious weight, and it can be rejected only after serious reflection and only for reasons of weight. For example, if one considers the realm of criminal law, then when a court imposes a sanction on the thief, this action would be considered as moral, whereas if a private individual or a group where to lock a thief up themselves that will be criticised as being immoral. Yet Finnis suggested that even the unjust law might be carrying moral authority, as long as the people have a moral duty to obey it, which results in a better action for the community. It is widely accepted that one has a prima facie duty to obey the law. Raz discussed that there is the necessary moral duty attached to the natural law. This is because the law should be obeyed by everyone, as the law demands it. The achievement of the good and just society would be achieved only by the deontology of the natural law. Thus, any human cannot be deprived of their natural law, and therefore the codified positive legal rules are only protecting the society from immoral law.

[8] Dworkin took a slightly different approach, in reference to positivism, by defining a notion of 'hard case' as 'when a certain case cannot be resolved by the use of an unequivocal legal rule, set out by the appropriate body prior to the event, then the judge has, accordingly to that theory, a 'discretion' to decide the case either way' (1978, p. 81).

[9] 'An unjust law is no law at all' comes from Latin: 'Lex iniusta non est lex' (Asher & Simpson, 1994, p. 2058).

3. Law and Morality

A debate between two well-known professors, Hart and Fuller, was concerned with the problem of immoral laws and the separability of law and morality (George, 1999, p. 62). The debate arose after questioning the legal system of the Nazi Third Reich (Penner, 2012, p. 63), with the immediate focus on a so-called 'grudge case'.[10] The Hart–Fuller debate can be understood as a debate about the nature of legal principles, and specifically about their legitimacy (Ketchen, 1999). Fuller introduced the dualistic concept of morality, expressing the distinction between 'morality of duty' and 'morality of aspiration' (Pavone, 2014). Such a concept received relatively little critique from Hart, a legal positivist, who concluded that this aspect 'contributed to moral philosophy' (Witteveen & van der Burg, 1999, p. 165). The morality of aspiration was associated with the Greek philosophy 'of the Good Life, of excellence, of the fullest realisation of human powers' (Fuller, 1969, p. 5). In the second type of morality, Fuller (1969) indicated that it 'lays down the basic rules without which an ordered society is impossible (...), speaks in terms of "though shalt not", and condemns men for failing to respect the basic requirements of social living' (p. 15). This concept places an emphasis on the moral duty of natural law as giving the best consequences. Thus, it is another example that deontology is connected with utilitarianism. Hart criticises the whole notion, identifying that right and duties have nothing to do with one's morals.[11] Thus, Hart's argument was that the Court of Germany was wrong in the grudge case, as the law must be valid, highlighting the necessity of retrospective legislation (Banerjee, 2017). On the other hand, Fuller accepted the verdict, claiming that it created respect for law and morality (Paton, 2014). The theorists indicated that the Finnis approach was more favoured, thus claiming that there is a moral duty attached to the law. Radbruch corresponded to such a debate, claiming that 'even though in plain case law can contradict some principles of morality, if the law is extremely unjust it should not be applied' (Peczenik, 2008, p. 236). This suggests that positive law is connected with the duties prescribed by the natural law (Finnis, 1993, p. 329). Finnis argued that 'the positive law is a necessary medium for the expression of natural principles' (Davies, 1994, p. 70). Also, both Hart and Fuller considered that there is a connection between law and morality that would be seen as the normalising facility of law (Cane, 2010). Furthermore, the sociological jurisprudence theorist Hegel indicated that there is a lack of logical completeness itself, finding that there must be law and morality as sourced within one's completeness of freedom (Friedmann, 1967, p. 343). Consequently, the unmoral law is not to be accepted, as the law would indicate the validity of the legal rules would be dependent on satisfaction of the moral standard, because moral and legal validity are intertwined.

4. Natural Law and Social Contract

Furthermore, the natural law aims to establish an objective order (Einwechter, 2018).[12] The ideas prescribed by natural law theorists were used for many different purposes, influencing the rise of a tide of individualism (Friedmann, 1967, p. 117).[13] Kant viewed the idea of the social contract as being a postulate of reasons (D'Entreves, 1994, p. 110). In addition, Kant is viewed as *the* deontologist, and his theory as one of the most influential natural law theories (Smith, 2016). One ought to consider that the theory of the social contract in deontological natural law is connected to ethical consequentialism.[14] For example, Ross (1930/2003, pp. 21–27) listed two *prima facie* consequentialist duties of beneficence and self-improvement in order to promote the greatest

[10] Some background is necessary: in this case a German citizen's wife reported her husband to the Gestapo for criticising Hitler's conduct of war. Subsequently, her husband was sentenced to death. Nevertheless, he survived the war as his sentence was fulfilled via service as a Russian soldier. After the war, the husband set in motion legal proceedings against his wife (Pappe, 1960, p. 264).

[11] 'The outer boundaries of this wide conception cannot be determined from this book with any precision, since the author does not give us any account of what "rules" are' (Hart, 1983, p. 343).

[12] Additionally, Grotius states that: 'Natural law is the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational nature, has in it moral necessity or moral turpitude; and consequently that such act is commanded or forbidden by God, the author of nature' (Coker, 1938, p. 411).

[13] Those actions included the English Revolution of 1798, the French Revolution of 1789 or the American Declaration of Independence.

[14] Kant criticised consequentionalism, but his theory might be perceived as connected to consequentionalism (Saja, 2013, p. 89)

good. Yet this statement requires further elaboration, especially on the deontological theory provided in Kant's work.

In his work, Kant provided an analysis of morality by drawing common-sense ideas of 'good will' and 'duty', which allowed him to believe that individuals are autonomous and free, as long as morality is not an illusionary concept (Kant, 1785/2012, Chapters 1–2). According to Kant, moral rules are universal and are derived from human reason; with humans having the capacity to be rational. His understanding might be demonstrated with an action-reaction response: if an individual perceives a certain act as morally permissible, then society will perceive such conduct as morally permissible. Similar reasoning can be applied to morally forbidden acts. Humans' actions are supposed to be based on obligation, without any emotional influence on humans' morality. Hence, morality should be seen as a set of guidance which acts to prevent certain acts and is independent of a human's desires. In Kant's reasoning, only morality could allow individuals to be 'worthy of happiness' (Kant, 1797/1964, p. 41).[15] Therefore, to achieve a satisfying legal system, the state needs to ensure that 'each person remains at liberty to seek his happiness in any way he thinks best so long as he does not violate (…) the rights of other fellow subjects' (Kant, 1795/1983, p. 7).

The essential feature of the doctrine of the social contract (Friedmann, 1967, p. 117)[16] is that from a state of nature, where there is no law and order, individuals formed societies which required some contract under which they would respect each other and live in peace (Elahi, 2005). To such a contract, one shall immediately add another contract in which the united people undertake to obey a government of their choice (Elahi, 2005).[17] The doctrine of the social contract connects all its protagonists in that the source of political power can be found in the people, and they are unanimously against the deduction of political authority from above, whether from the grace of God or divine law (Friedmann, 1967, p. 118). One shall review that democracy is perceived as being sourced from natural law theory (Calhoun, 1960, p. 31). Positivists, such as Bentham or Hume, rejected the idea of the social contract. Nevertheless, the theory of the social contract has been used by four notable legal and political thinkers: Grotius, Hobbes, Locke, and Rousseau. Such theories are still influential. According to Grotius, a social contract is constructed for a twofold purpose; firstly, as the justification of the entire duty of the people to obey to the government, and secondly, to create a foundation for stable and legally binding relations among the state (Dos Reis Falcao, 2018). In his theory, the state has been constructed by the social contract, by means of people having chosen the most suitable form of government (Becker & Reyelt, 2004, p. 14). Additionally, Grotius is bound to admit that the ruler is bound by the principles of natural law, which could be seen as valid without a promise. Thus, the keeping of the promise is of greatest importance to the principle of natural law (Friedmann, 1967, p. 119).[18] On the other hand, Hobbes, a strong positivist supporter, stated that man lived in chaos before the social contract,[19] resulting in humans' lives being 'solitary, poor, nasty, brutish, and short' (Hobbes, 1651/2017, p. 269). Thus, self-preservation is the greatest lesson of natural law, and is important to a human's existence as a notion which allows for the preserving of the existence of each individual and of society as a whole. The deontological approach would require to 'act only on that maxim thought which you can at the same time will that it should become a universal law' (Kant, 1781/1998, p. 421). The main idea of Hobbes was to rule out the civil rebellion, which he regarded as being the greatest evil, thus Hobbes (1651/2017) being against the natural law. Although Hobbes was regarded as a positivist, his views comprise the concepts of the natural law by recognising the good reason for building a coherent probative law, based on the basic function of natural law (Doliwa, 2012). Locke, who believed that the era before the social contract was a paradise (Strauss, 1965, p. 224), claimed that the social contract was needed to secure individual's rights. There is positivistic criticism of Locke's theory on the apparent

[15] See also, Kant's notion that personal happiness is a key feature of the good life: 'to assure one's own happiness is a duty (at least indirectly)…' (1972, p. 64).

[16] The use of the social contract has been found as far back as medieval times. It can be traced back to the Italian Marsilius of Padua (1270–1342).

[17] Locke also stated that: 'no man can be subject to the political power of another without his own consent' (1689/2010, p. 95).

[18] Grotius also indicated that he was in favour of an organic conception of the states (von Gierke, 1957, p. 55).

[19] It is worth remembering the famous Hobbes tenet: 'a war of every Man against every Man' (Hobbes, 1651/2017, p. 269).

lack of logical grounds. Nevertheless, the deontological natural law approaches of Locke indicated that 'utility is not the basis of the law or the ground of obligation, but the consequence of obedience to it' (Kantor, 2013, p. 92). Such an idea of Locke became the highest positivist law of the US through its incorporation in the Bill of Rights of the Constitution, thus then becoming part of the positive law (Curry, 2017). Jean-Jacques Rousseau's social contract theory of natural law had a great influence upon the French and American revolution, and subsequent politics. Barker noted that: 'Rousseau is a Janus-like figure in the history of natural law' (Mulgan, 1994, p. 373). In his approach, Rousseau attempted to prove the superiority of the natural rights of man and organic society (Friedmann, 1967, p. 125). Additionally, the justification of the people's sovereignty is described as being freedom and equality of all people (Ochoa Espejo, 2011, p. 130). Such an argument had a basis in their internal happiness. Rousseau, further, confirms individual autonomy by linking morality to the notion of freedom (Stern, 2011, p. 20). Thus, for Rousseau, a subjugated individual can have no morality to their acts, as he claimed 'to remove all liberty from his will, is to remove all morality from his acts' (Robinson, 2016, p. 20). Also, Rousseauian theory was analysed by D'Entréves, who claimed that the landmark of Rousseau indicated the strongest theory of democracy, indicating that therein lies the cleavage between legal and moral obligations (D'Entreves, 1996, p. 143). Kant reached a similar conclusion to Rousseau's, where there is the necessity of the general will (Freeman, 2014, p. 103). Therefore, deontological positive law could be regarded as a manifestation of deontological natural law, placing its emphasis on the outcome for a better society (Freeman, 2014, p. 103). In this sense, the author assumes that the concept of a better society is understood as a hypothetical concept, similar to the concept of perfect market identifiable in competition law, as history illustrates that there might be instances of an evil person leading a society. Yet, realistically, the concept of a better society can be achieved by having a genuine legal system which meets the demands of justice. The better society could be understood as a society which substituted justice and wisdom: particularity, it is necessary to disclose the obligatory duties on the moral sense of free people of a free society and the right to introduce suitable steps for future development, which would be based on safeguarding liberty against those who seek to destroy it. Consequently, to understand the freedom of the people is to understand their moral obligations, as it has been remarked that 'no other law counts, because in the realm of freedom there is not law' (Weinred, 1990, p. 95). Similar conclusions were reached by Hobbes, who argued that morality and freedom would be analogous to Aquinas' thinking on the unjust law (Robinson, 2016, p. 20).

Conclusions

To conclude, one shall perceive that natural law with the deontological approach has played an important role on the ethical plateau as to the meaning of the nature of law. It appears that society should be a supporter of deontological natural law, as this will result in the emergence of a better society. The positive law might be viewed as narrow, since it is impossible to decide purely upon the codified legal rules, as per Dworkin – the law should not be a mere set of rules. For the natural law, the action to achieve a better society is important. Furthermore, it is possible to apply the tenet of 'an unjust law is not law' even today, since this notion has been favoured even by the supporters of positive law, who indicated that the law and morality could be seen as connected. Also, the well-known Hart–Fuller debate, surrounding the question of if the law could be moral, resulted in Fuller's approach being favoured, and gives another example of the connection between law and morality. Additionally, the deontological natural law could be seen as the foundation of the most remarked upon political theory – the social contract. The deontological natural law favoured by Kant was influenced by the theory of the social contract. The social contract had its foundations laid in the medieval period, and was later fleshed out by both positivists and naturalists with both the deontological and consequentialist approaches. Both positivists and naturalists with both deontological and utilitarian approaches concluded that morality is an important threshold in the law, which would govern one's duty to obey the law and liberty.

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