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RECONCILING HART'S POSITIVISM AND FINNIS'S NATURAL LAW THEORY

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Abstract

Debates in jurisprudence have been consumed in exploring the dichotomy between positivism and natural law theory. Admittedly, positivists and natural law theorists diverge in their view of the connection between law and morality. Consequently, reconciling their analysis of the nature of law and legal theory is perceived as being impossible. As part of the positivist tradition, HLA Hart's work stresses that there is no necessary connection between law and morality. On the other hand, John Finnis, a natural law theorist, proposes that law and morality are inextricably linked with each other. Whilst Hart's jurisprudential project seeks to imagine a legal system as constituent of rules, Finnis's theory is focused on the principles that must guide legislators in framing laws. Evidently, the two projects operate in different planes while still seeking to address the key jurisprudential question of what is law or legal theory. This Note utilizes this very difference to harmonize the theories, by relying solely on the original texts of Hart and Finnis. By conceptualizing a reconciliation between the two theories, the Note explains that there is no fundamental conflict between the theories propounded by authors in these distinct schools of jurisprudence.

Keywords: HLA Hart, positivism, John Finnis, natural law theory, morality and law

Introduction

Natural law theorists and legal positivists have diverging views about the connection between law and morality. As part of the positivist tradition, HLA Hart's jurisprudential project seeks to advance a conception of the law that is descriptive and not morally evaluative.[2] Although he maintains that there is no necessary connection between law and morality, Hart acknowledges

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[2] HLA Hart, *The Concept of Law* (Clarendon Press, 3rd edn., 2012).

that moral principles could be part of the law, [3] so long as they are rooted in social practice. John Finnis, on the other hand, posits the achievement of the common good of the political community as the objective of law that legislators must pursue.[4] Finnis's natural law theory envisages the necessary incorporation of moral precepts in positive law.

While Hart's jurisprudential project chiefly seeks to explicate the validity of laws in a legal system, Finnis's project is interested in the determination of the content of law and the basis of political obligation. In light of Hartian legal positivism and Finnis's natural law theory, this Note will illustrate that there is no fundamental incompatibility in respect of the analysis of the nature of law. *First*, despite the methodological differences in Hart's and Finnis's legal theories, their accounts of the nature of law can be reconciled. *Second*, insofar as the key aims of the jurisprudential projects of Hart and Finnis are concerned, both theories can accommodate the other. *Third*, Finnis's account of unjust laws frees his theory from the shackles of Aquinas's classical law tradition, allowing it to be read harmoniously with Hartian positivism.

The consequence of divergence in methodology to the nature of law

In respect of methodology, both Hart and Finnis discarded the Austinian definitional approach in *The Province of Jurisprudence Determined*,[5] embracing the central cases method. For Hart, the central case method is descriptive and explanatory, oriented towards theoretical-explanatory virtues, such as precision, clarity, consilience, and adequacy, rather than virtues of political morality.[6] On the other hand, for Finnis, the identification of the central case involved an understanding of the purpose of law,[7] which is the realisation of the common good, in his view. Consequently, his legal theory is inherently evaluative.

This divergence in methodologies adopted by Hart and Finnis undoubtedly have some consequences for the nature of law and obligation in their legal theories. Hart regarded his legal theory as an exercise in "descriptive sociology", emphasising that there is no necessary connection between law and morality.[8] To this end, Hart maintained that laws can achieve iniquitous ends, and remained agnostic about whether the social and legal obligation imposed by norms could be regarded as moral obligations. To the contrary, Finnis's evaluative model

[3] *Id.* Chap. IX.
[4] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2 edn., 2011).
[5] John Austin, *The Province of Jurisprudence Determined* (John Murray, London, 1832).
[6] *Supra* note 1 at 16-17.
[7] *Supra* note 3 at 11.
[8] *Supra* note 1.

sought to understand both the law and legal systems as morally justified phenomena, where in respect of the law, there exists a moral obligation on part of citizens to obey it.[9]

Notably, Hart's methodology is not prescriptive in respect of the content of the laws of a legal system which conforms to the structure he envisages, comprising of primary and secondary rules. Moreover, Finnis's paradigmatic case can accommodate a legal system with the Hartian structure of rules. Therefore, despite the differences on the methodological level, Finnis's natural law theory and Hart's positivism, insofar as they describe the nature of law, can be reconciled.

Compatibility of jurisprudential projects

When Hart conceptualises law as a union of primary and secondary rules in *The Concept of Law*,[10] he hints at the main aim of his jurisprudential project, which is to explain what grounds the validity of law in legal systems. Accordingly, he describes primary rules that are largely duty-imposing, with the rule of recognition, the master secondary rule, providing for the validity of primary rules. A key claim Hart makes is that laws may be divorced from morality, which in the *Postscript to the Concept of Law* is modified to a soft positivist approach which recognises that some rules of recognition *may* be in conformity with moral principles.[11]

Finnis's jurisprudential project is different in many respects. At the outset, Finnis in *Natural Law and Natural Rights* is interested in the orientation of the individual lives of persons, which according to him, should be the pursuit of self-evident basic goods. Recognising that the achievement of basic goods often involves multiple persons and coordinated action, Finnis conceptualises the notion of the common good, which affords conditions suitable for such coordination.[12] In light of the complexities in society, he argues that a political community needs authority that enacts laws to achieve the common good.

Despite the differences in their approaches, both Hart and Finnis conceive that in all legal systems, there are human legislators who are responsible for enacting laws that impose obligations upon citizens. Hart argues that it is the practice of these human legislators or legal

[9] *Supra* note 3.
[10] *Supra* note 1 at 79-99.
[11] *Id.* at 250.
[12] *Supra* note 3 at 155.

governmental officials through the adoption of critical reflective attitudes that forms the basis of the formulation of the rule of recognition, and consequently the primary rules which impose duties upon citizens. In this respect, Hart's theory focuses on rules, and more specifically on the rules that determine other rules.[13] In his theory, however, Hart does not prescribe any specification of the nature of the content of the positive law that is validated by a rule of recognition.

Finnis's account of natural law quite evidently recognises the need for positive law in order to achieve the common good of the political community.[14] His account, therefore, is an explication of the content of positive law, which must be consistent with the moral standards as prescribed by the theory of basic goods. Laws that are not made in pursuance of the common good, in his view, amount to unjust laws. Since Hart's theory makes no claim in respect of the specific nature of the content of the law, it is perfectly possible to imagine a legal system where the primary rules seek "to favour and foster the common good" as Finnis's theory demands, and such rules are validated by an ultimate rule of recognition.

Moreover, Finnis's theory of the law indicates the existence of two types of positive laws that legislators would enact for the achievement of the common good that may be derived from natural law. Whilst some positive laws can be derived through logical deduction, some others would involve the determination of laws of nature. Admittedly, the former kind, which concretises principles of practical reasonableness, has a morally evaluative character. The latter type, however, is concerned with legislators arriving at the most reasonable solution to a problem. This includes, for example, the determination of the rules of the road[15] through positive law, which he regards as *determining* or *specifying* the law of nature. Finnis's account thus provides for what is *good* positive law, which may either incorporate moral principles or specify the form of rule to solve coordination problems.

Crucially, Hart is not oblivious to connections between positive law and moral principles. In his discussion about the *minimum content of natural law*,[16] Hart evidently recognises that his positivist conception can accommodate laws that incorporate moral principles. Certainly, Hart would contend that such incorporation is only a contingent and not a necessary matter, whilst Finnis would argue that the incorporation of moral principles of natural law, such as the

[13] *Supra* note 1 at 100.
[14] *Supra* note 3 at 281.
[15] *Id.* at 285.
[16] *Supra* note 1 at 193.

prohibition of murder, is oriented towards the realisation of a basic good. However, there is no reason to think that Hart would reject the normative demand that laws made by legislators ought to conform to sound principles of morality and offer reasonable solution to problem of policy.

Consequently, this is not a fundamental conflict in their theories. Since both types of laws identified by Finnis are perfectly compatible with Hart's theory insofar as they are regarded as valid by the rule of recognition, Hartian positivists would have no reason to deny that the content of law may be shaped in these respects. At the very least, positivists can interpret Finnis's theory as a guide to enacting good positive law which is based on principles of practical reason. Therefore, insofar as the theories of Hart and Finnis are construed as providing different specifications of the law, both theories are capable of accommodating the other's perspective without any inconsistency.

Finnis's account of unjust laws and consistency with Hartian Positivism

A key aim of Finnis's jurisprudential project is the explication of the notion of obligation, and specifically the contrast between moral and legal obligation.[17] Underlying Finnis's conception of obligation is the principle of fair play, which demands that each person who benefits from institutions in a society must also make contributions to that society. The crucial difference between moral and legal obligation, according to Finnis, lies in the indefeasible character of legal obligation which provides people with exclusionary reasons to act in conformity with the law.

This distinction between moral and legal obligation that Finnis draws is particularly relevant in his elucidation of the force of unjust laws. Finnis regards those laws made by legislators that do not pursue, or facilitate the achievement of, the common good as one form of unjust law. In such instances, there is a tension between moral and legal obligation, because Finnis argues that these unjust laws lack morally obligatory force since they do not facilitate the achievement of the common good.[18] However, the lack of moral bindingness does not entail the discharge of the legal obligation imposed upon citizens under such unjust laws.

[17] *Supra* note 3 at 297-350.
[18] *Id.* at 360.

In his attempt to recast the classical natural law theory found in Aquinas's work[19] to a more palatable modern version, Finnis makes this concession that unjust laws are legally binding upon citizens, even though they "fail to create any moral obligation whatsoever". But, since such laws are still binding on the members of the political community in the legal sense, it raises questions as to the source of such legal bindingness.

When Finnis divorces the idea of the pursuit of the common good and legal obligation, there seems to be a suggestion that the validity of law, insofar as it imposes legal obligation upon persons, is not dependent on its orientation towards the common good which endows it with moral character, but a form of procedural rule that has given power to the legislators to make laws. This bears resemblance to Hart's positivist conception and the conclusion in Hart's theory that unjust laws are binding so long as they are validated by the rule of recognition. The implications of the position that Finnis takes on unjust laws thus commits him to a theory that leans in the Hartian positivist direction.

Certainly, Finnis would not approve of a legal system where the legislators enact laws that are not in pursuance of the common good. However, in his account, this alone is not sufficient to dismiss the legally binding character of the laws and the authority of the legislators to enact such laws. If Finnis was forcefully insistent on the necessary and inseparable connection between law and morality, as incorporated in positive law through the appeal to the theory of basic goods, he would not conclude that the moral reasons to comply with unjust laws would be left to the conscience of individuals, but rather that there are no moral or legal reasons to comply with such laws.

Finnis's account of unjust laws seems to suggest that the emphasis on the necessary connection between law and morality is not as forceful in his theory in comparison to other classical law theorists like Aquinas. On the basis of this concession, Finnis's theory can be said to have strokes of inclusive positivist approaches. If Finnis's account of unjust law is read in this fashion, then his theory can be understood as an account of what makes good positive law, and not an account that is insistent on the incorporation of moral principles in every instance of positive law posited by legislators.

[19] Thomas Aquinas, *Summa Theologica* (1911).

Conclusion

Admittedly, Finnis's natural law theory which regards ascertaining the nature of law and legal systems through a moral evaluative exercise and assumes the presumptive moral obligatory force of law in pursuance of the common good of a political community sets it apart from the positivist tradition. However, the key aspects of Hart's positivist account and Finnis's natural law theory are perfectly harmonious, with the former allowing for considerations of the common good to guide legislators and the latter recognising the need for positive law. The reasons explained in this Note illustrate that there is no *fundamental* conflict between the natural law theory of Finnis and the legal positivist theory of Hart in respect of the nature of law.

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