Jurisprudence

Modern Natural Law Theory

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Introduction

• Classical natural law theory saw a decline after the 16-17th centuries.
• But after WW II there was a revival in natural law theory.
• Two very important natural lawyers: John Finnis and Lon Fuller
• Note- This lecture will not discuss Fuller at length as his theory will be discussed when doing Hart-Fuller debate

John Finnis

• The most important natural law theory of the modern age.
• The theory is found in his book ‘Natural Law and Natural Rights’. The book is not a history of natural law, it is a restatement of natural law.
• Finnis tries to propound a ‘pure’ theory of natural law.
• He integrated natural law within analytical jurisprudence.
• An important aspect of his theory is that he does not allude to a God or it does not talk about man’s nature or man exercising his reason to derive the principles of natural law.
• His theory is based on the fact that there are certain basic goods for human beings that help them flourish and he gives guidelines on how to order human life to achieve those goods.

For Finnis:
• Natural Law- is the set of principles of practical reasonableness in ordering human life and human community.
• Law - is a social institution whose purpose is to regulate the affairs of people and thus contribute to the creation of a community in which all people can flourish (a community in which everyone can realise the seven human goods).
At the outset of the book he makes two assertions:

1. That there are human goods that can be secured only through the institution of human law (‘human goods’ basically mean things such as an ordered society, freedom from tyranny, etc.).
2. That there are requirements of practical reasonableness that only human law can satisfy.

Finnis does not reject positive law as he asserts that ‘human goods’ and ‘requirements of practical reasonableness’ can be secured only through human laws (positive laws).

What are ‘basic human goods’ and ‘requirements of practical reasonableness’?

• The basic human goods can be seen as the targets in life, or the purposes that man must fulfill.
• Requirements of practical reasonableness can be seen as the way (guidelines) to achieve those purposes

Human Goods

• In some places of the book he also refers to these goods as ‘forms of human flourishing’. The word ‘flourishing’ describes his meaning better.
• Basically, human goods are those conditions, or aspects in life that are necessary for humans. They are necessary for humans to flourish and achieve their maximum potential. These are essential basic goods. According to Finnis, without fulfilling these basic aspects it is not possible for humans to flourish.
• He identifies seven such human goods:

1. Knowledge- knowledge for the sake of knowledge without any ulterior purpose. This is knowledge gained through pure desire to know the truth and avoid error by ignorance.
2. Life- Means every aspect of life which is necessary to put a human in ‘good shape for self-determination.’. Here, life includes physical health, freedom from injury and suffering, etc. It also includes the drive for self-preservation coupled with the desire to procreate.
3. Play- Means engaging in performances which have no point beyond the performance itself, enjoyed for its own sake. E.g. going for a round of golf on a Sunday morning.
4. Aesthetic experience- Means beauty, man-made or natural, experienced by the creator or spectator.
5. Sociability (friendship)- This in its weakest form is realized by a minimum of peace and harmony between men, and in its strongest form, full friendship. This includes acting for the benefit of one’s friend, doing things for one’s friends, etc. Basically, sociability means having human relationships.
6. Practical reasonableness- This is the basic good of being able to bring one’s own intelligence to bear effectively on the problems of choosing one’s actions and lifestyle and shaping one’s own character.
7. Religion- Does not mean religion as it is ordinarily understood. Means reflection and determination for oneself whether the universal order of things has any origin beyond that known to natural science, contemplation of man’s place in universe.

(Read PP. 152-157 in Freeman, 9th edn.)

- These seven basic human goods are ‘self-evident’.
- There are other goods apart from these seven (eg: generosity, courage, etc.). But these are ways of pursuing one of the seven basic goods described above.
- These basic human goods are not necessarily a reflection of human inclinations, but aspects that are needed for human flourishing.
- Also, there is no hierarchical order of the human goods, they are all equally fundamental.
- Finnis says, when these human goods are taken together, they form a ‘common good for all human beings’ and embody ‘everything one could reasonably want to do, to have, to be’.

### Requirements of Practical Reasonableness

PR has two roles in Finnis’ scheme: 1. As a human good 2. As a guideline (as a means) on how to fulfill/achieve the human goods.
Finnis describes practical reasonableness as ‘...the reasoning process that distinguishes sound from unsound practical thinking and which, when brought to bear, provides the criteria for distinguishing between acts that are reasonable all-things-considered (and not merely relative-to-a-particular-purpose) and acts that are unreasonable-all-things-considered...’
Practical reasonableness is about how to reasonably make decisions about achieving the human goods.
Requirements of practical reasonableness consist of a ‘set of methodological requirements.’ It means, when decisions are made about achieving the human goods described above, those decisions must be made in compliance with the requirements of PR. There are 9 such requirements:

1. One should have a harmonious set of purposes and orientations. People should have a rational plan of life and not the blueprints of a pipe-dream (an unattainable/fanciful/impractical).
2. Must pay equal regard to all the human goods, without disregarding or exaggerating some. This does not mean all goods must be pursued equally. Such an expectation is impractical. But what this means is that there must not be arbitrary preferences between values. For instance, if a scholar is taken, he may pursue knowledge more than play, but he must recognize that both knowledge and play are of equal validity as human goods.
3. No arbitrary preferential treatment among those who partake in the pursuit of human goods. Basically it means not to prevent others from getting what you are trying to get for yourself.
4. One must have a certain detachment from all the specific and limited projects that one undertakes. This is so that the individual will be sufficiently open to all the basic human goods in the changing circumstances of a lifetime.

5. One must not abandon their commitments lightly. Must be fidelity to one’s objectives but there must be a balance between fanaticism and dropping out, or refusal to get involved in anything.

6. One must bring about good in the world by actions that are efficient for their purposes. One must not waste one's opportunities by using inefficient methods.

7. One should not do anything that which of itself causes nothing but damage, even if the end sought to be achieved by such act is beneficial. End does not justify the means. This requirement rests on the principle that the basic human goods must be respected in every act done.

8. Must favour and foster one's own communities.

9. One must act in accordance with one’s conscience. Must not do things that one judges/thinks/feels should not be done.

- These requirements of practical reasonableness, together they form a set of guidelines for behaviour. Finnis calls them a ‘mechanism for producing correct judgments.’

- To Finnis, the requirements of PR constitute the content of natural law (morality).

Finnis’ take on natural law and man-made law

- According to Aquinas, there are certain ends for man and manmade laws must facilitate the achievement of these ends. When manmade law conflicts with the achievement of such ends, they are not laws.

- Finnis’ thinking is different to this classical understanding of natural law. According to Finnis, there are certain self-evident human goods that must be fulfilled/achieved as they facilitate human flourishing. There are requirements of reasonableness that must be observed in fulfilling these human goods. Manmade laws must reflect these requirements of reasonableness and facilitate fulfilment of the human goods.
• To Aquinas, an unjust law which conflicts with natural law is no law at all.
• Finnis does not consider this issue of whether unjust laws are valid or not, to be important.
• He considers the following to be the pertinent issue:

  Given that a legal system is by and large just, does a particular unjust law create a moral obligation for the citizen to obey that unjust law? Does an unjust law create a moral obligation to obey in the way that a just law does?
• Finnis answers this issue in the following manner: A ruler’s authority to give orders and make laws rest on the needs of the common good. If he uses his authority against the common good (or against the requirements of PR) then the ruler’s laws/directions lack the authority that they would have otherwise had. Hence, there will be no obligation for the citizen to obey such laws. HOWEVER...

• However, if the ruler (and/or the constitution) is largely just, save for a few unjust laws, then the citizen may have an obligation to obey even the unjust laws. This is because, if the other citizen’s see this citizen disobeying the unjust law, they too will lose respect for the legal system and start disobeying laws. This may weaken the authority and respect of the otherwise acceptable ruler and this is undesirable as such disobedience could render even the largely desirable parts of the legal system. Hence, there will be an obligation to obey the unjust law in order to prevent the legal system being held in contempt. Here, although the citizen may have an obligation to obey the unjust law, it is a diminished and collateral (incidental) obligation. The obligation stems not from the validity of the law, but from an extra-legal source. The ruler has no right to expect obedience and he has a responsibility to repeal that law.

• Here what Finnis does is distinguishing the focal (central) meaning of law from the penumbral meaning of law.
• Focal meaning of law entails laws that facilitate the common good, that is fulfilling the seven human goods in compliance with the requirements of practical reasonableness.
• Unjust laws are not considered to be laws in its focal sense.

(Read e-newsletter 2010-01 on the duty to obey unjust laws and pp.164-170, Freeman, 9th edn.)
Finnis’ answer to the ‘naturalistic fallacy’
(Does Finnis derive an ought from an is?)

What is the ‘naturalistic fallacy’?
There is a criticism of natural law by positivists who say that the natural law thinkers derive an ought from an is, when there is no logical connection between the two. You say what ought to be by looking at what is. This sort of reasoning is fallacious. The idea is, natural law is founded on the fallacy of deriving an ought from an is. You can’t logically do that.

E.g – Women can bear children (the is). Hence, it is their nature to have children. Thus, women ought to bear children because it is their nature and it is morally good for them to bear children and immoral not to bear children. This reasoning is wrong. Just because you can do something you don’t have to do it.

Does Finnis commit the naturalistic fallacy?

• He denies doing so and goes further to say that natural lawyers have never made such a jump from an is to an ought.
• To Finnis, the principles of natural law are the principles of practical reasonableness and they do not stem from the facts of human existence (they do not stem from human nature). The requirements of PR pre-exists the human situation.
• Basically what Finnis says is that there are seven human goods that help human flourishing. The requirements of PR are practical and reasonable guidelines to achieve these human goods.

To recap Finnis’ theory...

Finnis’ theory is based on seven self-evident basic human goods that are necessary for humans to flourish.
The requirements of PR, which forms the content of natural law, offer guidelines on how to fulfill these self-evidentiary goods.
For Finnis, the purpose of law is to provide, in line with requirements of PR, conditions in which those seven goods can be realised.

Some questions about Finnis’ theory...

1. How did Finnis choose his list of seven goods? Is it based on what human inclinations? If so, he pays too much attention to ‘good’ things that humans are inclined to and not enough attention to the bad things that humans are inclined to.
2. Some criticize Finnis for offering a natural law theory without nature- This is because, unlike classical natural law thinkers, he does not rely in human nature. His theory is based on seven ‘self-evident’ truths (goods) that humans must fulfill.
Lon Fuller

• Offered a ‘procedural’ theory on natural law. He was concerned with the issue of fidelity to the law. He said, a legal system must have certain characteristics if it is to command the fidelity of a right thinking person. A very important characteristic that a legal system should have in this respect is the ‘inner morality of law’. Systems that do not have the inner morality of law cannot constitute a legal system.
• Laws must be: general not *ad hoc*, published, non-retroactive, intelligible, consistent, capable of being complied with, endure without undue changes, applied in the administration of society.
• Fuller will be discussed at length when doing the Hart-Fuller debate.

Next Lecture....

• Double sessions...
• Read *The Concept of Law*, Preface, chapters 1-3.
• Also read Introduction to 3rd edn. by Leslie Green for a helpful overview of Hart’s project.
• Revise what we did on Command Theory and Natural Law for next week’s tutorial