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Natural Law and the Separation of Law and Morals

NEIL MACCORMICK

Some books make a radical impression upon the reader by the boldness and novelty of the theses they state; to write such a book is a rare and difficult achievement. It is scarcely easier, though, and no less rare, to make a radical impression by a careful restatement of an old idea, bringing old themes back to new life by the vigour and vividness with which they are translated into a contemporary idiom. That has been the achievement of John Finnis's *Natural Law and Natural Rights*,[1] a book which for British scholars has brought back to life the classical Thomistic/Aristotelian theory of natural law. A theory which more than one generation of thinkers had dismissed as an ancient and exploded fallacy kept alive only as the theological dogmatics of an authoritarian church was rescued from a whole complex of misunderstandings and misrepresentations. At the same time, it was exhibited as a thoroughly challenging account of law, fully capable of standing up to the theories which were regarded as having refuted and superseded it, while taking into account and accepting into its own setting some of the main insights or discoveries of these theories.

I suppose that I ought to have seen all this coming, for John Finnis launched some of his key ideas in postgraduate seminars that a group of us were responsible for presenting in Oxford in the late sixties. Still more should I have foreseen it when, in the early seventies, Finnis made a series of visits to Edinburgh as external examiner in jurisprudence, and in the course of outings for fresh air along the shore at Cramond or up the Braid Hills, he sketched the way his work was shaping. Even then, the penny did not drop for me, and it was only when a typescript arrived in early 1978 from Malawi for comment and advice that I at last grasped what was going on, and what it meant. I have seldom

read a work of philosophy with a greater sense of excitement and discovery than that which I experienced on a first breathless run through the pre-first edition of *Natural Law* (as I shall henceforward abbreviate it). It remains for me an intellectual landmark; one of those few books which bring about a permanent change in one's understanding; a shift in one's personal paradigm.

My first task here is to outline what have become for me the key points in the Finnisian position. Then I shall go on to reflect upon the implications they have for a view of law 'beyond positivism and natural law',[2] that is, after we abandon as misleading the false oppositions of view conjured out of the old caricature of natural law. The key points are these five: (1) first, what I shall call the thesis of 'natural law and the separation of law from morals'; (2) secondly, the thesis of 'the necessary moral aspiration of law-giving', according to which those who exercise legislative power must at least represent themselves as pursuing a social common good, however far they fall short of doing so in reality; (3) thirdly, the 'practical reason' thesis, according to which the same human capability of applying reason to practical issues is essentially and similarly involved both in legal activity and in moral deliberation; (4) fourthly, the thesis of 'the essential formal features of law'—minimal respect for legality as a part of the very being of law; (5) finally, the theses about 'the good and the right', concerning the priority of the good over the right and the irreducible plurality of human goods. I shall deal with these in that order, adding a concluding section to summarize what becomes of the supposedly fundamental opposition of natural law theory and legal positivism, and how in general I now view the law and morality debate, given my warm response to *Natural Law*.

1. NATURAL LAW AND THE SEPARATION OF LAW FROM MORALS

For long, the leading jurisprudential image of natural law theory presented it as defined by the thesis that unjust laws are necessarily non-laws. This thesis was taken to be coupled with a theory of the derivability of principles of justice from observation of nature (whether human nature or the nature of things, or

both), this theory in turn very probably involving an illegitimate derivation of 'ought' from 'is'. In general, there was a suspicion of a failure to draw adequate lines either way as between the morally desirable and the legally obligatory. Further, the relative clarity and knowability of positive law stood in contrast with the much disputed question of the nature and status of moral values and principles. So natural law involved a propensity to make appeal to that which is obscure and disputable from that which is at least capable of being established in a much clearer way by such methods as legislation and judicial precedent.

Positivist theories of law, by contrast, while acknowledging that law and morality have many parallelisms of terminology and of topics for concern, such as duties to refrain from violence, to deal honestly, to respect people's property, and possessions, to keep sexual impulses under proper control, nevertheless hold that law can be explained, analysed, and accounted for in terms independent of any thesis about moral principles or values. This is because in some way or another the validity and the content of law depend upon social practices or usages. The transformation of practice and usage into normative law may indeed require the mediation of some methodological or epistemological principles; but, if so, these are themselves independent of moral judgement. Thus it is clear that positivism as a position in legal theory stands for 'the separation of law and morals', to recur to a famous phrase.[3]

This does not entail that positivists are amoralists, or unconcerned about the moral quality of the positive law. On the contrary, many have been ardent reformers or critics of established law, and perhaps the single most influential British law reformer of all time, Jeremy Bentham, was (not by mere coincidence) the intellectual progenitor of legal positivism in its British, indeed anglophone, forms. In fact the positivists' claim is that the mere existence of a law as such is no guarantee whatever of its moral (or other) merits as a law. Nor is it a guarantee that obedience to the law's demands is morally obligatory or even morally permissible. The quality of much law may be such that a good human being should work tirelessly for its reform or abolition, and of some, it may be such as to demand disobedience in the last resort. Law is not due automatic moral respect, but watchful and jealous scrutiny from a moral point of view. Yet none of this

implies doubt or denial that bad law really is law. Its being law is an issue of social fact, not one of moral value. For some positivists, indeed, a ground for concern about the practical tendencies of natural law has been that any equation of the legal with the moral, any suggestion that whatever is legal really has some moral ground, may lead to a dilution of this attitude of watchful and critical jealousy lest the law which exists make demands which ought not to be made.

Finnis's theory of natural law, however, does not deny the thesis of the separation of positive law from morality in the form in which I have just ascribed it to unnamed positivists (if a name be demanded, let me unblushingly name my own, thereby evading all risk of the charge that I have invented a view which nobody has ever held; slim though my expertise may be, there is one theoretical position as to which it will not brook denial). For Finnis, the classical doctrine is not that there is a simple and universal all-or-nothing moral criterion for the validity of every law in every legal system, transcendentally superadded to whatever may be each system's explicit internal criteria of validity of law. That 'an unjust law is no longer legal but rather a corruption of law' is indeed a teaching of St Thomas; but, as Finnis stresses to powerful effect, it is not a thesis about the validity of law in the technical sense. Validity in this sense has to do with the observance of proper procedures by persons having appropriate competence. Of course there may be legislation properly enacted by competent authorities which falls far short of or cuts against the demands of justice. The validity of the relevant statutory norms as members of the given system of law is not as such put in doubt by their injustice. The legal duties they impose, or the legal rights they grant, do not stop being genuinely legal duties or legal rights in virtue of the moral wrongfulness of their imposition or conferment. They are, however, defective or substandard or corrupt instances of that which they genuinely are—laws, legal duties, legal rights.

This corruption or defectiveness does indeed weaken, and in grave cases simply negates, any moral case for obedience (to laws or duties) or respect (for rights). In being a defective law, an unjust enactment is, in a practical moral perspective, at best defectively obligatory, whether or not in the perspective of legal analysis it is a valid imposition of legal obligation. The UK

Parliament has recently enacted legislation, initially for Scotland alone, subsequently (and with effect a year later) for England and Wales also, which impose a new form of local taxation, replacing the old system of 'rates' (which were a form of property tax upon immoveable property based on the notional rental value of the property). The new tax, the 'Community Charge', imposes a flat rate charge at an amount determined by the local authority upon every adult resident of each local authority area regardless of the income or wealth of the payer, save in so far as a reduced charge is exigible from certain categories of particularly poor persons. If in its whole context this is (as I for one think it) a plain case of a seriously unjust enactment, the Finnisian account must be that any moral duty to pay is at best an attenuated one, notwithstanding that the enactments in question are unimpeachably valid as a matter of law, and that the content of the Acts includes centrally a legal duty to pay the statutorily prescribed charge. But the positivistic theory I have in view yields just the same conclusion —the law is a valid law, but if the duties it imposes are duties in violation of the demands of justice, it will follow that the moral issue whether or not to comply is prima facie an open one.

Up to this point in the argument, there is then no serious difference between the 'positivist' and the proponent of 'natural law', despite all the generations of controversy directed to this very point of the 'existence' of the unjust law 'as such'. Some natural lawyers may flatly deny the existence of an unjust law, but by no means all do; and Finnis has put it beyond denial that the mainstream of the natural law tradition (now flowing bounteously through his own books) affirms the possible existence of such laws, while denying or downgrading their morally compelling quality and insisting on their essential defectiveness as law. On the other hand, while there may be some positivists who will deem the unjust law as fully obligatory as any other, nevertheless the mainstream, at least in the English-speaking world, unequivocally asserts the lack of moral obligation of the unjust law.[4] Indeed, it can be claimed that the positivistic attitude actually facilitates a sharpened awareness of the always present potential conflict of the legal and the moral.

So what was all the fuss about then? Not entirely nothing—for at the very least, the positivists have highlighted a boundary for natural law theory, setting up useful signposts and perimeter

fences against the risk of overstated versions of jusnaturalism which slip fallaciously from the idea of corrupted or defective law to that of invalid law. Moreover, the positivistic programme of analytical enquiry into the conceptual structure of legal thought and the presuppositions of legal validity, the concepts of legal sources, and all the rest of it has borne good fruit, such indeed that (as Finnis again shows, equally by example and by precept) modern work in the natural law tradition can be considerably enriched by drawing on the resources of analytical positivism. In so far as both schools of thought warn us that from the moral point of view bad laws are only weakly obligatory, and in extreme cases entirely lacking in obligatory quality, and urge us to be vigilant about the injustice that may be done in the name and forms of law, their united voice is the more impressive for the dividedness of their theoretical starting-points.

Still, the fact that a natural lawyer can share in the affirmation of positivism's main point (namely, the conceptual independence of legal validity from moral value or moral merit), does not eliminate difference, and from that difference those attached to the positivist tradition ought to learn much. For there can be other essential connections between the legal and the moral apart from those which positivism has set out to deny; and these very connections may be built into a sound understanding of just those social sources from which positivists quite correctly see positive law as deriving. This warns us how tendentious has been the title of the present section of this chapter, and leads on into its second section.

2. THE ESSENTIAL MORAL ASPIRATION OF LAW-GIVING

As Finnis has argued, most social institutions and practices are intelligible only in the light of some point, some value, some specially appropriate excellence we ascribe to them. Books are not simply numerous sheets of printed paper encased between coloured covers, education is not simply whatever imparting of facts goes on in places called schools or colleges, music not any human contrivance of sequenced sounds, and so on. In all these cases, an explanation of what counts as a book, as education, as a piece of music, depends on explicit or implicit adoption of a view (however controversial) as to what would count as good or sound

or focal examples of the genus under consideration. A view about this depends on one's explicit or implicit sense of what values should be realized in this form, and this implies the holding of some view about the kind of general good(s) the practice or institution is supposed to serve. In the light of focal or paradigm cases, other weaker or more problematic cases may be brought in by closer or more remote analogy, the relevance of analogies being at least partly conditional on what one takes to be the values or excellences proper to the best examples of the genus or genre. Another way of putting this might be to say that all such concepts belong in Ronald Dworkin's class of 'Interpretive Concepts', or have the 'purposive' character ascribed by L.L. Fuller to all distinctively human institutions. In their broad thrust, Finnis's, Dworkin's, and Fuller's arguments on this point do not seem to me to be open to dispute.

All this helps us to understand the possibility of framing criteria for judging what counts as belonging to a relevant class. Can a pile of bricks, or a splosh of colour on canvas, or a cube of crushed cars be seriously considered as works of art—sculpture or painting? Criteria are called for, but they cannot be value-free. What is at issue is whether the objects in question relate at all to relevant values. What is necessary is not to go straight to one's own value judgements. What is necessary is rather to consider what intentions we can impute to the maker or collocator of the object—do they include an intention to appeal significantly to the aesthetic sense of viewers of the object? Is the object itself closely or remotely analogous to others which we regard as plainly and indisputably objects produced with that intention, and successful in light of it? Given affirmative answers to these questions, we can accept the objects as paintings or sculptures, even if, having passed our own value judgement, we regard them as hopeless failures in these categories (after all, they as failures may yet be more interesting than other clearer cases of art which are no more than painstaking but merely derivative work, lacking in inspiration or originality).

Different again is our response to what we deem essentially fraudulent presentations, where the 'artist' indeed purports to have relevant intentions, but we for our part judge the artistic posturing to be mere pretence, aimed at tricking the gullible public. Even the fraudulent case, however, is one which is

intelligible only by reference to that which it pretends to be. Always, there is an implicit 'claim to correctness', a pretension that one is seriously bent upon realizing relevant values, when one purports to be, or is, engaged upon any socially or humanly meaningful performance.[5]

The same applies to law. It is of course not a defining feature of law, nor a condition of legal validity, that the provisions of statutes or the holdings of case-law be actually just or have some actual tendency to secure or promote some public (social) good or benefit (what Finnis refers to as the 'common good'). Yet as both Robert Alexy and I have pointed out, there would be a pragmatic self-contradiction involved if a legislature enacted a Bill expressly purporting to be for the implementation of unjust discrimination.[6] It is not accidental that we have Acts called 'Administration of Justice' Acts, but no 'Administration of Injustice' Acts. This is not to say that none of the legislation we have administers injustice; nor is it to say that legislators must sincerely believe in its justice, its expediency, or its 'correctness' in any other dimension (maybe even some of those who voted for the Community Charge legislation had doubts as to its justice, or its expediency, or both); it is merely to say that, however things may stand on all these points, the idea of legislation passed without even a pretension to correctness is a kind of absurdity. When the Emperor Caligula threatened to make his horse a consul, this was a way of humiliating the Senate by reminding them that they would have to treat the purported 'nomination' and 'election' as formally correct, even though no one could possibly believe in this pretended correctness—an extreme version of the tale of the emperor's new clothes. If there were not an implicit absurdity, there would not be the humiliation.

A related point, which I have made more extensively elsewhere,[7] concerns the notion of punishment necessarily invoked by criminal legislation. On any theory of punishment which takes due account of the ineluctably expressive and symbolic aspect of punishment (punishment as expressing on behalf of the state an attitude of deep disapprobation toward the conduct criminalized by the law), it cannot but be the case that laws imposing punishment ought by virtue of their very nature to criminalize only such deeds as merit such an expression of such an attitude. Laws which invoke a morally loaded institution like

punishment cannot avoid becoming morally loaded themselves. Laws which penalize innocent conduct are thus necessarily perversions of law. For example, to punish people for taking part in something so blameless as interracial marriage is necessarily to stigmatize it as morally impure. That is what is so deeply objectionable about anti-miscegenation laws.

The general conclusion is that laws, like other social institutions, are fully intelligible only by reference to the ends or values they ought to realize, and thus by reference to the intentions that those who participate in making or implementing them must at least purport to have. This does not entail any acceptance of substantive moral criteria as criteria of legal validity, but it does involve acknowledging the moral quality of the relevant ends and values, namely justice and the public good. It is as true of law that justice and the promotion of public good within the constraints of justice are the particular goods that make it intelligible to us as a congeries of institutions and practices as it is true of art that its particular point is the communication of aesthetic experience through creative originality. It is thus the case that laws we judge unjust or detrimental to the public good are on that very account laws that we judge essentially deficient examples of the genus to which they belong, even though we may also judge them to belong validly to that genus.

On the one hand, therefore, we have to acknowledge that there is indeed a necessary connection between law and morality hitherto unnoticed by positivists, albeit perfectly consistent with the other 'separation' on which they have insisted. On the other hand, however, it has to be conceded that the connection in question does not protect us from very much. The problems of the real world do not seem often to arise from people passing legislation which they only pretend to think just, while secretly intending some nefarious purpose. Even less do they revolve around the open and unapologetic espousal by legislators of measures they openly characterize as unjust and inexpedient. They have a great deal more to do with the holding of perverse moral opinions and the legislative implementation of these. That such laws lack the special virtue of law is of no avail where the legislature and its constituency mistakenly and sincerely, but perhaps quite passionately, believe they act well and wisely.

If there are wicked or misguided people who hold power, they

will doubtless enact wicked or misguided principles into law. To teach them that legislation ought always to evince essentially moral aspirations will be of no avail, for they will be quite ready to agree and to point out how ardent they are in pursuit of exactly such aspirations. The only way to get rid of their wicked law will be by getting them out of power or by persuading them to change their moral and political convictions. The fact that there are certain moral aspirations which are conceptually intrinsic to law (though not conditions of its validity) could never stop perverted opinions about relevant values being transformed into perverted laws. A stark warning is provided by the fact that some of the leading jurisprudential ideologues of Nazism in Germany were denouncers of positivism, and some even took themselves to be propounding a purified version of natural law doctrine (involving, *inter alia*, such obscenities as assertion of the natural human and moral superiority of the Aryan race and other such nonsense).[8] The mistake they made was not that of thinking morality relevant to law-making; it was that of identifying their hideous views about the healthy sentiments of the people with the demands of justice and morality.

Still, the positivist who denies the conceptual dependency of legal validity upon moral value cannot use the arguments which avail to that end against the altogether different thesis that certain moral aspirations are intrinsic to the very concept of law. All the more so if weight is given to the powerful arguments put by H.L.A. Hart for holding the 'internal point of view' of the members of a group to be necessary for any explanation of what it is for a rule to exist.[9] Those who are committed to an enterprise give it the character it has, and those who wish to understand and to study social phenomena in a more detached, non-committal, 'external' perspective must nevertheless make themselves imaginatively aware of the attitudes which infuse those phenomena in the view of the participants. This is prerequisite to understanding, though not necessarily the whole of it. This hermeneutic[10] approach, however, seems to make the Finnisian conclusion inevitable, vigorously though Hart still defends a different view.[11]

Before one finally acquiesces in the thesis of the necessary moral aspiration of law-giving, one yet has to face a new and rather serious objection. It is one thing to claim that an ideal legislator ought to be committed to justice and the public good in

her/his acts of legislation. But it may be the case both that human legislators are not unanimous in their moral opinions, and all the more that the citizens subjected to the law are not completely or at all in agreement with each other or with any of the legislators. In this case, that is, in reality, there is therefore no possibility that in a multi-member legislature all who vote—even all who vote in the majority on any issue—fully agree about the justice or expediency of the legislation they join in enacting. A requirement of perfect unanimity (such as prevailed, I believe, in the ancient Polish Parliament) would practically preclude the passage of any legislation at all. But resort to majority voting and party whips and all the devices which make possible legislation as we know it under representative democracy seems to cut against the very possibility of Alexy's 'claim to correctness' being honestly made by any legislator. Majority votes rest on compromise, and compromise may sit uneasily with the claim that it is justice one is doing.

A classic example is provided by the framing of the Constitution of the United States in 1787. The framers found it necessary to compromise on the issue of slavery, and subsequently judges who themselves held slavery to be abhorrent and unjust nevertheless held also that the duties of their constitutional station required them to administer faithfully the laws regarding slavery.[12] Without a compromise on slavery, the Union would not have been formed. But what the compromise did was precisely to compromise the commitment to justice of those who were personally opposed to slavery as a grave injustice. On any reasonably rigorous test of the 'claim to correctness' as a claim about a belief in the justice of what one does, they would have resoundingly failed it. Yet if the United States of America have not got a full-blown Constitution, who has? Is the answer that they only got one *really* in 1865, or in 1954, but perhaps had none at all or, more plausibly, had only a corrupt or substandard one till then (as indeed anti-slavery Americans maintained in the times before the War of 1861–5)?[13]

Before we go too far down that line of argument, we had better recall that (whatever judgement we in the end pass about the compromises of 1787) a spirit of compromise is far from undesirable in any system of government by consent. Human beings, legislators included, may hold their convictions about justice

and the public good with passionate conviction, the passionate conviction which can be the enemy of compromise and tolerance. In extreme cases, this can be admirable; and depth or strength of conviction is always impressive. It can only be for the worse when the best lack all conviction and the worst are full of passionate intensity. But whoever is afflicted with passionate intensity, he or she is apt to have no truck with compromise, and even to have difficulty in summoning up a spirit of real tolerance for opposed views. And what then can become of democracy and constitutional government? Do not these above all require willingness to compromise and to be mutually tolerant, first on the part of the legislators, secondarily (but scarcely less) on the part of the citizen electorate?

Thus a positivist who is willing to be persuaded that the very idea of law has implicit in it a certain aspiration towards certain values, and that serious respect for these values is essential to authenticity in law-making, will do well to demand greater care than the present chapter has so far shown in delineating the relevant values. My students, who in this have a caution I do not exactly share, tell me that such a positivist ought also to be very chary indeed about accepting too readily Finnisian claims about the self-evident quality of basic judgements of value; for a belief in the self-evidence of one's judgements (the same would go for a belief in their divine certification) can also be an enemy of tolerance for those who see matters differently. However that may be as to self-evidence, I do believe (without being able to argue the point adequately here) that one of the historic roots of positivism's appeal has been that by freeing the concept of law from dogmatic attachment to any particular moral philosophy or theory of justice, one creates intellectual and political space for tolerance and democratic pluralism. This may help to explain a fact which many find paradoxical, namely that the generation of thinkers who spent the War of 1939–45 struggling against Nazism and Fascism and against all the time-servers who held that the law ought to be obeyed whatever the law was and whoever had made it to whatever ends and by whatever means, nevertheless stood firmly for positivism, rejecting the pleas of those like Gustav Radbruch who argued in Germany for a return to natural law as the necessary bulwark against the errors and crimes of the Nazi period.