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Law as an Expression of Adopted Justice

1. Introduction

Different theories of law have different views on the relationship between law and morals. The crucial question is about the role of justice in legal knowledge and interpretation. Traditionally, natural law jurisprudence and legal positivism have maintained the two opposite views on the role of justice.

According to the *natural law jurisprudence*, valid law is an actualization of certain kind of justice. As far as legal validity is concerned, given principles of natural law, protecting human goods, have the ruling position. Therefore, and in this sense, there is a necessary relationship between law and morals.

On the contrary, a supporter of *legal positivism* treats law as a factual phenomenon. For him, law appears as rules, decisions and outcomes of human will, and law is not dependent on justice or morals. Often, morals are understood as personal feelings or opinions and as such powerless in relation to law.

The author of the article treats law as an expression of justice. On the other hand, certain and given principles of justice or morals are not adopted as the starting point. This approach is introduced as the *legal point of view*, in the form of *legal knowledge* understood as *interpretation* and *understanding*, employed by judges and legal scholars.

In legal interpretation, sections of *statutes* and/or *precedents* are treated as the given *starting points*. On the other hand, they are understood as an *expression of justice* as well as other *substantial reasons*. There are certain principles of justice and other substantial reasons adopted and confirmed in a society in the forms of statutes and precedents. The adopted and confirmed justice can be shown and known with the help of statutes and precedents. In this way, the pointed principles of justice as well as other substantial reasons are exploited effective reasons in legal interpretation.

Legal knowledge appearing as legal interpretation and understanding is a combined operation of and the *interplay* between formal and substantial reasons.

2. On Natural Law Jurisprudence

Natural law jurisprudence had the predominant position in Europe from the Middle Ages until to the 19th century. That is, until the adoption of modern societies and states as well as the rise of positivistic legal thinking. *Necessary relation between law and morality* is the most fundamental feature of traditional natural law jurisprudence and its most distinctive feature separating it from positivistic understanding of law. According to the natural *law* thinking law is treated as a *special case of morality*.

Thomas Aquinas is the father and paragon of traditional natural law school in Europe. Besides him, here, the focus has been laid on *John Finnis* who has continued Aquinas' project.[1]

According to traditional natural law jurisprudence demands of morality appear as the *orders of practical reason*. In words of Aquinas, law is nothing else but a dictate of practical reason, and as such it is eternal and a manifestation of divine reason.[2] The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally.[3] Therefore, the natural law is nothing else than the rational creature's participation of the eternal law.[4] No doubt, according to Aquinas, all laws have a certain given foundation and provenance: God's order. In addition, following the principles of *Aristotelian philosophy*, law regards first and foremost the order to the common good according to Aquinas.[5]

According to Finnis, however, natural law can be understood without adverting to the questions of the existence of God and certain faith. In addition, his own approach on natural law offers such an interpretation.[6] Possibility for a secular approach is a significant feature of European modern natural law thinking after the 17th century.[7]

A crucial point of natural law doctrine is constituted by the *principles* of natural law. They are certain given principles protecting human goods. They are eternal and immutable.[8] According to John Finnis, they have no history.[9] They are certain and given things because human beings as creatures are certain and given things. Therefore, there is *no history* of human beings or human goods either. Accordingly, it is presumed that human beings and their goods are self-evident, eternal and immutable.[10] The basic features of human societies are eternal and immutable as well. The doctrine of natural law appears *static*, which has been one of the traditional objects of critique provided by the leading legal positivists.[11]

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[1] See Bix (1996), p. 228.
[2] Aquinas, first part of the second part, question 91, article 1.
[3] Aquinas, first part of the second part, question 90, article 4. Accordingly, here, the will of God is treated as the foundation of morals and law. This is the foundation of voluntaristic natural law theories. See Bix (2002), p.68.
[4] Aquinas, first part of the second part, question 91, article 2. See Finnis (1980), p. 398.
[5] Aquinas, first part of the second part, question 90, article 3.
[6] Finnis (1980), p. 49, 402 and 403.
[7] Bix (2002), p.67. See also Finnis (2002), p. 6.
[8] See Finnis (2002), p.1.
[9] Finnis (1980), p. 24. In addition to natural and human (positive) law Thomas Aquinas defines and mentions two other laws: eternal and divine (divided into old and new). On the other hand, Aquinas seems to deny law in the fomes of sin. See Aquinas, first part of the second part, question 91 and 93. According to Aquinas, the principles (precepts) of the natural law are many in themselves, but are based on one common foundation and principle (the first principle). The first principle is "good is to be done and pursued, and evil is to be avoided". Aquinas, first part of the second part, question 94. Finnis mentions the fulfilment of all basic human goods as the master principle. Finnis (2002), p. 28.
[10] See, for instance, in the case of knowledge ("knowledge is good") as a basic value and a practical principle. Finnis (1980), p. 64.
[11] See, for instance, Kelsen (1961), p. 399 and Hart (1994), p. 92.

According to the basic principles of natural law theory, *positive* (human) *law*, that is, law created and enacted by human societies, *derives its validity from natural law*, that is, from the certain and given principles in two different ways. First, as conclusions from premises, that is, from the principles of natural law, and second, by way of determination of certain generalities.[12]

Because of the second way, there are variable *determinations* in the frames of the principles of natural law. Positive laws are different in different places and times; they are variable determinations.

Principles of natural law are general, and therefore, adjustments, qualifications and choices are needed. On the other hand, it is presumed that all the *positive laws*, in order to be correct and valid, are *enacted on the condition of the principles of natural law*. That is, in terms of Finnis, "natural law 'already somehow in existence' does not itself provide all or even most of the solutions to the co-ordination problems of communal life".[13]

Natural law is in the dominant position in relation to positive law, but natural law proves to be insufficient in this respect. In addition, because of human weaknesses and in order to maintain peace and virtues, it is necessary for positive laws to be framed.[14] For practical reasons, legal procedures and forms are necessary. Ultimately, nevertheless, they are exercised because of protection of human goods.[15]

Determination in the form of legislation and precedents is needed because of the general nature of principles of natural law. However, sections of statutes as well as precedents prove to be vague and imprecise as well. Therefore, determination in the form of conventional legal *interpretation* is needed as well.[16]

Conflicts between the natural law and positive laws are possible. According to Aquinas, every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point a human law deflects from the law of nature, it is no longer a law but a perversion of law.[17] Despite its formal correctness and enforcement such a law is unjustified and *lacks legitimation*, moral authority as well as the "true" legal authority.[18] From the viewpoint of natural law jurisprudence, such laws are valid in the formal sense but *defective*.

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[12] Aquinas, first part of the second part, question 91, article 3 and question 95, article 2. Determination means here "making specific or concrete". See Bix (1996), p. 225.

[13] Finnis (1980), p. 28.

[14] Aquinas, first part of the second part, question 95, article1. On the other hand, positive law also is deficient in relation to natural law. Positive law does not forbid all vicious acts, by the obligation of a precept, as neither does it prescribe all acts of virtue. Aquinas, first part of the second part, question 96, article 2 and 3.

According to Aquinas, the natural law is a participation of the eternal law and therefore endures without change, owing to the unchangeableness and perfection of the Divine Reason, the Author of nature. But the reason of man is changeable and imperfect: wherefore his law is subject to change. The natural law contains certain universal precepts, which are everlasting: whereas human law contains certain particular precepts, according to various emergencies. Moreover, human law is rightly changed, in so far as such change is conducive to the common weal. Aquinas, first part of the second part, question 97, articles1 and 2.

[15] See Finnis (2002), p. 30 and 34.

[16] Finnis (2002), p. 38.

[17] Aquinas, first part of the second part, question 95, article 2. Here, Aquinas appeals to Saint Augustine.

[18] See Finnis (1980), pp. 354, Bix (1996), p. 226 and Finnis (2002), p. 12 and 22.

The eternal and given principles of natural law appearing as practical reasoning and moral (good) reasons and as part of law and legal reasoning demonstrates the necessary relation between law and morals. As far as acceptable positive law and jurisdiction is concerned, the necessary relation is granted. On the other hand, sections of statutes, precedents or other judgements, that is, positive law or its applications can be immoral and unacceptable, that is, contrary to the principles. In this sense, paradoxically, there is no necessary relation between law and morals even according to natural law thinking. The first approach bears internal approach to law, the essential approach, obeying the

The adopted relationship between natural law and positive law is applied even to *rights* of citizens. According to Aquinas, a right is a matter of relations between persons, and the natural basis is equality. As a natural dimension of rights (a natural right), for instance, there is the principle of proper price (Aristotelian *iustitia commutativa*). On the other hand, there are dimensions of rights founded on positive law, that is, human determinations (positive rights). Positive law means here both private agreements and their terms and public agreements as statutes or precedents.[19]

Accordingly, all acts of virtue, considered as virtuous, belong to the natural law. This is the area of *speculative reason*. Speculative reason is busied chiefly with the necessary things, which cannot be otherwise than they are, its proper conclusions, like the universal principles, contain the truth without fail. Therefore, by human nature we may mean which is proper to man, and in this sense, all sins, as being against reason are also against nature. As a rule, the natural law is altogether unchangeable. But virtuous acts, considered in themselves in their proper species, are not necessary prescribed by the natural law. Many things are done virtuously, to which nature does not incline at first, but which, through the inquiry of reason, have been found by men to be conducive to well-living. This is the area of *practical reason*. The truth or rectitude of the proper conclusions of practical reasoning are not the same for all and neither, where they are the same, are they equally known by all.[20]

According to natural law theory, on a large scale, *law is a universal order*. The differences between legal systems are secondary. As far as the most important elements of law are concerned, law is treated as a universal issue and affair common to all societies and people. According to Aquinas, it is evident that, as regards the general principles whether of speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all.[21] These principles are self-evident but, on the other hand, understanding and mature reasoning is needed in order to see them.[22]

The first principles of natural law are treated as given things, as self-evident and indemonstrable. According to Aquinas, their *foundation* is the *given* and immutable eternal and divine *orders*. Ultimately, the existence of legal order has a religious explanation.[23] The defence of natural law thinking has often been allied with the authority of the Catholic Church.

According to Finnis, however, the *first principles* are *not inferred from anything*. Principles of right and wrong are derived from the first principles.[24] The derivation is made with the help of intermediate principles which indicate basic requirements of practical reasonableness.[25]

The natural law *method* appears as working out the (moral) 'natural law' from the first (pre-moral) 'principles of natural law'. The aspiration of the method is to show reasons why (and thus the ways in which) there are things that morally ought or ought not to be done.[26]

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principle 'no ought from mere is' and the second one the external approach to law describing certain decisions as "legal facts". The latter one is not treated as a sufficient or intrinsic approach. See Finnis (2002), p. 11, 14 and 16.

[19] Aquinas, second part of the second part, question 57, article 1 and 2.

[20] Aquinas, first part of the second part, question 94, articles 3, 4 and 5.

[21] Aquinas, first part of the second part, question 94, article 4.

[22] Finnis (1980), p. 31.

[23] Bix (1996), p. 225.

[24] Finnis (1980), p. 33.

[25] Finnis (1980), p. 33 and Bix (1996), p. 229.

[26] Finnis (1980), p. 103.

Both Aquinas and Finnis treat positive law, like statutes and precedents, as norms of proper law when enacted on the condition of the principles of natural law. *Knowledge of law*, legal interpretation and jurisdiction appear as *practical reasoning* made on the condition and in the frames of the given principles of natural law.[27] In a large scale, positive law is treated as derived from the natural law.[28]

The sphere of law proves to be large and open to *substantial reasons*. As a matter of fact, all speak of normativity is legal.[29] Accordingly, all moral arguments founded on practical wisdom bearing the given principles are essential parts of legal reasoning, and their objectivity is granted. Arguments from and for justice, protecting human goods and promoting them, are natural legal reasons.[30] Natural law principles are treated as necessary conditions of a flourishing community, and they indicate the standards of proper and natural life of human beings. Even *contra-legem* interpretations and judgement, that is, deviations from the wordings of statutes or precedents, founded on the objective moral reasons, are conventional solutions.

3. Critical Notes on Natural Law Jurisprudence

Traditional natural law jurisprudence is often founded on the assumption of *divine order* as the given foundation of human beings and human societies. This is the approach adopted by Thomas Aquinas. It seems to be, however, that the presumed universal order appearing as the principles of natural law is a dimension of the *Christian world*, and more precisely, in the frames of the Catholic Church. The "universe" of the adopted universalism seems to, after all, restricted.

The *religious foundation* appears irrelevant, redundant and even misleading from the legal point of view. Association with beliefs of a particular religious tradition, doctrine and faith appears either unnecessary or harmful. The approaches adopted by many supporters of rationalist natural law during the 17th century and that after, for instance, made by John Finnis, are good examples. They bypass or abandon the presumption of the existence of God and the certain divine order as the foundations of natural law and legal systems.

Accordingly, I take as granted that legal knowledge is not founded on religious or theological arguments. They are irrelevant from the legal point of view. In addition, they might turn out to be even harmful from the viewpoints of equality and freedom of religion.

Secular versions of natural law thinking prove to be insufficient and misleading as well. I put forward *two critical notes* on these approaches. The aspiration of the first one is to show the missing foundation of the natural law approach. The aspiration of the second one is to show the irrelevancy of the natural law approach from the point of legal knowledge.

The presumed divine order provides, as such, a solid foundation for both natural and positive law according to a natural law theory. It is a consistent explanation for the given starting points, that is, the certain axioms of a theory and the basic inferences from them.

Abandonment of the presumed divine order means the *abandonment of the* given *foundation* of natural law theory. Despite the abandonment of the divine foundation the very same axioms and starting points are, nevertheless, preserved, maintained and treated as the given

[27] Bix (1996), p. 223.
[28] Aquinas, first part of the second part, question 95, article 2 and Finnis (1980), p. 281.
[29] Finnis (2002), p. 1. Because of the large and open sphere of law jurisprudence expand to the field of ethics as well as political philosophy and vice versa. There are no strict borderlines. Finnis (2002), p. 18.
[30] See Finnis (2002), p. 28.

starting points of inferences in a theory of natural law. In other words, despite the abandonment of the given foundation of the axioms the *same axioms* are, nevertheless, adopted and treated as given things but without any explanatory or justifying foundation.

The theory of Finnis is a good example. According to Finnis, principles of natural law, protecting basic human goods, have no history. They are self-evident. They cannot be demonstrated, and they need no demonstration. Accordingly, the axioms of Finnis' theory are given things but there is *no explanation* or foundations *for the givenness*.

It is true that the basic forms of good, enumerated by Finnis are relevant for human beings. They are, no doubt, objects of legal protection. On the other hand, understanding of these objects does not tell us about their protection. It is not possible to derive norms protecting human goods from the goods themselves. The *protection* can be *arranged in many ways*. The adopted protection and its details bear the crucial legal issues.

It is true, as well, that *practical reasoning*, in the way Finnis has described it, bear an important dimension of legal reasoning. On the other hand, mastering practical reasoning *is not sufficient* in order to gain legal knowledge. Practical reasoning, presented by Finnis, refer to substantial reasons exploited both in legal interpretation and jurisdiction. Substantial reasons are important legal reasons but, nevertheless, they are in the secondary position in legal reasoning. References to *statutes* and/or *precedents*, that is, conventional legal sources are *primary legal reasons*. That is, references to the chosen ways of legal protection of human goods indicate the primary legal reasons. In addition, mastering practical reasoning designates merely mastering a method of legal reasoning. The content and, in the sense of interpretation, objects of legal reasoning are, here again, statutes and/or precedents.

The question framing presented by the supports or natural law thinking proves to be misleading from the viewpoint of conventional legal knowledge. Legal questions are not questions about given human goods and, after that, about the best possible protection of them. Instead, legal questions are about the *adopted ways of protecting human goods*. There are various ways with various emphases in protecting human goods.

Basically, certain given human goods bear not the given starting point of legal knowledge or reasoning. Instead, the adopted and decided ways of protection of the goods bear the starting point. Therefore, the starting point of reasoning is valid and applicable sections of statutes and precedents. With their help it is possible to make conclusions about protected human goods and about the ways they are protected as they are adopted in a legal system.

In short, in legal reasoning, legal protection is not inferred from given human goods. On the contrary, protected *human goods are inferred from adopted legal protection*. With the help of knowledge of and understanding of adopted legal protection, that is, statutes and/or precedents, it is possible to know and understand human goods protected in a society in certain time.

In words of natural law concepts, in conventional legal knowledge and interpretation, human, that is, *positive law* is in the *primary position*. The principles of "natural law", that is, *substantial reasoning*, referring to the content and justification of positive law, is in the *secondary position*.

This is not, however, an order of importance but a *logical order*. It is the way how knowledge on adopted values and other substantial reasons as parts of legal order is reached in legal interpretation, which is here treated as the form of legal knowledge, as we can see in details later.

Basically, the assumed universal legal order, on the level of the given principles of natural law and determining different positive legal orders in a large scale, is not a relevant assumption. That kind of assumption is not made by legal scholars or judges when they interpret law. Instead, they start with applicable statutes and precedents of a legal system, and with the help of them, as well as with the help of legal interpretation, they can understand the protected human goods and the ways the goods are protected here and now, that is, as a part of a certain legal system.

Accordingly, natural law theory seems to be rather an ethical theory than a theory of law relevant from the viewpoints of legal dogmatics or jurisdiction.[31]

4. On Positivistic Jurisprudence

The birth and rise of positivistic legal theories at the end of 19th century and at the beginning of 20th century is easy to connect, for instance, to the birth of European national states, to adoption of the Enlightenment and other new European ideologies, to codifications of new state laws, to the rise of philosophical positivism and to secularization. In the era of the *new modern Europe*, the traditional doctrine of natural law seemed outdated and unfit. It did not appear anymore as a relevant or realistic study on law.

Here, attention is paid to two important representatives of legal positivism, *Hans Kelsen* as an exclusive positivist and *H.L.A Hart* as an inclusive positivist.

The two most important characteristics of positivistic thinking are the social and the separability theses.[32] According to them, law is a matter of fact as decisions or as other social facts, and there is no necessary connection between law and morals. These theses are closely connected.

The *social thesis* is one of the cornerstones of the approaches of both Kelsen and Hart. Kelsen saw legal rules in the form of sections of statutes as legal facts and as the content of the lawgiver's will.[33] For Hart, law appears as existing and valid rules of a legal system identified by the rule of recognition. For him, the existence of a legal system is a social phenomenon.[34]

For Kelsen, legal rules as sections of statutes (basically, the legal ought in the form of imputation) are the defined and existing objects of the statements of legal dogmatics. These statements are true or false, and hence, true statements are value-free and objective descriptions of their objects. Moreover, Kelsen employs correspondence as the definition of truth. Accordingly, valid legal rules are social facts and there is a *special branch of reality* as the object area of legal dogmatics.[35]

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[31] According to Bix, "Natural law theory often has little if anything to do with 'law' as that term is conventionally used". Bix (2002), p. 70). Bix's sentence can be interpreted in the following way. Natural law theory is remote and irrelevant from the viewpoint of conventional legal knowledge, legal reasoning and legal dogmatics. Instead, it can be treated as an ethical theory, and as such it is, nevertheless, relevant on the level of jurisprudence. This is why we are here discussing about natural law theory.

From this viewpoint, the description of natural law approach, introduced by Finnis, is understandable. According to him, natural law approach manifests an internal viewpoint. The dominant concern is judging for oneself what reasons are good reasons for adopting or rejecting specific kinds of option. Standards and norms of conduct are never constituted by the facts of convention, custom or consensus. Finnis (2002), p. 4.

[32] Coleman and Leiter (1996), p. 241.

[33] Kelsen (1970), p. 73 and 79.

[34] Hart (1994), p. 201.

[35] Kelsen (1970), p. 4 and Kelsen (2013), p. 196.

On the other hand, the existence of legal norms differs from the perceivable reality. Here, existence means *validity*. The special kind of legal reality embodies the will of the lawgiver (in a non-psychological sense).[36] Existence of laws depends on the decisions of the lawgiver. With the help of these philosophical points of departure Kelsen defended legal dogmatics as an acceptable branch of *science* but, at the same time, as an independent branch. The criteria of acceptability were, nevertheless, provided by philosophical positivism.[37] In addition, there seems to be no room for evaluations in the Kelsenian statements of legal dogmatics. For instance, interpretative sentences containing principles of justice are doomed to be subjective.

For Hart, the existence of legal rules or, rather, the *existence of a* certain *legal system* bears, on the one hand, social facts but, on the other hand, validity without any ontological commitments in relation to individual recognized rules. The existence of rules is explained by the membership of a legal system. Validity for Hart is a certain way to *understand language*, which is basically a factual (and contingent) practice.[38] The criteria of validity, in turn, refer to certain *rules of recognition* adopted by a certain society at a certain time. These criteria are reduced in the same way to a certain established *practice* of people and a society.[39] Basically, the existence of the rules of recognition means the existence of a certain practice of judges and other officials and, hence, Hart closes the gap between is and ought, too.[40]

The both main theses of legal positivism, that is, social and separability theses together entail the *difference* in quality between *law* and *morals*: descriptions of valid law (or expressions of valid law) differ radically from moral evaluations. The existence of legal rules is a social fact, but moral reasons appear as different personal opinions, attitudes, feelings or personal interests, that is, subjective expressions of persons but not descriptions of a society.

This presupposition appears in the major texts of positivists. Relativity of moral values in these texts means, in fact, different and contrary personal moral evaluations or values or interests of different groups of persons but not values of societies, that is, shared values of the members of a society as the subjects of a legal system.[41]

According to the positivistic understanding of law, the *sphere of law* is treated *narrowly*. The sphere of law is restricted to *positive law*, that is, in practice, to official sources of law. There are no other kinds of law. Legal reasons are formal reasons referring to statutes or

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[36] Kelsen (1961), p. 30, 46 and 153, and Kelsen (1970), p. 4, 72 and 76. I interpret the term ‘ a norm’ employed by Kelsen as a rule.

[37] Humanities and social sciences were under a great pressure assessed by the prevailing positivistic philosophy at the end of 19th and at the beginning of 20th century. Kelsen, like many other theorists, felt obligated to defend legal dogmatics as an acceptable branch of science. In addition, Kelsen found it necessary to transform legal dogmatics into a branch of science acceptable from the viewpoint of positivistic philosophy. On the other hand, supporters of legal realism went ahead much further in this way.

[38] See e.g. Hart (1960), p. 145, Hart (1984 a), p. 23 and Hart (1994), p. 94. The influence of the mature Wittgenstein on Hart is obvious here. That is why the phrase ‘use in the language’ (*Gebraucht in der Sprache*) is important in this respect. An existing practice can be seen as the core of Wittgenstein’s idea. See Wittgenstein (1958), I, p. 43. At the level of legal issues, Hart interprets this approach as the thesis according to which a concept’s meaning (content) is determined by its use (as a social practice). For the dynamic character of positive law, see also Kelsen (1961), p. 399.

[39] Hart (1994), p. 101 and 109. About the crucial role of officials as the foundation of existence of a legal system, see Lamond (2013), p. 110

[40] Both Kelsen and Hart define a crucial crossing point which belong to the world of ought (*sollen*) and to the world of is (*sein*). Kelsen defines legal rules as existing facts with the content of ought. Hart defines the rule of recognition as a norm and, at the same time, an existing fact of a society. See Kelsen (1970), p. 4.

[41] I interpret the texts of Kelsen and Hart as expressing the emotivistic or subjectivistic view on morals. See Kelsen, (1970), p. 63, Kelsen (1948), Hart (1994), p. 200 and Hart (1984 b), p. 82.

precedents. Instead, moral reasoning appealing to justice or other substantial reasons are doomed to be subjective evaluations, that is, non-legal reasons.

On the other hand, a judge can use substantial reasons in the form of *judicial discretion*. According to positivists, a judge exercising judicial discretion is *acting as a lawgiver*; that is, she or he is creating new law. In controversial cases (hard cases) law proves to be incomplete. In such cases incomplete law does not provide answers to legal questions. Controversial cases are unregulated cases and, therefore, judges must exercise restricted law-making function. This is a crucial part of the legal doctrine of Kelsen. In such cases, the new rules given by a judge are called individual legal rules.[42] Hart adopts a similar doctrine of judicial discretion.[43]

Finnis criticizes legal positivists' descriptive approach. According to Finnis and founded on Aristoteles, jurisprudence is part of practical philosophy, and practical philosophy is a disciplined and critical reflection on the goods that can be realized in human action and the requirements of practical reasonableness. It is necessary to assess importance or significance in similarities and differences within defined subject-matters.[44]

Even descriptive theorists, like legal positivists, should make these choices according to Finnis. They have to define crucial concepts and they have to decide central cases (typical cases) of the subject matter. On the other hand, they refuse to show the necessary reasons and foundation of their choices and definitions. So, the crucial question is where the concepts and central cases come from. They are excluded from the sphere of law to the pre- or post-legal sphere, for instance, to the sphere of morals as something independent from law by the positivists. Instead, they insist on variable considerations and evaluations of people.[45] Therefore, positivistic theory is short of its necessary foundation and it proves to be insufficient and misleading.

According to Finnis, practical philosophy, like jurisprudence, must have a practical foundation, that is, reflections on human goods. Legal concepts and central cases as the tools of jurisprudence have to be founded on certain choices embodying the adopted normative goals and justifications of law as the supporters of human flourishing. Central cases have to be identified with the help of requirements of practical reasonableness. Therefore, there is a necessary relation between law and morality, that is, human practical reasonableness.[46]

5. Critical Notes on Positivistic Jurisprudence

Legal positivism can be blamed for the *misunderstanding about* the role and significance of *statutes* and *precedents* as crucial features of modern societies.

Historical reasons for that, especially in the Continental Europe are obvious. Supporters of modern societies considered the new European societies different from the previous pre-modern societies founded on static and traditionalistic worldview. New European societies were detached from the pre-modern traditions and from the influence of religion. A new enlightened society was founded on reasons, and its laws were expressions of the will of the people written in the form of state statutes and enacted by parliaments or heads of the states. In addition, the

[42] Kelsen (1970), p. 234 and pp. 237.
[43] Hart (1994), p. 252.
[44] Finnis (1980), p. 11, 12 and 19.
[45] Finnis (1980), p. 13-15 and 18.
[46] Here Finnis appeals to Max Weber. See Finnis (1980), p. 16.

crucial position of state law, rather, exact written statutes, was seen as a guarantee of legal certainty and equality of citizens. State laws were not anymore expressions of a certain immutable tradition but expressions of a variable legislative will.

Even the positivistic jurisprudence is *nonhistorical* but in a different sense and way compared with natural law jurisprudence.

Even in the frames of English common law tradition, the nature of law and precedents were seen in a new way, in a positivistic way. Accordingly, it was not convincing or plausible any more to provide certain principles of natural law expressing given, immutable and determinative factors of law.

Legal positivism bears a *narrow conception of law*. It is too narrow which has been pointed out by the famous critic of *Ronald Dworkin*.[47] Adoption of the principles of modern society does not compel one to adopt a narrow conception of law. There are, however, even more severe deficiencies included in positivism. Both the main theses of positivism, that is, social and separability theses can be disputed.

According to positivism, law as an object of knowledge appears as social facts. These facts appear as sections of statutes or precedents, and they are described by a judge or a legal scholar. According to Kelsen, as decisions, they are manifestations of the will of the lawgiver.[48] According to Hart, they are known and shown with the help of the rule of recognition, basically founded on practices of judges and other officials.

As social facts law differs from moral evaluations in a crucial way. There is either a deep categorical difference between them (exclusive positivism), or the relationship between is contingent (inclusive positivism).

The idea of knowledge of law as descriptions of social facts can be contested. As far as the narrow conception of law is abandoned, the knowledge of law understood as fact descriptions is not sustainable any more. The *employment of principles* referring to justice and values is an essential feature of legal knowledge in addition to references to sections of statutes and precedents.

Why are the *principles* important in Dworkin's critique? According to my understanding, principles unite law and morals in a necessary way. Principles appear as *embodiments of justice* and values and they are independent of the existence or wordings of certain statutes and precedents. Appealing to justice of a society as well as other moral values is a necessary and significant feature of legal knowledge and reasoning in Western Societies.

In addition, there are *other substantial reasons* employed as legal reasons, like policies, administrative and economical goals and consequences of different options of interpretations or decisions. Advanced legal interpretation and decision making contain many kinds of relevant and applicable reasons independent of wordings of certain sections of statutes or precedents.

Often, principles of justice, policies and goals are seen as the necessary background of sections of statutes and precedents. They are treated as *justifications* and *explanations* of statutes and precedents. Therefore, it is natural and justified to employ them as legal reasons and as means of interpretation of these sections of statutes or precedents.

In addition, principles of justice, policies and goals are employed in broader ways. *Analogical interpretation*, that is, leaning on sections of statutes or precedents not straight

[47] Dworkin (1977), pp. 22.
[48] Kelsen (1970). p. 4.

applicable in a situation or case can be justified with the help of principles of justice, policies and goals. The same holds true with the so-called *gaps* in law and *contra-legem* decisions. Many of them can be seen as the Dworkinian hard cases.

Considering the consequences of different interpretation or decision options is similar substantial reasoning independent of wordings of statutes and precedents. It is an essential feature of legal interpretation and decision making.

Appealing to principles of justice, policies, goals and consequences of interpretations and decisions is *substantial reasoning supplementing appealing to applicable sections of statutes or precedents*. It is not a matter of describing law as facts but *understanding law* as a normative and meaningful whole in a justified way. There is a crucial difference between describing facts and understanding something.

Understanding law contains references to applicable sections of authoritative materials, that is, statutes and/or precedents as well as appealing to principles of justice, policies, goals and consequences of interpretations or decisions. This is the real content of advanced knowledge of law. It appears as conventional and advanced legal interpretation. Understood in this way, it is clear that legal knowledge as legal interpretation contains a necessary connection between law and morality and it does not bear fact descriptions.

6. A Fresh Start: On the Relationship between Law and Morals in the Frames of Legal Knowledge

In connection with critique against legal positivism, I *assumed* the *necessary relationship between law and morality*. On the other hand, in connection with critique against natural law thinking, I *abandoned the certain and given system of principles* as the necessary foundation of legal systems and as the given starting point of inferences. Therefore, no doubt, the assumed relationship between law and morality needs clarification.

Here, the adopted viewpoint is a *legal approach*. More precisely, the subject matter is legal knowledge as a topic of jurisprudence. What kind of knowledge is at the stage? What is the role of values in legal knowledge and interpretation? The object of the study is the knowledge of law judges and legal scholars possess and exercise in their job.

In the field of ethics, it is possible to presume certain human values as the starting point. A common or universal system of human values is often presumed. It is possible to see human norms as applications of these values. This seems to be the viewpoint of natural law theory as well. In the frames of legal viewpoint, the layout is different. The *differences between legal systems* have to take seriously. In this respect, the supporters of legal positivism are right. There are different legal systems containing different norms in the contemporary world.

No doubt, there are many *common norms* shared by all legal systems, at least most of them, and there are many *common values* as the groundwork of many, perhaps, all legal systems. In this respect, supporters of natural law thinking are right.

Nevertheless, a legal system bears an *independent system* and, as a whole, an independent object of knowledge. This is the undisputed starting point and presumption in all legal systems. Competent legal knowledge is knowledge in the frames of a certain legal system. Basically, all legal knowledge is knowledge about a legal system. Conventional legal point of view is not a universal viewpoint.

Differences between legal systems or different norms of the systems do not exclude the necessary relationship between law and morals. In the frames of a legal system, *moral values* can be treated as the *foundation of the system*. It is even possible that several systems or all systems share the same values. On the other hand, it is possible that the same values are *interpreted*, that is, applied, emphasized and weighted in *different ways*. Human goods can be protected in many different ways and with the help of many different procedures. Values as such are on the general level. In the frames of the legal viewpoint, the crucial issue is the varying ways they are implemented and adapted. As a matter of fact, these differences bear the main source of different norms of different legal systems despite common and shared values.

For instance, in a certain legal system, the adopted balance between contrary principles, expressing adopted values and their adopted weights in the society, is specified and expressed with the help of legal rules. The differences between legal systems are embodied as different legal rules. Moreover, often, the adopted values as the groundwork of the legal system are not an interesting topic as such on the level of legal reasoning. Instead, the adopted balance between values and between conflicting principles is the interesting topic. In addition, in unregulated situations or cases, the proper balance between conflicting principles has to be decided without the straight help of legal rules.[49]

The same holds true with relationships between values and other substantial reasons as the justifying groundwork of a legal regulation.[50] Policies or goals of a society are often treated as self-evident and undisputed matters. The interesting matter is the influence and weight of a policy or a goal in relation to certain principles and values, especially in certain situations or cases. An adopted policy or a goal often conflicts with an adopted principle or a value. Protected rights of citizens are often in tension with policies of their societies.[51]

Therefore, it is not helpful to indicate certain values or goals as such. Normally, there is no disagreement about them. Instead, the crucial and interesting question is, whether those values or goals are treated as operative and effective legal reasons and what are the exact weights of those substantial reasons as parts of legal reasoning or decision-making.

Does this mean that there are certain given values expressed with the help of given principles and certain given policies and goals bearing the given starting point of legal interpretation and reasoning? No doubt, my answer is negative. I have already stated that certain given human goods bear not the given starting point of legal knowledge. Instead, the adopted and decided ways of protection of the goods bear the starting point. Therefore, the *starting point* of legal reasoning is valid and applicable sections of *statutes* and/or *precedents*. They are norms about rights and duties as well as procedures. *With their help it is possible to make conclusions about protected human goods* and especially about the ways they are protected as adopted in a legal system at certain time.

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[49] See Dworkin (1977), pp. 24 and 35.

[50] See Dworkin (1977), pp. 82.

[51] Here appears an additional difference compared with traditional and conventional natural law thinking. Following Aristotelian philosophy, it is presumed in natural law tradition that personal goods can be reduced to common good, that is, the goals of the societies of people. Therefore, there cannot be any genuine difference or tension between justified goods of individual people and the goals of their societies. However, the tension between rights belonging to people and common good, that is, policies of their societies is one of the main theses of contemporary legal thinking, emphasized, for instance, by Ronald Dworkin. See Aristotle (2002), book I, chapter 2, 1094b, Aquinas, first part of the second part, question 91, article 2, Finnis (1980), p. 214 and Dworkin (1977), p. 22, 82, 90.

In a concrete interpretation situation, like a court case or a subject of discussion in legal dogmatics, an *established practice of legal reasoning* has been adopted. The first step is to *show applicable* sections of *statutes* or *precedents*. They are applicable if they match the facts of the case or situation in a sufficient way. They are considered effective because of their form. In other words, they are employed as formal reasons in legal interpretation. Even in unregulated situations or cases, this is the first step. Possible rules as the foundation of legal analogy or the lack of applicable rules is the outcome of this step.

However, finding applicable sections and/or precedents and considering applicability or suitability of a section or a precedent contains already legal interpretation. The situation or case has to be described in legal terms, that is, the situation or case has to be perceived in and with the help of proper and suitable legal terms. The crucial question is: *What is this all about in the legal sense?* The relevant question is how the situation or case shall be described and understood from the legal viewpoint and in the frames of the legal system. Here, systematics and relevant concepts of the system are applied. This is a crucial step and form of legal understanding, that is, legal interpretation. Even so-called easy or routine cases always contain this kind of interpretation.

Often, however, different rival sections of statutes or precedents are proposed by the parties of a case of by different legal scholars. The *choice* between proposed sections or precedents will be made with the help of interpretation. It is presumed that the alternative equipped with *best legal support* will be chosen. Even the applicability and suitability of the only proposed section of a statute or a precedent has to be justified in the same way. There are always many alternative ways in understanding a statute or a precedent and many alternative applications of them.

This is the stage of interpretation where references to *principles* (values), *policies*, *goals* and *consequences* of different options of interpretation start to take place. They are understood as the *justifying factors behind the formal reasons*, that is, statutes and precedents, as their background. Application of a certain section of a statute or a precedent is justified with these substantial reasons. In other words, application of certain official sources of law (sections of statutes or precedents), that is, formal reasons of interpretation, is justified by substantial reasons.

The order of the stages of legal interpretation is the important issue here. First, the attention is pointed out to the possibly applicable sections of statutes and/or precedents, that is, formal reason of interpretation. Second, the attention is pointed out to the substantial reasons. Substantial reasons are treated as the justifying factors of the applied sections or precedents, that is, something behind the applied sections or precedents and their wordings as their justifications.

The aspiration of legal interpretation is to *understand* the applicable sections of statutes or precedents. It is the core of legal knowledge. The crucial question is: what is the purpose or target, that is, the true normative meaning of this regulation. Understanding wordings is the starting point but it is not enough. Advanced interpretation requires understanding of substantial reasons as the justifying reasons of the applied sections or precedents. I take it as granted that all legal decisions and interpretations must be justified in the substantial sense.[52]

[52] In practice, nevertheless, substantial justifications of decisions or interpretations are expressed in the needful extent. Often, references to sections of statutes are enough. Easy or routine decisions, for instance, made by a policeman or another officer, are normally made without any references to principles, values or other substantial reasons. For practical reasons, it is not necessary. Lack of substantial justifications means here that the decision-maker considers the case easy and unproblematic. Even in these cases, however, the decision or interpretation has to be justified and, for

In the cases of legal *analogy* and in *unregulated situations* or cases, principles and other substantial reasons are employed as justifications of analogy and the adopted interpretation in the gap situation. In other words, in these hard cases, because of the lack of rules straight applicable interpretation and/or decision has to be made on the ground of substantial reasons.

Advanced legal interpretation requires understanding of the applicable *systematics* and *concepts* adopted in the legal system, too. In addition to the need for legal perception of situations and cases, specific systematic principles are employed. Systematic reasons function in interpretation in the same way as substantial reasons. Basically, systematic reasons are founded on material justice. Similar cases collected together and being subordinated to a certain concept are treated equally.

Accordingly, values are treated as parts of the justifying framework of statutes and precedents. Statutes and precedents are expressions of adopted justice in a society, and they are understood with the help of adopted values as their background. As a rule, statutes and precedents are applied but the applications are influenced by values as justifying reasons. Therefore, legal interpretation contains the *necessary relationship between law and* values, that is, *morals*.

The significance of the justifying reasons does not restrict merely to applications of certain sections of statutes or precedents in a certain adopted way. Often, they are treated as the justifying groundwork of a larger part of the legal order. In this way, they can act as justifying reasons in analogical interpretations, and even *contra-legem* decisions are possible and rational. An important and heavy substantial reason can overrule a section of a statute or a precedent, most often, however, in a certain situation or a case.

Examination and analysis of adopted principles of justice and other substantial reasons behind and as the foundation of the wordings of statutes and precedents provide means of *critical discussion and interpretation* as well. A certain section of a statute or an interpretation adopted in a precedent might turn out to be problematic in relation to the values and other substantial reasons behind the statute, other statutes, systematics or the whole legal system. The adopted section, precedent or interpretation under the criticism might prove to be poorly justified. Restrictive interpretation or application or, here again, even *contra-legem* decisions are possible. Often, convincing, heavy and overruling substantial reasons are provided by a constitution. In the end, legal interpretation is always made in the frames of a whole legal system.

In this arrangement and according to the established logic of legal interpretation, values, often enunciated in the forms of principles, appear as the justifying framework of statutes and precedents. From the legal point of view, certain statutes and precedents are adopted in a legal system and, at the same time and together with the statutes and precedents; certain values with certain weights are adopted in the society. These *values and their significance* are *confirmed* by the adoption of the statutes and precedents.

In other words, a society has adopted certain values with certain weights, and this adoption and weights can be proved by the adoption and wordings of certain statutes and precedents, that is, by decisions as to the formal reasons of legal interpretation. On the other hand, their form as decisions and social facts is not the determinative issue. It is merely the necessary formal aspect of decision making. The important issue is the normative meaning contents of the statutes and

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instance, in a case of appeal or contest, one must be able to show the substantial justifications in the needful extent. In other words, they shall not prove to be problematic in the substantial inspection. Eventually, in the profound analysis, it must be possible to show the material justice of all decisions and interpretations.

precedents as well as the values and other substantial reasons as justifying factors of legal interpretation confirmed by the adoption of the statutes and precedents.

7. Conclusions

The basic principles of traditional *natural law jurisprudence* prove to be *problematic*. The traditional religious framework is alien to the legal viewpoint. Even the secular interpretations of the theory prove to be problematic. From the viewpoint of a legal system and legal knowledge, the certain given principles of natural law appear arbitrary.

No doubt, legal systems share many common values and protect human goods. On the other hand, the adopted different ways of protection in the frames of different legal systems is the crucial point. Legal knowledge is about a legal system and competent in the frames of the system.

The starting point of legal knowledge consists of sections of statutes and/or precedents. They are manifestations of the adopted principles of justice and other substantial in a legal system. The adopted values and the ways they are protected in a society can be shown and known with the help of statutes and precedents.

Because of the important role of values, principles of justice and other substantial reasons the *positivistic approach* on law and legal knowledge proves to be *problematic* as well. Legal knowledge as legal interpretation does not consist of descriptions of law as facts. Rather, sections of statutes and precedents appear as objects of understanding. Moreover, there is a necessary connection between law and morals.

Sections of *statutes* and/or *precedents*, that is, formal reasons function as the *first stage* of interpretation. With the help of them, it is possible to *show* and *know* values, principles of justice and other *substantial reasons as the justifications* of the sections and precedents adopted in a legal system and society. As justifications, values, principles of justice and other substantial reason function as efficient legal reasons as well. Legal knowledge as legal interpretation and understanding is interplay and collaboration of formal and substantial legal reasons. Both of these reasons are employed as premises of the conclusions of legal interpretation.

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