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Natural Law Theory (Contemporary)

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Introduction

Under the heading "contemporary theories of natural law," we refer to a number of theories of law inspired by the traditional theory of natural law, and especially by Aquinas' thought, but that substantially diverge from the neo-Thomist reading. The latter, which is nowadays represented by updated (McInerny 1997) or deeply renovated versions (Rhonheimer 2000), was characterized by a metaphysical foundation and by an account of the natural law as a theory of morals, which did not have any substantial impact on the field of jurisprudence, with few exceptions (for instance, Massini 2005). By contrast, not only the new theories of natural law relate themselves to contemporary moral and political philosophical debates (George 1992, 1996a), but most importantly they pretend to compete with the theories of legal positivism, claiming to provide a much better grasp of positive law, compared to the latter ones. In fact, they can be labeled as natural law theories of positive law or as natural law jurisprudence.

These new theories of natural law state – by so doing paying respect to their tradition – that the issue of the obligatoriness of positive law and the one of the justification for obeying the law both constitute full and integral part of any theory of law. As it is well known, legal positivism has either undervalued the theoretical relevance of these issues, insofar as these would imply moral and political considerations, or it has not done anything else than addressing them just in terms of the coercive power of law, which stems from a legitimate authority. HLA Hart wrote: "laws may be law but too evil to be obeyed" (Hart 1957–1958: 620). But if a valid norm must not to be obeyed, then it is normatively inert. It is indeed bizarre for a theory of law not to address legal normativity in its fullest meaning. If we acknowledge that legal positivism is not a whole theory of law's nature (Gardner 2001: 210), then we also acknowledge the existence of a space, which can only be filled by theories that somehow explain normativity in terms of considerations of merit and, as a consequence, claim that all definitions of law cannot but take into account, at least in part, its content.

This widened spectrum of the theory of law as a whole implies a rejection of the Kelsenian ideal of a legal science which is independent from moral and political philosophy – feature which is mistakenly considered the essence of its scientific status. The law is clearly aimed at providing continuity, stability and regularity to the life of a community (Finnis 2012: 67–69).

Whether the research goals of the new theories of natural law are plausible or not, must be

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assessed both on the grounds of the wide recognition of the priority given to human beings and their dignity, and on the current evolutionary trends of positive law, which is in fact more and more entrenched with value judgments – due to the advent of human rights, as well as the constitutionalization of the law – phenomena which have both triggered a process of internal critique in the legal positivist debate (Viola 2016: 75–90). Two theses, in particular, originated from legal positivism, have unintentionally made a contribution to these new versions of natural law theories.

The first contribution derives from HLA Hart's accent on the "internal point of view" in order to identify any legal rule. Independently from HLA Hart's intentions, the internal point of view spotlights the role of the participants, with their intentions and reasons in the process of using those rules, allowing for an explanation of the guiding role of the law, which is more convincing than the one offered by the empirical account of action (Rodríguez-Blanco 2017: 161). By endorsing the point of view of the participant, and not the third-person perspective, one is led to abandoning a mere descriptivist approach to the theory of law.

The second influential thesis is Dworkin's well-known distinction between rules and principles. Leaving aside Dworkin's intentions – his theory still being of uncertain theoretical location (See, for instance, Himma 2003) – the above mentioned distinction has displaced what was the theoretical centrality of the formal validity of the norm. Principles not only require identification criteria that are not merely formal, but also most importantly, constituting an ideal drive, request us to make use of practical reason. As a result of it, the law is understood more like a generative process rather than a ready-made product. When facing a product, one must deal with its source or pedigree (source thesis), while if one has to do with a process, then one will end up interrogating what are the criteria of correctness in the making of it. Under this approach, the same theory of law is normative in its own character.

The minimal conditions required for bringing forward, in the current times, a renewal of the natural law tradition are: a rational justification of the obligatoriness of the law, the point of view of the participant – i.e., the relevance of the practical reason – and the normative character of the theory of law.

This is the thesis which the new theories of natural law have in common: "necessarily, law is a rational standard for conduct" (Murphy 2003: 244; Crowe 2017: 114). This thesis, although able to mark the distance with legal positivism and voluntarism, is not sufficient for characterizing a theory as a natural law theory and, even less, as a theory concerning positive law. A few fundamental specifications are required. First of all, reference to reason must be understood in terms of reference to the area of practical reason, i.e., those reasons which regulate choices and actions. Second, these reasons are ultimately rooted in the good, which is the intrinsic aim of human action.

These new theories of natural law, which operate under this frame, do not elaborate on the traditional idea of natural law understood as a collection of precepts coming from the will of God and inscribed in human nature. These theories can be grouped under three different families: the epistemological, the ontological, and the aspirational trends. Clearly this categorization is only meant to have an explanatory function, but at the same time this may end up offering a simplistic account of the complex and rich interconnections among these theories.

The Epistemological Trend

This new wave of natural law studies starts with the pioneering work of John Finnis, *Natural Law and Natural Rights*, published in 1980 (Finnis 2011), which can be taken as a paradigmatic example of a new theory of natural law, insofar as it highlights each and everyone of the most relevant subjects that are still currently debated. In accordance to Finnis, a theory of positive law presupposes a theory of ethics and implies a certain stance in political philosophy.

This new theory of natural law – which is often referred to as "new classical theory of natural law" – is in reality the outcome of the research undertaken by a number of philosophers who have reinterpreted Aquinas and his philosophical

and theological work as a whole, but which, *stricto* sensu as a theory of law, has been developed initially by Finnis, followed by Robert P. George (1996b). Apart from some theorists who endorse this stance, even though sometimes distancing themselves quite substantially from it (see for instance Grisez and Boyle 1998), there are also others who endorse its general targets, but with very substantial variations in terms of its moral, legal, and political theory background. Therefore, an overview of the new theories of natural law, which are currently brought forward, ends up being a very articulated one. We will only examine those fundamental elements of the mentioned common debate, which are the most controversial ones.

At the roots of Finnis' moral theory we find an overturn of the traditional approach, which states that the principles of natural law are deduced from human nature. By contrast, the fundamental goods of human beings show us their nature (Finnis 2011: 34). We have knowledge of these goods insofar as they are self-evident principles of practical reason – principles which allow us to make human actions intelligible. The plurality of goods, the principles of practical reason, and the priority of the good on the right require us to reject both consequentialist and deontological theories.

Two main questions arise from the issue of the fundamental goods: which goods are fundamental ones, and how we get to know them? As far as the list of fundamental goods is concerned – roughly speaking and not taking into account the diversity of their formulations (for instance, with regard to the good of life) –, there is a general agreement, which leaves room to some differences, for instance with regard to whether pleasure is a fundamental good (something which is excluded by Finnis 2011: 96, while endorsed by Crowe 2019: 43). The most controversial issue is regarding how we get to know them: whether they are self-evident principles, insofar as they are a necessary implication for us to make our actions intelligible (Finnis 2011: 64–69), or still whether they are principles based on the correspondence between the theoretical understanding of what the human flourishing is and the practical knowledge that this is the good we must pursue ("real identity thesis," defended by Murphy 2001: 40–45, 137), or finally whether they can be grasped by normative inclinations as human dispositions to act in certain ways and to believe that these actions are worthwhile or required (Crowe 2019: ch 1, which takes inspiration from Lisska 1996). As it is clear, the traditional theory of natural inclinations is still quite influential (Jensen 2015).

A further controversy concerns the immutable and incommensurable character of the fundamental goods. It can clearly be the case that their formulations change in consideration of the historic consciousness, while the fundamental goods themselves do not change over the time. But the crucial philosophical question at stake is whether these goods have such a characterization insofar as they are characteristically owned by human beings or whether they are goods in themselves. Some state that their objective normativity is compatible with their being "socially embodied, historically extended and dependent on contingent facts about human nature" (Crowe 2019: 5) and that their incommensurability must be understood in terms of them being unable to be reduced to one another, and not in terms of them being non-comparable among them. Comparing them, in order to find out which one must prevail in any given case, seems to be necessary in order to make a moral choice (Crowe 2019: 65–68). As a result of this stance, the theory of moral absolutes – notoriously defended by Finnis (1991), goes under review and criticism.

The following step taken in the frame of a moral theory consists in extracting from the elaboration of the moral goods those moral rules which allow us to participate in them. To this extent, Finnis' distinction between the practical or premoral dimension of an action and its reasonableness, which makes it obligatory in moral terms, is particularly relevant (Finnis 2017a: 20). Not everything that is identified as worthy of being pursued by our intellect is, just for that reason, a moral good. While fundamental goods make an action intelligible, practical reasoning requires guidelines for choice or requirements of practical reason itself in order to find out the moral norms of action, which are aimed at enabling human realization as a whole (Finnis 2011: ch 5;

Murphy 2001: 157). Natural law theorists debate whether to affirm an agent-relativist or an agent-neutralist conception of the fundamental reasons for action. Nonetheless, even those supporting an agent-relativist conception accept that this view can provide real moral reasons for action in virtue of their fitting an agent-neutral perspective (Murphy 2001: 174–182). However, it must be acknowledged that the traditional appeal to the Golden Rule is still the most harmonious escape route from the clash between agent-relativist and agent-neutralist conceptions (Finnis 2011: 107).

Arguments taken from a moral theory make their way into the theory of law through the issue of how the concept of law is formed. In accordance to Finnis, the theorist should identify the central instance of the law, or its focal meaning, on the basis of what is expected by practical reasonableness, all things considered (Finnis 2011: 9). This will set a benchmark against which one can identify faulty, defective, or deviant instances of law. Therefore, the law is an analogical concept in the proper tradition of Aristotle and Aquinas, which contrasts with the univocal and essentialist rationale set by analytical jurisprudence. In the process of examining the features of this benchmark, we shed light on those principles of natural law and practical reasonableness, which are necessary in order to justify the authority and its exercise in accordance to human rights and common good, and more generally with the Rule of Law (Finnis 2011: 270–290). As we already observed, these principles are derived from human goods, and are then developed and elaborated by practical reasoning. In such a way, the ethical theory of natural law, which is in itself compatible with legal positivism, transform itself into a legal theory of natural law, which is not compatible with it anymore (Murphy 2005: 22–23).

Such a thick concept of law – other natural law theorists argue – would lead to a moral reading of law, which is a feature of a fully normative theory (Murphy 2006: 21, 27). On the contrary, a descriptive theory of law must acknowledge that the positive law has the expectation of being, by itself, a decisive reason for compliance. However, we have to acknowledge that a full-fledged descriptive theory is not complete without an understanding of the requirements of practical reasonableness (Murphy 2006: 23). Decisive legal reasons are not only those based on the authority, but also those which delve into the merit of the law (Murphy 2006: 54).

On that basis, the new natural law theory distances itself from the traditional formula *lex iniusta non est lex* (Kretzmann 1988). Broadly speaking, the weak version of natural law is going to be endorsed, the one which acknowledges the validity of unjust laws, even though these may be legally defective. However, the strong version of natural law, which is normally attributed – sometimes wrongly (George 2000: 1641) – to the tradition of natural law, has not been fully overtaken. This is still part of Radbruch's formula, insofar as it states that laws which are extremely unjust cannot be counted as laws at all (Alexy 1999; Soper 2007).

Such a weak version must face the issue of the identification of the threshold which, once passed beyond, would make the law no law at all. This process of weakening of the full-fledged concept of law can be understood imagining the law as a degreed property or in terms of some non-defectiveness conditions of law (Murphy 2017: 358). In accordance with the first view, the law is to be seen as a matter of varying degrees and, as a consequence, there are different levels of obligatoriness under the general flow of practical reason. Therefore, we also need a minimal concept of law, the one the law creates legal obligations only (Finnis 2011: 354) and which is very proximate to the concept of law endorsed by legal positivists. In accordance with the other approach, norms are defective – although valid – if they do not constitute decisive reasons in support of their own obligatoriness. However, this implies an endorsement of the strong version of natural law, insofar as in case of serious profiles of defectiveness, it will be very difficult to maintain that the law is valid anyway (Murphy 2006: 57). Finally, one should mention the argument, inspired by HLA Hart, which states that the law is a deontic marker by creating a sense of social obligation (Crowe 2019: ch 9), although with the proviso that this obligation must be backed by reasons

for compliance. In conclusion, the weak version locates itself somewhere in between the strong version and legal positivism, and cannot be so thin that it becomes then undistinguishable from the latter (MacCormick 1992).

The political theory implied by new natural law theories is itself integrally part of the theory of law, insofar as it takes the common good as the general aim of the law. The contribution given by the law to the pursuit of the common good is to be found mainly in the social coordination and in the task of giving stability to society. However, how the common good has to be understood is quite controversial. We refer to three different conceptions: the instrumentalist one, the one of the distinctive good, and the aggregative one (Murphy 2006: 62). Murphy ascribes the first one to Finnis (2011: 155), as well as arguing for the third one, which can be described as the state of affairs in which all members of a political community are fully flourishing (Murphy 2006: 64), but this clearly works as a regulative ideal. The distinctive good conception, although rooted in the tradition of natural law, is underdetermined. These authors share the willingness to avoid communitarianism and its relativism. However, a full conception of the common good cannot but include each one of these three elements (Duke 2017).

The aim of the common good requires that, where there is no unanimity, an authority will decide on it. However, for a theory that takes the law to be a rational standard of conduct, it cannot be accepted that the obligatoriness of the law derives from the simple fact that this is a law. As a consequence, one of these two lines of arguments comes in support: either we aim at qualifying the authority and its exercise, or we underdetermine its role. The first argues for justifying the legitimacy of the authority on grounds of the good that is produced by it, as a matter of fact. This good is expressed in terms of the achievement of social coordination, as a result of the consensus manifested by citizens, and the provision of a system of norms that are obligatory under the law (Finnis 2017 and, for a specific theory of consensus, Murphy 2006: ch 5). The second line of arguments does not support the view that a legal norm, if part of the machinery of a political community, would on that simple basis be relevant for the identification of the common good, or in other terms does not derive any presumption of justice from the mere legal validity. All active and responsible citizens are always entitled to judge autonomously whether any law fulfills the requirements of justice or not (Crowe 2019: 192). Moreover, it must be acknowledged that not every law is decided by an authority. If one takes into account the evolution of international law, there are more and more areas of law populated by legal norms of a different nature: consensual law, emergent law, and natural law can all operate independently of the state (Crowe 2019: ch 6). At this stage, one can question whether the central instance of law put forward by Finnis, which is too much reliant on the state (Finnis 2017), should not be rephrased or updated.

In conclusion, we must observe that the debate which is internal to the new natural law theories is diametrically opposed to the one that is currently animating legal positivism. Inclusive legal positivism, which makes space for moral consideration, finds a match in weak natural law theories that include considerations of mere legality, in exactly the same way in which exclusive legal positivism – which does not account for moral considerations – finds its own match in strong natural law theories, which exclude considerations of mere legality.

The Ontological Trend

Also with regard to the issue of the nature of law, i.e., its essence or its typical features, we can track new kinds of natural law theories.

The central issue is whether the nature of law must be found in the realm of nature or in the realm of nonnatural entities. Michael Moore defends a version of moral realism that asserts the existence of moral kinds, which are mind- and convention-independent as the natural kinds (Moore 1992: 190). The nature (and not the concept) of law is determined not through its structure, but on the basis of functions attributed to each feature of the law (Moore 1992: 208). These typical functions of the law are those

which allow the achievement of the general moral aims of the law, which Moore, in line with Finnis, spots in the social coordination and the common good. Therefore, there is a necessary connection between law and morals, understood in an ontological and metaphysical fashion, in accordance with a strong version of natural law. Moore's theory is deliberately lacking an anthropology able to provide a justification for the aims of the law and, consequently, to provide a justification in support of its aims. One may legitimately question whether this can be adequately qualified as a theory of natural law, as Moore pretends to do, or rather as a "moral law theory of law" (Moore 1992: 192).

By contrast, if we qualify the law as an artificial kind (Burazin 2016) – as it is more obvious, therefore we cannot envisage it as independent from human intellect and conventions. The nature of law will necessarily require to be explained in terms of its authors' intentions and, even more in case of non-intentional norms, through the factual acceptance of its recipients. Among the theories of law as an artificial kind, we can find some versions that are inspired by natural law theories as well. For them, intentions and acceptance are not sufficient by themselves, but insofar as they are aimed at giving shape to what has the typical function of the law (intention and acceptance conditions), in the same way in which the intention of creating a chair is not enough, if then the end product cannot be considered a chair and is unable to meet its typical functions (success conditions) (Crowe 2019: chs 8, 9). Generally, the typical function of the law is to guide human action. This requires that certain formal or procedural conditions are met, such as those of the Rule of Law, and the reasonableness of the contents of the law. On that basis one can test how successful the law is, assessing it by different degrees of success. Such an artifact will be legally defective if it does not perform well its typical functions and legally invalid if it is not minimally adapted to performing its function (Crowe 2019: 177). From this point of view, it is clear that an artifact theory of law implies a concept of the functions of law, able to take into account the intentions of the authors and the acceptance of the recipients of the law. Therefore, it cannot be taken as a self-standing theory.

The artificial character of the law is very peculiar, in that it is a normative output which derives from actions that are interpreted as sources of the law and accepted as such. Different kinds of artifacts contribute to the creation of the law, which make us talk of an artifact of artifacts (Finnis 2017). Natural law theorists debate on what is the prevailing or distinctive artificial feature. It does not seem to be correct for us to give prevalence to the external works, which are the result of certain operations. A reference to performances seems more appropriate, characterized by certain correct procedures, through which they can achieve their own goals (MacIntyre 2007: 187). The end goal of dance is not dancing in itself, but dancing well, as well as for swimming the goal is swimming well. Also language and reasoning are artifacts made out of a number of cooperative performances, governed by the rules of good performance set by grammar or logic, in such a way that we can then differentiate a proper from an improper way of speaking and reasoning. The same can be said with regard to the law, if we take it as a social practice (Viola 1990). The law as well has got its own grammar, which directs us in deriving or determining positive laws, in their continuous change, from a number of immutable principles (Finnis 2011: 351). In such a perspective, the law itself is an art (*ars boni et aequi*).

The artistic practice of law requires abilities in the fields of argumentation, deliberation, decision, and rules implementation. If the law is understood as the result of human will, therefore the mentioned abilities will be those requested by the legal operators' own technique. However, if the law is an output of human reasoning, then these abilities will take the moral shape of a virtue. Indeed, in the natural law tradition we find the study of the legal practitioners' own virtues, with a specific focus on judges and jurists. The fundamental legal virtue – as everybody knows – is the prudence (*recta ratio*), while the main art is the rhetoric, which is nowadays reassessed by the studies on legal interpretation, where this is understood as the art of interpretation and argumentation (Viola and Zaccaria 2007). A specific interest for this

practical perspective is also shared by those traditional natural law theories, which elaborate on metaphysical realism (Vigo 2016), and which in this regard are fully compatible with the new theories of natural law. Practice unites what theory divides.

The Aspirational Trend

One last form of natural law theory can be drawn around the lines of Lon Fuller's thought – and still connected to Aquinas, even though more loosely. As it is well known, Fuller characterizes the Rule of Law as the essence of the law and sees the purposive character of the human action as its basic anthropological feature. As a result of it, we do not look anymore at a wide concept of law (as Finnis does), but rather at a narrow concept of law, i.e., the identification of the most elementary instance of law. Such a concept of law is understood as an idea, an "intellectual archetype" to which actual instances of law approximate to various degrees (Simmonds 2007: 52). Such a minimal concept of law is already a moral ideal, insofar as it corresponds to a form of human community characterized by reference to legality and trust in the law. When a social practice as a whole is in accordance with the principles of the Rule of Law, as codified by Fuller – even if in a contingent fashion and liable to be reviewed – then it will have the right credentials for being acknowledged as an instance of law. The issue of the validity of the norm is addressed only once it is ascertained that we are in front of a set of rules, which is embodied in the Rule of Law, or, more general, a social entity ruled by the law. The validity comes from the law, and not the other way around. A norm can well derive its validity from a basic rule of recognition – as suggested by HLA Hart – but its legal character is derived by the way in which the normative system – which includes the rule of recognition – approximates itself to the idea of law (Simmonds 2017: 256). These are exactly the grounds of the judges' duty of fidelity to law and, more generally, of all legal professionals (Postema 2014).

Legal doctrine highlights that such an archetype has got a potential in terms of legal production, on the basis of varying historical conditions and specific contexts, which contribute to define the concepts of justice and common good of a certain community. To the extent that law governs, citizens will enjoy juridical liberties, i.e., autonomy from the powers of others, and juridical protection. This will open the doors to the enjoyment of other fundamental goods. At any rate, the institution of law as such can be rendered intelligible only when we discern its relationship to certain moral value (Simmonds 2007: 63).

One of the advantages – pointed out by those who argue for this line of arguments – is that here we have a concept of law that can be acknowledged by everybody, i.e., legal positivists included, insofar as it does not rely on a specific moral conception (as it is the case for the wide concept of law). The assumption is that, once this archetypical concept of law is admitted, one could not but accept that moral considerations are part of the law, with all their implications. Legal positivists will have to change their mind. But in fact things have not gone this way, as it was already the case in the well-known Hart-Fuller debate – today reconsidered more in favor of Fuller (Rundle 2012). Indeed, the real obstacle is not whether this minimal concept of law is plausible, but whether it can be taken as a real self-standing moral ideal, able to ensure – even to a minimum degree – that the legal order is in accordance with justice. It is true – as pointed out by HLA Hart – that the rule of law, taken as a strictly formal requirement, is perfectly compatible with a very great iniquity (Hart 1994: 207), even though it is also true that legal justice is incompatible with a serious breach of the requirements of the Rule of Law. By contrast, if we take the Rule of Law as a widened ideal for society, then it must also embody a claim to correctness. However, in such a way, it ends up becoming a much thicker concept, more proximate to Alexy's non-positivism, if not to Finnis' account of focal meaning.

Conclusions

The new natural law theories are different from those of the neo-scholastic approach, insofar as they do not move from an account of the human nature, but rather from practical reason – which is anyway going to be governed by a specific conception of human action (Rodriguez-Blanco 2014). From this perspective, they oppose legal positivism, but their focus shifts from the one taken in the past. The common spotlight has been for a long time the issue of the validity of the law and the connection or separation of law and morals. However, as these theories now admit that there might be a separation between the validity and the justice of the law, and inclusive legal positivism now admits that there might be a connection between law and morals – although a contingent one – the opposition has now shifted toward the issues of the relations between law and practical reason, of how to justify the obligatoriness of the law and of its role internal to a theory of law. As a consequence, the current debate between natural law theories and legal positivism focuses on how to conceptualize a theory of positive law. On their own turn, in consideration of the different theoretical approaches characterizing the new theories of natural law, these can be drawn as a whole in terms of a trend of contemporary legal thinking, more than as a proper school of thought (Crowe 2014).

Cross-References

- ▶ Aquinas (On Natural Law)
- ▶ Authority of Law
- ▶ Common Good
- ▶ Finnis, John
- ▶ Fuller, Lon Luvois
- ▶ Law as an Artifact
- ▶ Law As Reason for Action
- ▶ Legal Positivism
- ▶ Ontology of Law
- ▶ Positive and Natural Law
- ▶ Radbruch's Formula and the Concept of Law
- ▶ Rule of Law: Theoretical Perspectives
- ▶ The Concept of Law
- ▶ The Nature of Law

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