

# Natural Law Thought Reviewed

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## Özet

İnsan doğasını esas alarak, söz konusu doğanın, gene insanın söz konusu dağısına özgü yöntemler ve düşünsel süreçlerle ele alınması gereği üzerine temellenen **doğal hukuk görüşü**, Otça çağ düşünürlerinden Aquinas ile başlayan düşünsel açılımında, daha asonraki pozitivist düşüncenin yönemsel teknikleri olarak deney ve gözlemi ele alan, ancak bu yönemsel tekniğin neden bu şekilde olması gerektiğine ilişkin bir yargıyı veyahut tercihi –ki bu doğa hukukun belirleyebileceği doğa örüntü modellerin içerisinde,, eşyanın doğasına uygun bir tercih olacaktır!– kendi sistematik açılımı dışında bırakan yaklaşımına karşıt olarak, işte bu iki noktayı, başka bir deyişle hareket noktası ile bu hareket noktası bağlamında ulaşılan diğer noktaları veyahut sonuçları birlikte değerlendirme sorununu, doğa hukukun "doğallık" anahtar kavramında yeniden ele alarak doğaldan insanlarla uzanan süreçte kendi düşünsel ve yönemsel süreçlerini oluşturmuştur.

## *Natural Law THought Reviewed*

### **Abstract**

Natural law thought arising from the very "nature" of mankind claims the very need of "accordance" in almost all aspects of this human enlightenment to this nature. Therefore whatever "is" to be acknowledged through positivist understandings of observation is to be checked out once more in accordance to this nature to have some "value" (ought) of its own -yet again in natural patterns which bear within itself a natural insight to the natural phenomena; and what natural law is actually the natural "insight" drawing the schemes of understanding of this natural phenomena, without which we would be dwelling in either partially acknowledged positivist traditions of thought or utmost skepticism. In the historical background of this major theme there lies the Aristotelian, Aquinan, Humean and finally Kelsenian points of view which we have endeavoured to bring within an outlook of compositional unity in this article through John Finnis' modern comprehension of the theory yet mainly based on Aquinan concepts and process of reasoning.

## Natural Law Thought Reviewed

Natural law has been a major referee in the everlasting play of the human being on social arena under the guise of this and that urgent dressing again addressed to it by certain players of the time. Thus Friedmann is saying

"The history of natural thought is a tale of the search of mankind for absolute justice and of its failure. Natural law has fulfilled many functions. Natural law has at different times been used to support any ideology." (Friedmann, 1967: 95-97, Ross, 1958: 258-262)

So the first premise is the need and the accompanying function of a referee in continuum for the play to take action as well as its stopping line being drawn. From the ancient times on to our modern *maybe post-modern* Society, either conscientiously or sub-consciously humanity on the whole has searched for a referee and his decisive power in his own premature architecturing of an "artificial" universe being well aware of its lack of absolute efficiency.

If we look at in another context -yet pointing to the same epistemological basis-to Martin's evaluating Hart's theory (Hart, 1961: 195, Martin, 1987: 181-190) adding his own premises especially (K1) to his, for a natural theory to evolve the premises are

(R) People are rational

(K1) People know that T1-5 and W

(N) People are not prevented from carrying out their plans.

Therefore without some insight into the human psyche working in the process of internalising life experiences -yet postponing the rational outlook to the following stages of study as Martin does- Hart's premises would be quite subtle and detached from any context comprehensible just for the sake of his envision that this foreseen detachment might help to lead to universalizable truisms which in fact lead to truisms without truth not providing attachment to factuality together with its cognition.

Thus without a "rational cognition" of all T's and W

(T1) Human beings are vulnerable to physical attack

(T2) Human beings are approximately equal in mental and physical abilities

(T3) Human beings have limited altruism

(T4) Human beings have limited resources

(T5) Human beings have limited understanding and strength of will.

(W) Humans want to survive

Hart would not be supporting his own premises as an individual human being or vice versa on which grounds would he be doing that? As in the case of a sceptic stated by Finnis

"The sceptical assertion that knowledge is not a good is operationally self-defeating" (Finnis, 1980: 74).

Reviving once again our point of departure from a closer perspective the need for a referee has also been associated with his being ascribed the nature of a similar standing like the players yet differentiated in his expertise of prescribing acts to be done or to be prohibited together with stipulated sanctions so that his ruling the game or in other words his prescriptions will have the factuality of the play itself and not something irrelevant to and out of it. Without confronting the Humean "is-ought" cleavage (Hume, 1874: Book III, part 1, section i, Kelsen, 1957: 139-142) this procedure is merely possible through a "natural" understanding of human "nature"; not a bare tautology as it seems at first sight with the correct apprehension of the theory stated by Finnis (Finnis, 1980: 33-36), Finnis, 1983: 20-22).

Before we move on to this correct apprehension, in regard to it there lies the profound contra-argument of Humean cleavage standpoint which needs explanation and states that where the referee's function of ruling is concerned lightning his way is merely possible through posited prescriptions which foul at a point most critics misinterpret.

"If the conclusion of an argument can contain nothing which is not in the premises and there are no oughts in the premises "according to what Kelsen says for instance "value (ought) is conformity with a presupposed norm (ought)" which is not in the premises and but is supposed to be somewhere yet its "being" supposed somehow (Davies-Holdcroft, 1991: 173, Kelsen, 1957: 139). One would wonder whether this view is hardly different from Finnis's or not since he also claims that

"Reflection on practical reasoning and human action is truly empirical when it seeks to understand human capacities by understanding human acts and to understand those acts by understanding their object(ive)s" (Finnis, 1983: 51-52).

In order not to misinterpret the expression "empirical" in the statement-that is not in its wrong meaning that "understanding is just a matter of opening one's eyes (or other senses) and looking", we have to relate to the very following expression again by Finnis that

"Thus the revealing question is the question "why?" not interpreted blankly as if one were investigating iron filings jumping to a magnet or the ricochet of billiard balls, but humanly and intelligently as "what for?" (Kelsen, 1957: 139-142).

As a conclusion thus, relating to Kelsen's famous definition of the norm (Ross, 1958: 262-263, Finnis, 1980: 29-31, 33-36), norm is the meaning in other words "what for" of the action which certainly does not depend on the arbitrary will of the legislator that is on some empirical data but the validity of which does depend on a presupposed basic norm of human reflection at its peak which brings forth norms or put otherwise in Aquinas' terminology "precepts" of practical understanding climbing down the hierarchial ladder similar to again Aquinas' derivative process of primary and secondary precepts of natural understanding.

Just before this point studied below, we have to clear out one more point that Kelsen's approach -being a sample of similar accounts of anti-natural law and its binding force on human nature- does give rise to from another perspective of the desire of human psyche (Finnis, 1980: 65, 69, 107) in relation to its end, in other words its own ought that it desires to be free of all constrains of the outside world and to be self-dependant on its very functioning as for instance one would like to be free of his fear and thinks it likely that he would be in the cases where the object of that fear is disregarded all together, coming from a metaphysical universe. Yet it is not the object mostly but the characterization ascribed to it by the human reflection that does belong to this universe. The resolution of the problem rests on the identification and rationalisation of the empirical data or evidence in our context the object of inquiry symbolised as "is" with its correct "true" meaning. That is, practical reason of the empirical nature bringing forth human reflection (on things) should not be mistaken for metaphysics. The example of "object of fear" is the very psychological sample of an is-ought characterization of a foreign object in the perceiving process where the meaning is distorted psychologically. Yet this working process shall not be running on its own without human participation (is) and cognition (ought) (Finnis, 1980: 85-86) as stated above and does not relieve one of the burden of responsibility for the correct choice with its true meaning. In other words there is still the case of choice (Finnis, 1983: 75, Finnis, 1980: 155) of true identification of the object and as Finnis says ethics is practical and practical "individually", not for a class or society of people with common features as in anthropology, sociology etc. Yet there is the problem of "legal" standing and at which point law

does arise with its sanctions? The answer is practical ethics and individual cognition through participation makes legal systems work with a reasonable scope for self-preference around the idea of "community" (Aquinas, 1952: Q94A4) and the "common good" similar to a definite legal system acting as an "individual" on ethical choices with reasonable self-preference of posited stipulated sanctions for particularised matters of principle yet around a scheduled framework of thought under the name of practical reason and its derivative process of primary and secondary precepts of this common nature bearing determination to certain generalities of definite individual and particular posited laws. Since as Weinreb says these principles of generality are of use as applicatory guidances in contrast to natural primary precepts in their natural true meaning, they give way to posited laws in cases of social and civil strife amidst the "individual" and socially "common" (Finnis, 1980: 155, Weinreb, 1987: 111-115). In other words in Finnis's exquisitely refined statement

"Common good is a set of conditions which enables the members of a community to attain for themselves reasonable objectives or to realize reasonably for themselves the values, for the sake of which they have reason to collaborate with each other positively and/or negatively in a community" (Finnis, 1980: 155, 276-277).

Coming to our point now according to Aristotle's main division of reasoning, in the realm of meanings of things, first there was the "focal" meaning of a thing corresponding to the very object and serving as an identification card for it in regard to its "notion" making up the object of the thing in mind and thus perceiving it in its notional sphere and then, once this sphere has been drawn, there came the "peripheral" meanings that amidst the common notion of the thing different characteristics being applied to it lead to (Finnis, 1980: 10-11, Davies-Holdcroft, 1991: 152, Aquinas, 1952: Q95A4). Thus we are faced by some derivative process with its major two stages; one the "initiative", the other, following the "conclusive" with its finalistic premises this time with additive qualifications such as in the notion of a man, additive qualifications of white and black have been ascribed characteristically to the notion conclusively.

Thus from this point on, we move to another related reasoning process that of "speculative" versus "practical" reasoning (Aquinas, 1952: Q94A2, Q94A4, Finnis, 1980: 33, Finnis, 1983: 20-22) whereas in the first arena of these, things are what they are in their essence and are required to be themselves in their "necessity" where derivation comes from first indemonstrable, self-evident, common principles as premises (since the function of necessity is plying here!) and goes on to derived principles from these first initiatives of necessity where the first category of necessity is doubtless the "being" (and its notion as stated above) itself. Within the speculative arena, human reasoning relates to beings in their "notional" essence (necessity) through its speculative abilities again with no

direct or indirect relevance to practical understanding, whatever that might be for instance as in our modern ages of 19th to the almost end of 20th century, understood as methods of perceiving in positivist tradition such as experiencing, experimenting, trial-denial etc. The question is what could be practical understanding in its notional meaning rather than these peripheral methods claimed to be derived from it? First of all, practical reasoning does require in itself no essence of necessity yet on the contrary does point to changeable relations of things. This is not the same concept, as might be understood, as the conceptual bearings of peripheral meanings since here, at the point where we stand, even the first initiative stage is not a given a priori or self-evident "being" but rather it is exchanged with a finalistic reasoning taking the concept of "good" for granted which is again this time in its original, initiative stage "indemonstrable" and "underived". Again at this point to keep our reasoning in order without being trapped by Humean "is-ought" cleavage, we hold on to this "underivability" quality since the end of "good" which all humans have in mind firstly to preserve their "being" on earth is not derived from any natural evidence, any fact coming from the practical world of nature itself or from the human nature supposed to be derived from this general concept. So the methods do not apply here such as experimenting, experiencing and then coming from these evidences to principles as if turning the process up side down. So again we conclude there is no derivability but a common principle of "good" in this arena.

Now moving on to the following stages of inquiry, whereas in the practical reasoning of humanity, we move again from the general, common, abstract to special, particular and concrete "principles" and then this time correctly stating them to "cases" of real life in nature, in other words of "practical"; in the speculative arena of sciences of essence, both in common principles and in the derivated principles from them, human reasoning is capable of "true" understanding due to this "necessity" of things in themselves (notion qualification) nature but even in this arena, when we move on to particular, special cases, (such as man versus angel since there is no necessity of sciences "valid" in the concept of angel) only people with additive talents such as wisdom may have a "true" therefore common understanding which is thus "wisely" envisioned.

Just in relation to this point there comes the different understandings of practical things even in "stages" of commonly "derived" principles. Therefore as Aquinas states, in natural law which is certainly a "practical arena", where orderings of alive things is concerned, this order can be shaped in various ways but it is that is there a common core in general? There lies the question; so if we again return back to an underivable common concept of "good" in connection of preservation of the being on earth, this might be the primary precept of a natural "order" (in other words individually sustained life) and the derived principles

-yet although "derived"- thus keeping this general finalistic approach in mind and may require an additive talent of wisely encircled secondary precepts. We must not forget that we are still in the arena of principles and not of special cases of evidence. Thus in the legal order of practical arena, as in contrast to the example of man versus angel above in speculative arena, we have the first primary principle as "do good, keep away from evil" as an underived initial stage. There comes following but still as primary precepts as in relation to preservation of life "do not kill" and many others notionally as also with a modern approach to the matter stated by Finnis (Finnis, 1980: 88-89, 65, 29-31) in his namely eight ends or rather goods in life; life, knowledge, play, aesthetics, religion, friendship etc. And then in the second stage of derivation we have secondary precepts in relation to the example above for instance (do not kill) "one who kills must be punished" or rather in concern to Finnis' (Finnis, 1983: 75) "intermediate" principles of good, "have a rational plan of life", "do not make arbitrary preferences amongst things (goods), persons and opportunities" etc. Yet still in this realm we have quite a lot of place to manoeuvre, to shape and create an order which is not yet totally articulated by any or set of any of these principles. As Aristotle says again (Aquinas, 1952) Q91A2, order will be given a shape by a measure of human beings which is already measured by these first underivable principles. So now in the following stage we are finally in the natural world of evidence, experience and experiment but these still in consideration to the reasoning capacity of humanity and not as brute social anthropological (Finnis, 1980: 85-86, 65-66), psychological etc. facts of human appearance, its relation torn and broken by its origin of human "good" in end being on earth. In other words these principles of primary and secondary precepts of natural law were what Aquinas called also "human law" derived from natural law and which must be in accordance to it. But there is another law of position (Aquinas, 1952: Q95A2, Q96A4, Finnis, 1980: 28), posited through human law which may or may not be in accordance to it just due to the reason mentioned above of differing opinion in regards to shaping special, particular cases in accordance to these principles "wisely", with an additive talent, in order for them to be "true" or rather have "some truth", meaning the very "accord" to the principles mentioned above. So if the principles are followed (in their derivative trace), the conclusions will be true, both in abstract as in the initial stages and in the concrete as well, in this secondary stage, providing for the "accord" mentioned above, missing the obstacles of unwise judgments as to how the cases "should be", compared to their present evident settings as "is", which is a distorted derivation process due to lack of wisdom. Just from this point on, all statements of facts as that of Hart (HART, 1961: 195) as human truisms etc. without being related to any such principle thinking of speculative and in relation to it practical reasoning is destined to be a failure if not for anything for its partial and very limited vision of human presence and bearing on earth. Thus

Martin (Martin, 1987: 181-190) is trying to liquidate some secondary principles into his explanation such as education, passivist communistic understanding of punishment and earning etc. as counter-examples of present human standing in order to emphasize some underlying principles behind and moving on to Finnis' eight goods of this standing but still in principle. In a very similar context Kelsen's (Kelsen, 1957: 139-142) understanding of norm as a "meaning" of an act of an authority (with capacity of wise judgement which will provide for the true derivation process of common hierarchy dismissing the disorder of independent individual arbitrary acts of wills of shaping or creating etc.) is bearing within itself this reasoning process of both speculative (of essence of things in themselves as in sciences) (that is acts) and practical arenas (meaning the wisely derived conclusion of a principle thought in mind that of good; surely a presupposed basic norm as he puts it, with an end in mind but not in relation to evidential facts but of its own again underived; the first stage of a notion of a thing "life and being on earth.")

Finally we have to conclude that once we agree on the fact that one who kills should be punished, as Finnis' notion of ethics which is shaped by intermediate principles as stated earlier, there will be a lot of place for manoeuvre and exploitation as well which is left open to posited, positive law of natural evidential facts (Weinreb, 1987: 111-115). So once the primacy is given to natural understanding of law thus stated and always keeping its primacy in mind, derivation process should thus ply that posited law should always be as far as possible in accordance with human law of practical understanding (and not practical evidence again) that is maximized in itself and should be wisely guided even if it does require for this purpose "legal authorities" of an institutionally built presupposed basic norm nevertheless with the same essence of this common origin. In historical perspective even the ancient ideas gave this primacy to posited law in order to avoid human destruction (Davies-Holdcroft, 1991: 159-160, Aquinas, 1952: Q94A4, Q94A5) and desolution of order which meant the very clash of initial stage of reasoning in other words the point of departure for humane journey -its path lost and found only through the way sought for this positive enlightenment. And thus if we did cut the connection with this initial point of departure on the half way we might easily forget where we were leading to and much more important how close we had got to it and "how" through our irksome efforts. Thus natural law thought should never be disregarded or ignored if we are not to lose our way on the positivist path we are following which is certainly "the path of our being that follows the good of our being in natural patterns".



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