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A Finnis-based Understanding of the Rule of Law and the Dialectical Method of Aquinas

Razumevanje vladavine prava in dialektična metoda Akvinskega na osnovi Finnisa

Abstract: The paper investigates the possibility of a conception of the Rule of Law, based on Finnis' natural law theory. His claim that law exists in degrees, but has a focal meaning, is the starting point to the research. A contradiction regarding incommensurability of values in connection with the focal meaning of law is emphasized and an interpretive turn to his theory proposed. It is claimed that the substantive elements of the Rule of Law can be understood through his concept of common good. In order to assess the congruence of individual laws with the Rule of Law, supplementation with the dialectical method of Aquinas is proposed. Such an approach also enables the restatement of modern natural law on a theological foundation, which is, however, more nuanced than its older natural law counterparts.

Key words: natural law, Finnis, Aquinas, dialectics, interpretive turn, Rule of Law

Povzetek: Prispevek proučuje možnost zasnove vladavine prava, osnovane na Finnisovi naravnopravni teoriji. Izhodišče raziskave predstavlja njegova trditev, da pravo obstaja v odtenkih, vendar ima osrednji pomen. Izpostavljeno je protislovje med neprimerljivostjo vrednot in osrednjim pomenom prava, pri razlagi njegove teorije pa predlagamo obrat. Postavljena je trditev, da je vsebinske elemente vladavine prava mogoče razumeti skozi njegov koncept skupnega dobrega. Za oceno skladnosti posameznih delov prava z vladavino prava je predlagana dopolnitev z dialektično metodo Akvinskega. Tak pristop dodatno omogoča postavitev sodobnega naravnega prava na teološkem temelju, ki je bolj niansiran kot starejše naravnopravne teorije.

Ključne besede: naravno pravo, Finnis, Akvinski, dialektika, razlagalni obrat, vladavina prava

1. Introduction

John Finnis is, in adopting his concept of the common good, arguably the most prominent intellectual heir of St. Thomas Aquinas in contemporary legal philosophy. This article is inspired by the Finnis' idea of the rule of law existing in degrees. If his conception of the common good is to be applied to assess the congruence with the rule of law of individual legislative solutions, his positing of seven basic goods does not by itself suffice and might even be contradictory to his claims regarding intelligibility and incommensurability of values. It will be argued that when trying to apply his theory as a rule of law test, scholastic dialectics of Aquinas can be used as a method of obtaining necessary additional understanding.

For the above purpose, first the idea of the rule of law in general and its potential use as a test of quality of legislation in specific will be presented. Then Finnis' understanding of the rule of law will be discussed, especially in light of the claim of incommensurability of values and the idea of law or rule of law existing in degrees. It will be claimed that this makes Finnis' understanding of the rule of law specific and more precise than alternative theories, but at the same time posits additional practical problems in the application of a Finnis-based rule of law test. Both substantive and procedural aspects of his understanding of the rule of law will be discussed. Regarding the former, his theory is based on the idea of the common good, borrowed from Aquinas. Regarding the latter, he accepts a version of Fuller's eight *desiderata* as the institutional basis for the inner morality of law.

Next it will be argued that the assessment of the degree to which different aspects of an individual legal order comply with the rule of law, can be performed using the dialectical method of St. Thomas Aquinas. His method may be applied to the weighing of substantive criteria in accordance with the understanding of Finnis's rule of law as a thick conception. Finnis' Aquinas-based theory will therefore be enhanced, and inner contradictions lessened by adding the dialectical method of Aquinas to perform weighing of basic goods in order for the legal system to enable the flourishing of human beings. At the same time, the theory will be presented as a practical framework for assessing the congruence of modern legal systems and their parts with the requirements of natural law, in service of promoting the common good.¹ An interesting consequence of such an interpretive turn to Finnis' theory will be noted, namely the possibility of putting natural law theory back on Christian foundations, without losing the logical rigour and subtlety of Finnis' account.

2. The rule of law and the quality of laws

The rule of law, although often invoked as an idea in both scientific and public debates, is actually a highly contentious notion. Not really contentious in terms

¹ For a discussion of the importance of Finnis' conception of the common good in interpersonal justice, see Krašovec 2017, 121.

of it being disputed as a concept, but contentious in terms of its actual content and what it entails. It is best understood as a notion with an almost unlimited semantic range (Barrett 2018, 25), which can therefore be subject to interpretation and even politicization. After all, even totalitarian regimes based on communist, fascist or socialist ideologies² have in one way or another claimed to be in accordance with some (however ill conceived) form of rule of law. As such, the notion of the rule of law should be clearly grounded in some sort of deeper, non-positivist values. This is not really contested as even many of the strictest of positivists, such as Joseph Raz, have posited their own conceptions of what the legal system ought to be and contrasted it with descriptions of what the legal system actually is (Raz 2009, 212).

The idea of the rule of law comprises of two main elements, namely the principle that everyone is subject to the law and the notion of the rule of law as an ideal of a legal system (Cormacain 2017, 116). The rule of law as a principle is described by Bingham as the duty of the government to act in accordance with the law (Bingham 2009, 33). This emphasizes the *iure imperii* nature of the relationship between the government and the governed, while at the same time putting some necessary constraints on the exercise of authoritative powers. The rule of law as an ideal has many expressions and connotations, but it may be claimed that it is an abstract regulatory goal. On one hand it represents the object of striving in legislative and adjudicative endeavors, while on the other hand it can be posited as a framework through which the assessment of the quality of positive law is made possible. For the latter purpose, in addition to Finnis', which will be the subject of detailed analysis in the next chapter, several other theories may be used as tests of quality of legislation. For comparative understanding, to display the heterogeneity of approaches and to support the assertion of rule of law being an undefined notion, a few selected tests will be concisely presented.

Strict positivist Raz originally adopted a formal approach to the rule of law, which does not contain substantive weighing, and posits the following requirements:

- Laws should be open, prospective and clear;
- Laws should be relatively stable;
- The making of laws should be guided by open, stable, clear and general rules;
- Independence of the judiciary;
- Application of the rules of natural justice;
- Court power to review implementation of other principles;
- Courts should be accessible;
- Discretion of crime-preventing agencies should not pervert the law. (Raz 2009, 214–18)

Lately he has revised his approach to a certain degree, by putting in the center of the notion of rule of law protection of individuals from arbitrary use of power.

² For more regarding pseudo-communities with fundamentalist orientations, see Bahovec 2009, 453: »... communism, fascism and National Socialism – all of them suppressed personal and social freedom.«

He understands the rule of law as a moral doctrine of great importance (Raz 2018, 17).

Natural law theorist Fuller similarly puts forth eight formal criteria, which he terms *desiderata*, and which a legal system should possess in order to deserve to be called an actual legal system:

- Generality,
- Promulgation,
- Prospectivity,
- Clarity,
- Non-contradiction,
- Laws should not require the impossible;
- Temporal constancy;
- Congruence between law and official action. (Fuller 1969, 39)

Legal realist Sunstein posits, drawing on both Fuller and Raz, that in order for compliance with the rule of law to exist, what is necessary are:

- Clear, general, publicly accessible rules laid down in advance;
- Prospectivity, no retroactivity;
- Conformity between law on the books and law in the world;
- Hearing rights and availability of review by independent adjudicative officials;
- Separation between law-making and law-implementation;
- No rapid changes in the content of law and no contradictions or inconsistency in the law. (Sunstein 1994, 212–14)

Dworkin does not put forth any entirely clear principles of what a rule of law might entail, but his idea of law as integrity entails weighing to ensure integrity in legislation and in adjudication (Dworkin 1986, 217), while taking into account political fairness, material justice and procedural due process (Dworkin 1986, 405).

Above examples showcase that different theories can be understood to represent thicker or thinner conceptions of the rule of law (Craig 1997, 467; Sampford 2016, 60). Thin conceptions are connected with the form of the legal system and are less controversial. Thicker conceptions contain not only the formal, but also substantive ideas about what a legal system or an individual law should be like to sufficiently match the ideal posited by the notion of the rule of law. While approaches such as Raz's original position and Fuller's *desiderata* represent thin conceptions, Dworkin's potential inclusion of substantive criteria puts his theory firmly in the realm of thicker conceptions of the rule of law.

3. Rule of law in Finnis' natural law theory

Finnis' conception of the rule of law, his inconsistent terminology notwithstanding, can also be understood to be a thick one. It can be claimed to have two aspects, the formal and the substantive (Forte 1990, 97). In *Natural Law and Natural Rights*, he at first defines the rule of law as:

»The name commonly given to the state of affairs in which a legal system is legally in good shape is »the Rule of Law« (capitalized simply to avoid confusion with a particular norm within a legal system).« (Finnis 2011, 270)

This formal aspect is inspired by Fuller's eight *desiderata* and entails the following requirements:

- Prospectivity;
- Capability of compliance;
- Promulgation;
- Clarity;
- Coherence in light of the legal system as a whole;
- Relative stability through time;
- Private legislation should be guided by promulgated, clear, stable, general rules;
- Accountability of authorities and consistent administration of the law. (Finnis 2011, 270–71)

In this, formal regard, Finnis' requirements do not seem to differ much from other formal accounts of the expected content of the rule of law, which were discussed above. More interesting is the approach Finnis' theory takes in connection with substantive requirements. He posits the idea of a focal meaning of the legal system, an ideal, which displays the highest level of compliance with the rule of law:

»If there is a viewpoint in which the institution of the Rule of Law and compliance with rules and principles of law according to their tenor, are regarded as a least presumptive requirements of practical reasonableness itself, such a viewpoint is the viewpoint which should be used as the standard of reference by the theorist describing the features of legal order.« (Finnis 2011, 15)

What has to be noted however, is that he is to some degree inconsistent in his use of the term »rule of law«. While in *Natural Law and Natural Rights* he at first uses the term to describe merely the formal aspects, for example:

»...the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good.« (Finnis 2011, 274)

he in the further development of his argument states that substantive principles have to be followed by a reasonable legislator as well, seemingly referring to the *desiderata* of the rule of law in formal terms, while at the same time admitting the need for substantive criteria, all the while excluding them in linguistic terms:

»The reasonable legislator's principles include the desiderata of the Rule of Law. ... But they also include a multitude of other substantive principles related, some very closely, others more remotely, some invariably and others contingently, to the basic principles and methodological requirements of practical reason,« (Finnis 2011, 286)

until finally emphasizing the need to include the substantive criteria in the deliberations regarding the rule of law:

»...the derivation of law from the basic principles of practical reasoning has indeed the two principal modes identified and named by Aquinas; but these are not two streams flowing in separate channels. The central principle of the law of murder, of theft, of marriage, of contract . . . may be a straightforward application of universally valid requirements of reasonableness, but the effort to integrate these subject-matters into the Rule of Law will require of judge and legislator countless elaborations which in most instances partake of the second mode of derivation.« (Finnis 2011, 289)

Thus, although in many places in the Natural Law and Natural Rights Finnis uses the term Rule of Law to describe merely the formal aspects, his account of what a flourishing legal system and the rule of law require, is broader and includes the substantive principles as well. It is to these substantive requirements that the attention is now turned.

4. Substantive criteria and the common good

In the center of the understanding of what Finnis is proposing regarding the substantive criteria, is his assertion that social arrangements can be more or less legal and that legal systems and the rule of law exist as a matter of degree (Finnis 2011, 279). This has to be understood in connection to the focal meaning of the legal system, law and rule of law. The latter three concepts are in this sense equated to some degree and it is understood that the ideal legal system is what is truly legal in its nature; most compliant with the rule of law. Any derivation from this ideal ensues in something that, although still law to a certain degree, is less law than law in the focal meaning of the word. This also applies to the individual legislative solutions. The less they comply with the rule of law in terms of formal *desiderata* and substantive content, the less legal they are.

Finnis' understanding of substantive requirements is based on the Thomist idea of the common good, connected with the idea of the flourishing human being and is not that different from what for example Letnar Černič has proposed regarding the human dignity and the rule of law (Letnar Černič 2018; 147–57). Under the notion of the common good, Finnis understands those human values, which are:

- Good for any and every person;
- Can be participated in by an inexhaustible number of persons in an inexhau-

- stible variety of ways or on an inexhaustible variety of occasions;
- A set of conditions which enables the members of community to attain for themselves reasonable objectives or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community. (Finnis 2011, 155)

He identifies seven such values, namely life, knowledge, play, aesthetic experience, friendship, religion and freedom in practical reasonableness. This of course leaves us with a dilemma. How are these to be applied in judging the actual existing legal systems in comparison to the focal meaning of the legal system, in assessing its »legalness«, its compliance with the rule of law in both formal and substantive meaning?

Finnis himself gives only a few hints. Regarding the questions of incommensurability and intelligibility of values, he states that:

»...in free choice, one has reasons for each of the alternative options, but these reasons are not causally determinative. ... No factor but the choosing itself *settles* which alternative is chosen.« (Finnis 1997, 220)

And even more clearly, in his criticism of Dworkin's interpretive turn:

»... in the absence of any metric which could commensurate the different criteria (the dimensions of fit and inherent moral merit), the instruction to »balance« (or, earlier, to »weigh«) can legitimately mean no more than bear in mind, conscientiously, all the relevant factors, and choose.« (Finnis 1987, 374)

His position proves to be contradictory. On one hand, he claims that the legal system can be posited in a focal meaning. On the other hand, he denies the possibility of ever gaining the knowledge of such a system by claiming that the values that are needed as criteria for measuring congruence with it are incommensurable.

Thus if we want to use his theory as a basis for developing a more pronounced substantive rule of law test or even if we simply want to gain understanding of what the focal meaning of law might be with an actual piece of legislation in mind, it can be seen that Finnis' theory needs to take an interpretive turn. Since Finnis' theory is heavily influenced by the writings of St. Thomas Aquinas, his dialectical method seems a natural counterpart. Therefore, below, an Aquinas-based method of weighing will be proposed, which however, due to the primacy of antithesis, will still entail an idea of choosing, which is at least partially compatible with Finnis' original assertions.

5. Interpretive turn and the dialectical method of Aquinas

As has been shown, for a focal meaning of law to exist and be available to become known, there has to be a possibility of Finnis' proposed substantive values to be

understood as commensurable. When applying the substantive rule of law test, based of his theory, the substantive and formal congruence with the rule of law becomes known through interpretation.³ Such an interpretation that is in its core the search for focal meaning of law and its comparison with the legal system or legislation in front of us has to aim at the truth. If it did not, the idea of a focal meaning of law would be impossible or at least nonsensical, since claiming that law has a focal meaning and at the same time saying that this is not the true meaning of law, is a contradictory statement. This is where Aquinas' dialectical method comes to the rescue. According to Aquinas, truth claims are metaphysically grounded, meaning that if something is true, it is true in virtue of something (Liska 2013, 143). When comparing a law at hand with the focal meaning of the Law, a value synthesis is necessary (Pavčnik 2008, 557). Such a value synthesis must be arrived at in a dialectical process, by forming opinions through the use of argumentation (Wöhler 2006, 33). Aquinas proposes one such model.

His dialectical approach in *Summa Theologica* (Aquinas 1920) is to first pose a question. Then he proposes reasoned objections (antitheses) to the original position. This original position, which seems *prima facie* most reasonable to him, remains at this point unstated. Next the original position (thesis) is stated and defended. In the final stage all the arguments in favor of the antithesis are refuted with strong objections, supporting the thesis. To summarize:

1. Question;
2. Unstated original position;
3. Antithesis;
4. Thesis;
5. Refutation of the antithesis.

The usefulness of Aquinas' method as a tool for reasoned argumentation, for interpretation and for acquiring knowledge of the truth, transcends merely his writings in *Summa Theologica*. Applied as a part of the rule of law test to the search for the focal meaning of law and its comparison with actual, in terms of positivists, »positive« law, it consists of the weighing of substantive criteria. Although there might be different approaches to interpretation, Aquinas' account offers a structured method, plausibly describes the actual thought process in which the interpreter might engage and at the same time enables the performance of the act of choosing that Finnis describes.

The process of applying a Finnis-based test for rule of law will thus roughly consist of the following steps:

1. Identification of the legal system or the part of a legal system for comparison with the focal meaning of law;

³ This is similar to Dworkin's approach in *Law's Empire* (Dworkin 1986, 45–86); see also Plankett and Sandell 2013, 242–281.

2. Analysis of congruence with formal *desiderata*;
3. Substantive weighing in light of the common good according to Aquinas's dialectical method;
4. Conclusion.

This dialectical approach is to a certain degree similar to what Dworkin proposes in *Law's Empire* (Dworkin 1986, 45–86; Plankett and Sandell 2013, 242–281), as it might be applied to what Dworkin calls integrity in legislation (Dworkin 1986, 167). It namely entails interpretive weighing in order to arrive at the best possible position, for example to ascertain congruence of legislation with the rule of law. There are two main differences however. While Dworkin aims for a somewhat obscure combination of integrity (primarily), fairness, justice and due process (Dworkin 1986, 164–167), a Finnis-based Thomist approach aims at the focal meaning of law as common good (Finnis 2011, 23). The problem with the vagueness of Dworkin's approach is illuminated by Guest. He claims that there is no sufficient reason, why integrity should be given precedence over other criteria proposed by Dworkin. While accepting Dworkin's general framework of four values, he states that justice is more important than integrity (Guest 2005, 441–468). A Finnis-based interpretive approach is not prone to this line of criticism, since it allows for a flexible weighing of different values, while retaining the notion of the common good as the overarching denominator. Furthermore, in contradiction to Dworkin's more or less arbitrary mental process of interpretation (Dworkin 1986, 240–250), the dialectical method of Aquinas offers a more structured approach that is arguably easier to apply and replicate.

A further interesting possibility opened up by the above approach and by the interpretive turn to Finnis' theory is that it enables the restatement of his theory of natural law by setting its foundations in the Christian faith. The common good and its values may namely be weighed in search of the focal meaning of law with the Christian understanding of life, knowledge, play, aesthetic experience, friendship, religion and freedom in mind. For the focal meaning of the law to even exist, it necessarily has to be the true meaning of the law. »Human mind by its nature longs for truth and does not rest until it has reached it.« (Petkovšek 2007, 205) Such an aim in interpretation is deeply Catholic in its nature, since the notion of truth is the starting point and the base of Catholic theology (Petkovšek 2018, 236). Interpretation as a way to seek the truth also seems to be congruent with Christianity, since to accept a Christian way of life does not mean that we possess the truth, but that we are on our way to finding out what the truth might be (Petkovšek 2018, 257; Strahovnik 2015, 253–263). Such an approach thus enables the restatement of modern natural law on a theological foundation, which is however much more nuanced and logically rigorous than its medieval natural law counterparts.

6. Conclusion

In attempting to apply Finnis' understanding in both its formal and substantive dimensions as a rule of law test and remaining philosophically consistent, it is necessary to perform an interpretive turn to his original theory. The dialectical method of St. Thomas Aquinas from his *Summa Theologica* is indeed a potentially important tool for the necessary weighing of values to be performed in the light of the common good.

The ensuing Finnis-based rule of law test might be applied to a wide range of legal systems and their parts, individual laws and acts of officials. It is practical to the degree that it allows for a structured approach to comparing the existing legal system with the focal meaning of law. At the same time, it is also firmly based on the foundation of the modern natural law theory.

Additionally and most interestingly, an important flaw in Finnis' conception has been exposed. It stems from the contradiction between his claims of incommensurability of values and the necessity to gain understanding of the focal meaning of the legal system through the same, supposedly incommensurable values. While the above flaw may be easily rectified by allowing for his theory to take an interpretive turn, this does have further implications. Since it seems that the search for truth is inherent in the honest search for the focal meaning of law, it might be that Finnis' theory can be restated in this way to put modern natural law back on a theological foundation.

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