JOHN FINNIS ON LAW AND JUSTICE

JOHN FINNIS O PRÁVU A SPRAVEDLNOSTI

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ABSTRACT
The article deals with the analysis of one particular aspect of natural law theory of John Finnis – his definition of law and justice. First part analyzes the focal meaning of the term law, which includes five basic features of legal system, rule of law principle and the role of practical reasonableness in law. Rule of law principle is connected with common good, which is prerequisite for the flourishing of all the members of a society. Practical reasonableness is one of the basic goods. Second part deals with Finnis's notion of justice and its types. He divides justice into three kinds – general justice, distributive justice, and commutative justice. According to him every justice issue requires a consideration of all three kinds of justice.

ABSTRAKT
Článek se zabývá rozborem jednoho z dílčích aspektů přirozenoprávní teorie Johna Finnise – jeho vymezením práva a spravedlnosti. První část analyzuje ohniskový význam pojmu právo, který zahrnuje pět základních aspektů právního systému, princip vlády práva a roli praktické rozumnosti v právu. Princip vlády práva spojuje s obecným dobrem, které je předpokladem rozvoje všech členů společnosti. Praktická rozumnost je pak jednou ze základních hodnot. Druhá část se věnuje Finnisovu pojetí spravedlnosti a jejím druhům. Spravedlnost rozděluje do tří forem – obecnou spravedlnost, rozdělovací spravedlnost a vyrovnávací spravedlnost. Podle jeho názoru se musí v každé situaci, kdy je zvažována spravedlnost, brát do úvahy všechny výše uvedené formy.

I. INTRODUCTION

A proper exposition of John Finnis's position on law and justice necessarily has two principal themes. One theme concerns his idea of what law and justice are. This identification theme will be the subject of this article. The other principal theme in Finnis's works is the determination of the extent of our duty to obey unjust law.

The identification theme will require an examination of what law and justice are for Finnis. We will show what the role of practical reasonableness in the law is for Finnis, namely, law in conformity with the basic goods and requirements of practical reasonableness, and after this explanation of law and practical reasonableness we will provide a review of Finnis's notion of justice.

The first part will begin by showing the differences between the focal and secondary meanings of concepts and words as focal and secondary meaning applies to law. This distinction will be followed by a consideration of Finnis's definition of an unjust law. Finnis believes that we can understand this concept by referring to the following notions: the five features of any legal system, the rule of law and its limits, and the role of practical reasonableness in the law. The identification of an unjust law is the recognition that a particular law has a defective relationship to practical reasonableness.

The second part of the identification theme will concern Finnis's notion of justice. Finnis's notion of justice consists of three components: general justice, distributive justice and commutative justice. It will be shown that his theory of justice and law are connected through the presence of the common good as ultimate end. The underlying principle behind any unjust law for Finnis is that a basic good must not be directly attacked by a law or in the alternative the common good must be favored, fostered, or respected by a law. Deviations from this negative or positive test result in injustice in the law.

II. THE FOCAL MEANING OF LAW

Finnis turns to Aristotle for a technique that he finds useful in articulating the differences between the focal and the secondary meanings of law. Aristotle regularly employed in many contexts a notion that Finnis terms "the identification of focal meaning."[1] Finding the focal meaning of a term refers to the situation in which a term is used in a basic and univocal way; this situation requires us to search for the element that will then be common to the spread of usages when it is used analogously and to determine this to be the prime analogue that contains the fullness of meaning found in the best uses of a given term; one can then identify related or secondary meanings. Finnis uses what Aristotle says about friendship to exemplify his point.

In the eighth book of the Nicomachean Ethics Aristotle discusses three forms of friendship.[2] One kind is based on utility and allows one to secure the necessities for life, e.g., business associates working together to make a living. Another kind of friendship is centered on pleasure, e.g., the friends with whom one goes out for recreation. The third kind of friendship is the most authentic. This kind of friendship is one where one has the best interests of the other in mind, regardless of utility or pleasure. The last kind of friendship is the type that Aristotle found to be primary (or in Finnis's term, focal).

Indeed, if one begins to think of good law on this model, one will stress the point that it promotes no interest (money, power, or honor) other than best interests of all involved. This procedure makes possible a fuller understanding of Finnis's substantive position on law both, just and unjust, although the point is not that good law is like the best friendship, but that the procedure gets one to a proper understanding of the focal sense of the term.

Locating the focal meaning of friendship in the third kind does not mean that the other two kinds of friendship are not friendship, but that they are friendships in the secondary sense. They are forms of friendship that fall short of the focal sense in some way. The structure does not disqualify them from being friendship in a secondary sense.

The technique of identifying focal and secondary meanings can be applied to the law. Finnis believes that when faced with a range of cases it is best to point out differences and similarities, for we can get a sense of the range of a word by noting the multiplicity of significations: "Terms can differentiate the mature from the undeveloped, the sophisticated from the primitive, the flourishing from the corrupt, a fine specimen from the deviant, the straightforward from the simply speaking."[3]

In a later work Finnis says: "The immature, the decayed, the parasitic, and the morally corrupted instances of constitutions, or friendships, or legal systems, are not allowed to force a thinning down of the account of the good kinds of constitution, friendship, law etc., but appear in the account, nonetheless, as what they are: as not fully constitutions, law, and so on, not central cases of those kinds of human reality and human purposefulness, and not within

1 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 9.
2 ARISTOTLE, Nicomachean Ethics, Book 8 – available at http://www.constitution.org/ari/ethic_08.htm.
3 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 10.

the focal meaning of those concepts."[4] In other words, for Finnis, one comes to a broader notion of the law by examining the different cases of law even though many of the non-central cases may be thought of as watered down versions of the law.

It should be noted that the focal case sense should be described in a way that is as complicated or uncomplicated as is necessary for a proper description. In this way, the principal meaning can be clearly identified and then extended to other cases by moving from a term's focal meaning to its secondary meanings. The principal meaning "is settled not by statistical normality but by the true forms and requirements of human flourishing and practical reasonableness, that is the topics and conclusions of a critical openly discussed natural law theory".[5]

In other words, the central or focal case is always up for discussion based on the rest of a natural meaning by reference to the basic goods and the requirements of practical reasonableness. Neither the focal case nor the secondary case is fixed for all places and all times. But we can get a better sense of focal meaning by looking to Finnis's definition of law, his explanation of the five features in the legal system, his explanation of the rule of law, and notion of the limits to the rule of law. Through these notions a clearer picture of the focal sense of law can be acquired in that the focal sense of the law is an amalgam of many different elements, all of which together seem to be what Finnis calls generally law as practical reasonableness.

III. THE DEFINITION OF LAW

Finnis spells out his definition of law in two places. In one place he says: "The central case of law is the law and the legal system of a complete community purporting to have authority to provide comprehensive and supreme direction for human behavior in that community and to grant legal validity to all other normative arrangements affecting the members of that community."[6]

In another place, Finnis says with more specificity: "throughout the book Law has been used with a focal meaning so as to refer primarily to rules made, in accordance with regulative legal rules by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a complete community and buttressed by sanctions in accordance with the rule guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the communities co-ordination problems (and to ratifying, tolerating, regulating or overriding coordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities."[7]

These passages show that Finnis's definition of law has within itself the notion that any particular law can be assessed by the degree to which it serves the purpose of law in general. Finnis believes that we can arrive at clearer concept of law by respecting the legal order and the rule of law. To the degree that a law or legal order instantiate the definitions above, it will be closer to law in the focal sense of the term.

The definition contains a number of major elements including "regulative legal rules", "maintenance of reciprocity" and the "common good". These elements all help to define what the focal sense of the law should be. On this topic Neil MacCormick says: "The focal or central meaning of our concept of law is of an authoritative common ordering of a community,

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4 FINNIS, J. Natural Law: The Classical Tradition. *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Ed. Jules Coleman and Scott Shapiro. Oxford: Clarendon, 2002, p. 17.

5 FINNIS, J. *Natural Law*. Volume 2. New York: Dartmouth Publishing and New York University, 1991, p. xii.

6 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 261.

7 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 276.

aimed at facilitating the realization of the common good."[8] This focal sense of the law could also be called loosely law as practical reasonableness.

Ultimately the meaning of a law is reached by considering the major elements in Finnis's definition of law above. The first element is the idea of "regulative legal rules". This can be understood by looking at what Finnis says about the five features of a legal system. The second major element relates to the "maintenance of reciprocity". This element concerns Finnis's discussion of the rule of law and its limitations. The third element relates to the common good which is to a large extent an exploration of law as practical reasonableness, although law as practical reasonableness is also implicated in the prior two elements.

IV. THE FIVE FEATURES OF LAW

Finnis believes that there are five features of any legal system: (1) law brings predictability and clarity, (2) it regulates what it brings into existence, that is, its rules define and regulate institutions, (3) it provides rules by which to terminate institutions, e.g., winding up a partnership or dissolving a corporation, (4) legal thinking brings a way of treating past acts as giving sufficient reason for acting in the present, and (5) all practical questions or coordination problems in the law are provided for in the prior four features.[9] Thus considered, law has two broad poles. It is a coercive power, but it is also self-regulative. It has to have a way of determining what is good and bad within itself.

These five features of law bring us beyond the idea of law as only a command that responds to recalcitrance (understanding law as the application of punitive sanctions to those who disobey the law). Finnis says: "It will be evident from the list that the ways in which the law shapes, supports, and furthers patterns of coordination would be desirable even in a society free from recalcitrance."[10] In other words, these five features of the legal system are what make up the law, not command. For Finnis, when these five features are present as far as the law is concerned, "the social arrangement would have a completely adequate rationale in a world of saints".[11] Finnis is saying that presence of the five features of the legal system operate as well with the best people as well as the worst.

V. THE RULE OF LAW

A treatment of law based only on the five features of the legal system is incomplete because the rule of law also has a positive role to play. More specifically, what we need is to establish the relationship between these formal features and the common good. For Finnis, the connection between the common good and the five features of the legal system is through the rule of law, which is "a virtue of human interaction and community".[12]

To help understand the notion of the rule of law, for Finnis, it is essential to stress the idea of the common good because the rule of law is always in service to the common good, and the common good is always in the service of people.[13] This means that the rule of law as well as the common good is only a means to the end of the flourishing of all the members of a society. Finnis describes the rule of law and the common good as "the whole ensemble of conditions that tend to foster the realization of each individual's good".[14]

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8 MACCORMICK N. Review: Natural Law Reconsidered. *Oxford Journal of Legal Studies* Vol. 1, No. 1, 1981, p. 106.
9 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 266.
10 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 267.
11 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 268.
12 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 272.
13 FINNIS, J. The Priority of Persons. *Oxford Essays in Jurisprudence*. Ed. Jeremy Horder. Oxford: Clarendon, 1999, p. 151.
14 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 47.

It should be noted that there are proponents of Finnis who hold a different view of the common good. Mark Murphy holds that the common good is a collective good and should be pursued as a goal itself instead of as a way of promoting individual flourishing.[15]

What is important to see is the instrumental character of Finnis's view of law, the rule of law, and the common good. He writes: "Thus the political community – properly understood as one of the forms of collaboration needed for the sake of the goods identified in the first principles of natural law – is a community which is instrumental, not itself basic."[16] Finnis is saying that the fundamental point of the rule of law and law in general is to promote the common good and the purpose of the common good is to promote the basic welfare of each individual. Law as well as the rule of law are not ends in themselves, but rather the means by which people pursue their flourishing.

Another way to say this is that the rule of law works with the common good "to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation. The rule of law is thus among the requirements of justice and fairness."[17] As we have seen, Finnis holds that justice is achieved by promoting the eighth requirement of practical reasonableness and this requirement includes promoting the common good. As Finnis puts it: "Very many perhaps even most of our concrete moral responsibilities, obligations, and duties have their basis in the eighth requirement."[18] The rule of law and the common good are instruments to promote the wellbeing of individuals and the government.

A legal system will exemplify the rule of law to the extent that its rules are (1) prospective, (2) not impossible to comply with, (3) promulgated, (4) clear, (5) coherent, (6) stable, (7) made for limited situations, and (8) made by those in authority who make and administer rules properly. This last consideration reminds us that a legal system exists in the "ordering the affairs of people to shape their projects through institutions".[19]

The idea of the rule of law is that it enhances the quality of interaction between the ruler and the people. People have to know what laws they are obeying. People have to have notice of laws. Laws cannot be overbroad in their applications. In short the rule of law implies stability and permanence in a legal system. But the rule of law is not the only aspect to a legal system. The demands of the common good are always in the background when the rule of law is at play.

The purpose of the rule of law is to promote the wellbeing of a community and thereby allow individuals to develop themselves in a stable environment. As Finnis says: "Individuals can only be selves – i.e. have the "dignity" of being "responsible agents" – if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a lifetime."[20] The rule of law means that "a certain quality of interaction exists between the ruler and the ruled".[21] The elements of the rule of law exist so that everyone knows where they stand in relation to the law's demands and the purpose of the rule of law is to allow people to become themselves in a stable and secure environment.

For Finnis, the rule of law has an important role in making sure that legal system is in service to the people. But the rule of law also has its limitations, for instance, when it does not promote the common good or is not in service to the people. This means that sometimes the basic values (that is, the fundamental goods of his system of ethics) have to be secured by

[15] MURPHY, M. *The Philosophy of Law: The Fundamentals*. Malden: Blackwell, 2007, p. 62.
[16] FINNIS, J. Is Natural Law Theory Compatible with Limited Government?" *Natural Law Liberalism and Morality*. Ed. Robert George. Oxford: Oxford University, 1996, p. 5.
[17] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 273.
[18] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 125.
[19] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 270.
[20] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 272.
[21] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 270.

departing from the constitution. In other words, the rule of law usually expressed through the supreme document of the land, can be set for Finnis, but these occasions call for responsibility and the "most measured practical reasonableness".[22]

The practical reason for sometimes not following the rule of law is that a constitution is not a suicide pact (the rule of law cannot ask people to do things that will undermine the country). In situations where survival of a society itself is at issue, major documents like constitution where the rule of law is reflected may be set aside for the sake of the common good. For example, one might think of a law that is placed in a constitution (in a country with a small population) that permits only one child per family. On Finnis's view, even though this is written into the constitution by proper procedure there is something dramatically wrong with the law, that is, it is not in the best interest of the people, that is, the common good. For Finnis, we can recognize moral principles outside of law to matters that are judged by the constitution.[23] In other words, for Finnis, the legitimacy of any law is always a legal and a moral question.

As Finnis puts it, we have "to stress again and again in an age of conceptual dogmatism concepts of law and society are legitimately many, and their employment is subordinated to matters of principle rooted in the basic principles and requirements of practical reasonableness (which themselves generate many concepts and can be expressed in many reasonable forms)".[24]

In a work composed after Natural Law and Natural Rights Finnis makes an even stronger claim about the rule of law. He says: "The principles of the rule of law are, at least in their main lines, moral requirements, strong even though not unconditional, unqualifiable or indefeasible."[25] This shows that, for Finnis, at least in his later works, the rule of law may have more of a moral than legal grounding despite the fact that the rule of law and its components look more legal than moral in nature. In addition, the quote shows that the rule of law has a strong authoritative effect thus continuing the tension in Finnis's works between the basic goods and the state's legitimacy. The rule of law may be set aside, but for Finnis, these cases are far and few between.

The foregoing discussion about the formal features of the legal system, the rule of law, and the limits to rule of law are crucial for determining questions about the justice or injustice of a given law. Laws that do not reflect the five features and the rule of law will be at risk of being unjust because they are legally defective. In addition, as the discussion of limits to the rule of law show the basic goods and the requirements of practical reasonableness will be needed in any discussion of what makes a good and a bad law.

All explorations of the law are explorations of "practical reasonableness".[26] Morality and the law are very much interconnected – in fact, almost inextricably intertwined. Finnis rejects in part the basic positivist position that law is a mere matter of social fact, that is, what the legislatures and courts say the law is. Law for Finnis is a matter of what the courts and the legislatures say and do, that is, what they decide and legislate, but good law is more than this. Good law goes beyond what the government decides and legislates. For Finnis, law is an instantiation of the basic goods and the requirements of practical reasonableness not only for individuals but also for governmental bodies. Just as an individual has a duty to participate in the basic goods and requirements of practical reasonableness so does a governmental body or judge. Without such a participation in the basic goods and the requirements of practical reasonableness governments like individuals will run the risk of making unjust laws or bad deci-

22 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 275.
23 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 275.
24 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 273.
25 FINNIS, J. Law and What I Should Truly Decide. *American Journal of Jurisprudence* 48, 2003, p. 112.
26 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 135.

sions.

Finnis writes: "The life of the law its primary reality, is not in the logic of conceptual; adherence or of understanding what other people have thought or said or stipulated of commanded or enacted nor in the experience of cause and effect and patterns of recurrence. Those are parts of its matrix of necessary preconditions. The primary reality of the law is rather in its claim as itself a moral requirement, on my deliberating about what to decide that is what to judge about the options available to me and what to choose and do once I have made my judgment."[27]

Law, in other words, is a morally compelling claim on my actions; although it is conditional and defeasible should certain kinds of moral consideration override it. Finnis holds this when he states that law is "so decisive that it could be overridden only by some competing moral obligation bearing on me here and now with such weight that anyone with the community's common good in mind would acknowledge the justice of my treating the latter as overriding the law and its legal – moral obligation".[28] Another way of putting this is by saying that our obligations with regard to the basic goods of morality can override our obligations to obey certain legal enactments.

The kind of moral override that one considers here is laws which permit people to do things that are not in conformity with the basic goods and requirements of practical reasonableness. One need only consider a law which would permit the disposal of an extremely hazardous waste in someone's back yard, thereby subjecting their neighbor to potential sickness and death. This kind of law would give to the neighbor the right to trespass on the property next door to remove the toxic material. In this case the basic moral good of life would justify a trespass on the property and thereby override the law against trespass. When the moral basic goods are violated legality may be challenged.

This tension between morality and legality can be better understood by looking more closely at the notion of relation of law and practical reasonableness. The basic idea will be that the five features of the legal system, the rule of law, and the limits to the rule of law are not the entire requirements for good law. They bring us to a certain kind of understanding of legality of law but fall short of deeper understanding of the morality of the law. Once the full meaning of law and its proper relationship to practical reasonableness is understood it will be possible for one to appreciate the full meaning of unjust law for Finnis.

VI. THE ROLE OF PRACTICAL REASONABLENESS IN THE LAW

It is important to point out that Finnis's understanding of the role of practical reasonableness in the law is very dense and hence it needs to be analyzed carefully, for it is a major building block in his theory of jurisprudence. In addition, it is important to realize that there are a few important points that need to be made to help one understand the role of practical reasonableness in the law for Finnis. These points concern the meaning of the terms "basic good of practical reasonableness", "the requirements of practical reasonableness" and the "concept of law".

Practical reasonableness is a basic good for Finnis. It is the basic good that guides one's projects and what one does in "carrying them out".[29] In other words, explaining how all the other basic goods and principles are brought to bear on our projects "is the problem of practical reasonableness".[30] One aspect of the basic good of practical reasonableness is called the requirements of practical reasonableness. There are ten requirements of practical reasonable-

[27] FINNIS, J. Law and What I Should Truly Decide. *American Journal of Jurisprudence* 48, 2003, p. 112.
[28] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 280.
[29] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 190.
[30] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 190.

ness and there is one in particular, number eight, which concerns itself with justice and the common good.[31] It is largely this eighth requirement of practical reasonableness which helps us to understand the role of practical reasonableness in the law.

This is not to say that the other basic goods and requirements of practical reasonableness are not relevant in the role that practical reasonableness plays in the law. On the contrary, Finnis says that they do have a role: "Deeper and more demanding than any constitutional or other legal limits on government are the moral principles and norms which natural law theory considers to be principles and norms of reason, and which are limits, side constraints recognized in the conscientious deliberations of every decent person."[32] Again the role of the basic good of practical reasonableness is to bring to bear all the basic goods and all the other requirements of practical reasonableness in our commitments. A given person may emphasize one basic good or requirement of practical reasonableness over another, but the requirements of practical reasonableness mean that one must consider all of the basic goods and all of the requirements in order to make commitments properly, and this requirement is true of law as of every other aspect of life. The point of practical reasonableness is to order ourselves and to order the relationship we have with those around us.[33]

Again Finnis seems to emphasize the need that concept of law must be grounded in the basic goods and requirements of practical reasonableness when he says: "As we have to stress again and again in an age of conceptual dogmatism, concepts of law and society are legitimately many, and their employment is subordinated to matters of principle rooted in the basic principles and requirements of practical reasonableness (which generate many concepts and can be expressed many different forms)."[34] What these quotes show is that the role of practical reasonableness is to provide a standard that is over the law by which we are able to make sure that the requirements of practical reasonableness are respected, and this is a particularly the case with the eighth requirement of practical reasonableness, that is, that the law promote the common good.

The eighth requirement of practical reasonableness directs that the common good be promoted. This notion of the promotion of the common good is not only a requirement of practical reasonableness; it is also part of the standard definition of law that Finnis himself advances, and a part of the concept of law that has always been prominent in natural law theory. The basic of the role of practical reasonableness in regard to a concept of law is that this notion requires us when we are making law or when we are applying law or when we are constructing a concept of law to remember that the law must remain consistent with its own purpose and definition, which is among other things to promote the common good.

Another way to understand the role of practical reasonableness in the area of the concept of law is to say that the concept of law is an expression of practical reasonableness in the political community, for it is a task of practical reasonableness when the political community seeks the common good. The standard of practical reasonableness forces us to recognize that law needs to be an instrument in service to people, and in this capacity, a concept of law requires that citizens respect and honor law by their obedience, although this presumption that they give their obedience is not an absolute sort of allegiance because obedience itself is not the end of the good life, but merely a means to get to the good life.[35] The problem arises when giving obedience to a particular law seems to be at odds with other requirements of morality.

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31 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 125.

32 FINNIS, J. Is Natural Law Theory Compatible with Limited Government? *Natural Law Liberalism and Morality*. Ed. Robert George. Oxford: Oxford University, 1996, p. 2.

33 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 88.

34 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 273.

35 FINNIS, J. The ethics of war and peace in the catholic natural law tradition In John Aloysius Coleman (ed.), *Christian Political Ethics*. Princeton University Press, 2007, p. 193.

Of course it is easy to see that under Finnis's view, when we have a law that does not promote the common good or attacks the common good in some way, then we may have an unjust law.

Another way to say this is that law that actually injures the common good in some way or that directly attacks a basic good could more easily be thought to be "bad law" or "unjust law". Also, our interest in considering the question of "bad law" or "unjust law" not only comes from questions about the way a given law may be unjust by failing to promote the common good, injure the common good or attack the common good; it will also be a matter of interest to see if from the standpoint of practical reasonableness we have a duty to obey a bad or unjust law. This will present us with the issue of investigating various degrees of practical reasonableness.[36] One way in which we can understand the different forms of practical reasonableness is by understanding that the "concept of law" has a very precise meaning for Finnis. His "concept of law" is very much tied to practical reasonableness because his concept of law is closely connected to "moral concern".[37]

Finnis recognizes a certain ambiguity in his concept of law when he says that his intent was to "develop a concept which would explain the various phenomena referred to (in an unfocused way) by ordinary talk about law – explain them by showing how they answer (fully or partially) to the standing requirements of practical reasonableness relevant to the broad area of human concern and interaction".[38] In other words, when we attempt to understand the concept of law for Finnis, we have to try not to think just about law in ordinary ways which can be ambiguous. These ordinary ways would include what a lawyer does in his day to day function or what a judge or legislator do in their day to day functions. The way we think of the concept of law for Finnis is through his definition of law and the rule of law as expressions of practical reasonableness.

What this means is that the concept of law will explain the elements of what the central case of the law is and within those descriptive elements there will be an evaluative component which always forces us to ask if this is the way our concept of law ought to be from the viewpoint of practical reasonableness. This is what Finnis means when he says: "In relation to law, the most important things for the theorist to know and describe are the things which, in the judgment of the theorist make it important from a practical viewpoint to have law – the things which it is, therefore, important in practice to 'see to' when ordering human affairs. And when these 'important things' are (in some or even many societies) in fact missing, or debased, or exploited or otherwise deficient, then the most important things for the theorist to describe are those aspects of the situation that manifest this absence, debasement, exploitation or deficiency."[39]

Finnis acknowledges that legal reasoning, like all technical reasoning, is concerned with achieving a particular end. In the case of legal reasoning the end is the resolution of disputes. "As far as it can the law is to provide sources of reasoning – statutes and statute based rules, common law rules, and customs – capable of ranking (commensurating) alternative dispute resolutions as right or wrong, and thus better or worse."[40] But this is not the kind of thinking about law that Finnis wants us to consider especially when we consider the role of practical reasonableness in the law.

Considering law in regard to the requirements of practical reasonableness includes using as the standard of assessment not only the technical requirements for statutes or judicial decisions but also the requirement of measuring any proposed or existing law in terms of the basic

[36] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 361.
[37] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 14.
[38] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 279.
[39] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 16.
[40] FINNIS, J. Natural Law and Legal Reasoning. *Cleveland State Law Review* 38, 1990, p. 7.

goods and the other requirements of practical reasonableness. For Finnis, when law is considered in terms of its moral value, it means that law is subject "to any criteria of right judgment in matters of practice (conduct action), any standards for assessing options for human conduct as good or bad, right or wrong, desirable or undesirable, decent or unworthy".[41]

Here Finnis wants us to consider all the basic goods and all the requirements of practical reasonableness. Hence law is not to be understood in merely the ordinary and technical ways we might think about it. Law needs to be reviewed with regard to the requirement that all the basic goods and requirements of practical reasonableness, but particularly the requirement that actions be assessed by reference to the common good. Under Finnis's view, it is the function of the basic goods and the various requirements of practical reasonableness to consider how a proposed or existing law can promote the common good, how it might fail to do so, and even how it might injure or attack the common good or some basic good such as life.

One important role of practical reasonableness in the law then is to show us a criterion by which to assess which laws are good laws and which laws are defective in some way, perhaps because they are not in the service of people in that they fail to bring about or as Finnis says foster, favor or respect the common good.[42] This raises the question as to whether the test is the positive promotion of the common good or merely not offending against the common good.

It is clear that we have a duty not to attack any basic good. This duty is the seventh requirement of practical reasonableness. Thus it is clear that our laws must not attack the common good so we must not offend the common good. But a good argument can be made from Finnis that the words "foster", "favor" and "respect" point to a more positive test.[43] The sense of this very complex, but the basic idea is that we should foster a shared community where all the members can prosper.

In this process of addressing the common good it is critical to remember that all the requirements of practical reasonableness and all the basic goods implicate one another so when we say that the role of practical reasonableness in the law is to respect, favor or foster the common good what we are also saying is that the role of practical reasonableness in the concept of law is to promote all the basic goods and requirements of practical reasonableness.[44]

VII. FINNIS'S NOTION OF JUSTICE

Finnis's notion of justice cannot be understood unless one appreciates his division of justice. He divides justice into three kinds – general justice, distributive justice and commutative justice. His idea of general justice is confusing because he uses the notion in two senses. The first and clearer sense is that general justice refers to justice as a virtue in the individual. The second and less clear sense is that general justice means justice "generally speaking".[45] He wants us to understand that general justice in the second sense is understood by looking at justice in a broad sense. In this way, the second sense of general justice has within its definition distributive justice, commutative justice, and all the basic goods and requirements of practical reasonableness.

For Finnis, general justice is an "ensemble" of the other requirements of practical reasonableness although he is not very specific about what ensemble means.[46] His concept of justice

41 FINNIS, J. Natural Law: The Classical Tradition. *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Ed. Jules Coleman and Scott Shapiro. Oxford: Clarendon, 2002, p. 1.
42 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 125.
43 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 125.
44 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 126.
45 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 164.
46 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 161.

is derivative from what he says about the requirements of practical reasonableness, namely, the demands of the common good. The demands of the common good require that all distributive justice and commutative justice be realized in our moral actions.[47]

VIII. GENERAL JUSTICE AND ITS ELEMENTS

Finnis says that general justice is concerned with three elements, other directedness, duties owed to others, and equality.[48] The first element consists of a kind of communal thinking where the focus is away from individual self-interest. The second element considers all the basic goods and requirements of practical reasonableness in our relation to others. The third element highlights the importance of geometrical equality as opposed to arithmetical equality. For example, geometrical equality occurs when two people want food and one person is larger than another. Each person under proportionate justice gets an appropriate portion of food, but those portions are not equal in size but proportionate to the size of the individuals.

The three elements of general justice give "the concept of justice sufficient precision to be useful in an analysis of practical reasonableness and sufficient breadth for it to be worthy of its classical and popular prominence in that analysis".[49] Finnis's concept of general justice emphasizes the broad range of his theory. In other words, Finnis does not restrict his notion of justice to institutions, nor to the principle to treat similar cases alike and different cases differently, nor to the ideal conditions in a society in which everyone complies with the institutions of justice.

Finnis also ties his definition of general justice to the requirements of practical reasonableness, particularly the eighth requirement – the requirement to promote the common good. "The requirements of justice, then, are the concrete implications of the basic requirement of practical reasonableness that one is to favor and foster the common good of one's communities."[50] In other words, general justice is about our relation to the common good as well as to all the other basic goods and requirements of practical reasonableness and what these rules instruct us to do in our relations to others. We advance, in large part, the good of our neighbor and the common good by appreciating the demands of distributive and commutative justice as aspects of the requirements of practical reasonableness.[51]

IX. DISTRIBUTIVE JUSTICE AND ITS ELEMENTS

Distributive justice refers to how the benefits and burdens in society are distributed across that society fairly. Distributive justice is composed of six elements. The first element is the need of the people as a whole in a community. The second element is the need of people as a whole with reference to need as it relates to the basic human goods in the entire human community. The third element of distributive justice is the criteria of capacity. As Finnis says, flute players should "be flute players" and not persons they were not designed to be.[52]

The fourth element is the issue of deserts and contributions. These relate to notions of self-sacrifice and community gratitude in each person's use of their talents and abilities in the community. The fifth element of distributive justice is the awareness of foreseen and avoidable risks. Finnis believes this is a "familiar problem to lawyers but rather overlooked by philosophers".[53] Finally, in matters of distributive justice "we are not seeking to assess states of

47 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 166.
48 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 161.
49 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 163.
50 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 164.
51 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 164.
52 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 175.
53 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 175.

affairs by reference to consequences. Rather, we are trying to assess what practical reasonableness requires of particular people".[54] The last element of distributive justice is important because it reminds us of two other aspects of distributive justice.

First, distributive justice reminds us that we must not demand exact precision in our distribution schemes. The lack of exact precision entails we are never going to get an ideal solution to any distribution issue because the entire problem of distributive justice arises on account of limited resources. When it comes to achieving distributive justice, not everyone is going to get what they want because there is not enough to go around when resources are scarce. Second, for Finnis, it is critical to understand that the "objective of justice is not equality but the common good, the flourishing of all members of the community, and there is no reason to believe that this flourishing of all is enhanced by treating everyone identically when distributing roles, opportunities, and resources".[55] But this does not mean that equality is not a large consideration in matters of distributive justice.

Finnis insists that equality has an influential role to play in the concept of justice. This belief is evidenced not only by its presence in his definition of general justice, but also through its presence in the fourth requirement of practical reasonableness, that is, we are to give no arbitrary preference to any person.[56] Thus, the meaning of distributive justice, for Finnis, is largely tied to the concept of equality, especially the idea of proportionate equality.

X. COMMUTATIVE JUSTICE AND ITS ELEMENTS

Commutative justice exists to remedy inequalities or wrongs between individuals in a society. Commutative justice is related to the law of torts, contracts and crimes between individuals. It is that area of justice which determines "what dealings are proper between parties".[57] It is less concerned with duties we have to a society as a whole and more concerned with what duties we owe to one another as individuals.

Commutative justice consists of five elements.[58] The first is that there must be ascertained individuals, that is, there must be a zone of identified individuals to whom an act of justice refers. The second element is the duty one has to such an ascertained individuals. The third element is the potential duties owed to many ascertained individuals. For instance, in the case of a chain automobile accident, a negligent driver owes duties to other individuals beyond those duties owed to the person in the first car he first strikes. The negligent driver has a duty to be careful to all other drivers on the road. The fourth element of commutative justice is the collective duties an individual owes to the governing authorities in a society. Good examples of these duties are the duties of loyalty to a state, that is, the duty not to commit treason and the duty to pay taxes.

Finally, the last element of commutative justice relates to the duties owed by those who have authority over their subjects. For example, even though a law of taxation may be just, it maybe that the way it is administered to individuals by a judge is unfair. For instance, citizen A may get a certain benefit by an administrative ruling and citizen B may not get the same benefit under another ruling dealing with the same issue with identical facts. A judge's misapplication of the law in B's case would be an instance of an authority violating the commutative duties he owes to the citizen in that he has failed in his duty to apply the law similarly to similarly situated individuals.

The essence of Finnis's view of commutative justice is that persons have certain duties and

54 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 175.
55 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 174.
56 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 106.
57 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 178.
58 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 183.

responsibilities to their fellow citizens. They also have duties and responsibilities to their governments. In addition, leaders have certain responsibilities and duties toward their citizens. Commutative justice differs from distributive justice in that distributive justice looks to each individual's responsibility to the society as a whole whereas commutative justice looks more to the responsibilities that citizens have to one another. Commutative justice also differs from general justice in that it is less concerned with virtue and more concerned with correcting wrongs that occur between individuals.

Finnis points out that many human acts involve both distributive and commutative problems, like the act of a judge rendering a judgment. The good judge helps a society correct a wrong and also fixes the wrong between the two parties. The biased judge violates distributive justice by not meeting the needs of the community, and also violates commutative justice by applying the law to a particular case in a way that hurts an individual party. For instance, when a judge fails to give an individual a proper sentence for a large larceny, he not only violates his duty to protect the society as a whole, he also fails to correct the harm done to the victim.

XI. CONCLUSION

Finnis says that his analysis of justice is more in the spirit of Aquinas's view of justice and as such Finnis's view is directed against a certain contemporary view of justice.[59] Finnis believes that the problems with this contemporary view of justice are shown by contrasting the contemporary notion with Aquinas's view. On Aquinas's view of justice, according to Finnis, both distributive and commutative justices are equally important.[60]

In contrast to Aquinas's view of justice the contemporary view of justice only emphasizes commutative justice or the duties that we owe to one another. Finnis believes that the private justice between individuals, that is, commutative justice, always needs to work with the demands of distributive justice. Finnis says: "On Aquinas's view, legal justice is the fundamental form of all justice, the basis of all obligations, distributive and commutative, for it is the underlying duty to respect and advance the common good. On the contemporary view of justice, justice is little more than the citizen's allegiance to the State and its laws."[61] What Finnis is saying is that on the contemporary view of justice the idea of the individual promoting the common good is replaced by the idea that the advancement of a person's own rights is the best way to insure justice.

On the contemporary view of justice, according to Finnis, one conforms to the laws of the state only to advance one's own interest, and not to advance anyone else's interests, let alone the interests of the common good. What Finnis is saying is that there is little place for the distributive function of justice under the new view. In the absence of the need to promote the common good, all we need to have is a system of justice that protects people from one another, and hence the emphasis on commutative justice under the contemporary view.

On Finnis's view, justice is held to exist not only between individuals, but also among the relationship between a person and the state. Another way to think of this is to say that on Finnis's view an individual has larger sense of distributive justice, that is, distributive justice requires more of the individual. The individual not only has to think about how he fits into the whole, but also about how every other individual other than himself fits into the whole. Finnis takes exception to view which holds that an individual has no distributive obligations to advance the common good.

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59 The view put forward principally in Robert Nozick's Anarchy State And Utopia (Oxford, 1974).
60 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 186.
61 FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 186.

Finnis believes that the contemporary view of justice contributes to some mistaken ideas, such as the notion that once a person has acquired property rightly it is unjust for any person or any institution to take the property away from that person absent very compelling reasons. Finnis believes in the importance of private property, but suggests that when the common good requires it, one needs to reconsider the duties that a person as a property owner has. The demands of practical reasonableness will require at times that a distribution of property may be in the best interests of the common good. For example, in the case of a natural flood disaster sending a relief check to flood victims is the right thing to promote the common good regardless of what the state may or may not dictate through its laws about providing relief to victims in such situations. The duty to discharge the call of practical reasonableness is independent from any property right because property rights have a "subsidiary function".[62]

In summary, justice is multifaceted for Finnis. It entails identifying the general, distributive and commutative aspects to justice. Each of these different aspects of justice has its own elements but, for Finnis, every justice issue requires a consideration of all three kinds of justice. One must also consider the ensemble of the basic goods and the requirements of practical reasonableness. For our purposes what this means is that in the context of unjust laws and our duty to obey them justice will be achieved either in whole or in part by the application of the requirements of each kind of justice to particular case.

KEY WORDS

Unjust law, rule of law, practical reasonableness, general justice, distributive justice, commutative justice

KLÍČOVÁ SLOVA

Nespravedlivé právo, vláda práva, praktická rozumnost, obecná spravedlnost, rozdělovací spravedlnost, vyrovnávací spravedlnost

BIBLIOGRAPHY

1. ARISTOTLE, *Nicomachean Ethics*, Book 8 – available at http://www.constitution.org/ari/ ethic_08.htm
2. FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980
3. FINNIS, J. Natural Law and Legal Reasoning. *Cleveland State Law Review* 38, 1990
4. FINNIS, J. Natural Law: The Classical Tradition. *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Ed. Jules Coleman and Scott Shapiro. Oxford: Clarendon, 2002
5. FINNIS, J. The ethics of war and peace in the catholic natural law tradition In: John Aloysius Coleman (ed.), *Christian Political Ethics*. Princeton University Press, 2007
6. FINNIS, J. Is Natural Law Theory Compatible with Limited Government? *Natural Law Liberalism and Morality*. Ed. Robert George. Oxford: Oxford University, 1996
7. FINNIS, J. Law and What I Should Truly Decide. *American Journal of Jurisprudence* 48, 2003
8. FINNIS, J. The Priority of Persons. *Oxford Essays in Jurisprudence*. Ed. Jeremy Horder. Oxford: Clarendon, 1999
9. FINNIS, J. *Natural Law*. Volume 2. New York: Dartmouth Publishing and New York University, 1991

[62] FINNIS, J. *Natural Law and Natural Rights*, Oxford: Oxford University Press, 1980, p. 188.

10. MACCORMICK N. Review: Natural Law Reconsidered. *Oxford Journal of Legal Studies* Vol. 1, No. 1, 1981
11. MURPHY, M. *The Philosophy of Law: The Fundamentals*. Malden: Blackwell, 2007

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