

JURISPRUDENCE

COURSEWORK QUESTION:

“Given the contrast between the internal and external moralities, it should be clear that compliance with the eight principles does not guarantee that the law will be just. It is logically possible for a government to comply with the eight principles to a very high degree and nevertheless enact unjust laws.”

[N.E. Simmonds, *Central Issues in Jurisprudence*, Sweet & Maxwell, 2002, Chapter 7, p. 236]

Explain and analyse Fuller’s internal morality of law in detail, paying specific attention to its place in the natural law tradition. What specific criticisms have been made of Fuller’s inner morality thesis, and how did Fuller respond?

Sample Essay Answer

The work of American jurist Lon Fuller (1902-1978) is based upon the close relationship between law and morality. For this reason, Fuller's work is often viewed as a modern continuation of the natural law tradition. However, Fuller's theory is not simply a restatement of the old natural law maxim 'an unjust law is not a law'.¹ In fact, as Simmonds' quote indicates, Fuller's 'morality' of law could possibly co-exist with injustice. Fuller therefore does not seem to fit comfortably into the school of natural law. This essay will explore this aspect of Fuller's theory and the surrounding academic debate.

Fuller and Natural Law

Formulating a precise definition of natural law may be difficult as the concept has not remained static; there have been different doctrines of natural law.² However, the term "natural law" has continuity, so it may be possible to find a "family resemblance"³ between the doctrines, establishing a common intention between the philosophers of the natural law school, i.e. to search for principles of social order, which will "enable men to attain a satisfactory life in common."⁴

At the most general level natural lawyers seek to examine the extent of the relationship of law and morality. The essence of natural law seems to lie in the constant assertion that there are objective moral principles which depend upon the nature of the universe, and are discoverable by reason.⁵ For the natural lawyer, one cannot have a proper legal system that is devoid of religious or moral content.

It is claimed the best description of natural law "is that it provides a name for the point of intersection between law and morals,"⁶ so that anyone who tries to explain law automatically makes assumptions about what it 'good'.⁷ Therefore, theories of the natural lawyer seek to avoid the tension between what 'is' and what 'ought to be,' arguing that what the law 'is' is based on a higher reason, and so is also what the law 'ought' to be.

The influence of the positivist school began in the eighteenth century and prevailed for most of the nineteenth century. Positivism's empirical methods and value-free account of law substantially displaced theories of natural law.⁸ However the twentieth century saw a revival of interest in natural law theory.⁹ Although a number

¹ MDA Freeman, *Lloyds Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001) p 26.

² *Ibid* 90.

³ L Fuller, 'Human Purpose and Natural Law', *Journal of Philosophy*, (1956) Vol.53, No.22, 697-705.

⁴ *Ibid*.

⁵ Freeman (n 1) 90.

⁶ AP D'Entrèves, *Natural Law*, (Hutchinson 1970) p 116.

⁷ J Finnis, *Natural law and Natural Rights* (Clarendon Press 1980). John Finnis a natural lawyer stated that "A theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness."

⁸ P Halstead, *The Comprehensive Guide To All The Facts: Jurisprudence* (Hodder Arnold 2005) p 8.

⁹ Freeman (n 1) 123.

of factors contributed to this,¹⁰ the jurist Professor Lon Fuller played a significant role.

Instead of postulating the substantive natural law view that proclaims a higher law than that enacted by statute, Fuller adopts a ‘procedural natural law’¹¹ approach. Like earlier natural law tradition he believes there is a connection between law and morality. Yet, the difference is, he believes there is a *necessary* connection.¹²

Fuller’s Internal Morality

Distinguishing between what he calls the “internal” and “external” morality of law,¹³ Fuller suggests there is an ‘inner morality’, or order for law, and he summarises these procedural natural law ideas as comprising eight principles. According to Fuller, these are the eight ways in which laws should be made: there must be known and ongoing rules of conduct expressed in general terms, not random orders; the rules must not be retrospective in effect; rules must be published so people know what is expected of them; rules have to be intelligible, expressed in terms that are understandable and unambiguous in meaning; rules should be consistent and not contradictory; it must be possible for people to obey the rules; laws should remain as constant as possible, and the administration of the rules should be consistent.¹⁴

These eight principles are what he calls the ‘internal morality’ of law. They are internal because they are implicit in the concept of law, and moral as they set up standards for evaluating official conduct.¹⁵ This may be contrasted with the ‘external’ morality of law, which according to Fuller, is to do with whether a particular subject should become an object of legislation, e.g. ‘such topics as polygamy, the study of Marx, the worship of God, the progressive income tax, or the subjugation of women.’¹⁶ When individuals comment on the morality of laws regarding these or other issues they are commenting upon this external morality of law. However, Fuller’s focus is upon law’s internal morality.

For Fuller, the principles of procedural morality are the “eight kinds of legal excellence toward which a system of rules may strive,”¹⁷ the moral foundation which a legal order must have,¹⁸ and the principles are necessary before any set of rules can be considered to constitute a proper legal system. Therefore, despite the fact that Fuller’s views seem to fit most comfortably amongst natural law thinkers,¹⁹ according to Nicholson his ‘natural law terminology should not be allowed to obscure his

¹⁰ For example, the post-war recognition of human rights and their expression in declarations such as the European Convention on Human Rights, the Nuremberg war trials, the atrocities of the Nazi Regime etc.

¹¹ L Fuller *The Morality of Law, Revised Edition* (Yale University Press, 1969) p 97.

¹² B Macleod-Cullinane, (1995) ‘Lon L. Fuller and the Enterprise of Law’, *Legal Notes* (1995) No:22.

¹³, Fuller (n 11) 96.

¹⁴ *Ibid* 39.

¹⁵ Freeman (n 1) 126

¹⁶ Fuller (n 11) 96.

¹⁷ *Ibid* 41.

¹⁸ L Fuller, ‘*Positivism and Fidelity to Law-A Reply to Professor Hart*’ *Harv. L. Rev.* (1958) Vol 71, p 630.

¹⁹ A Sacks, ‘*Lon Luvois Fuller*’ *Harv. L. Rev.* (1979) Vol 92, p 349.

originality.²⁰ Rejecting the idea that infinite and eternal principles exist like a “brooding omnipresence in the sky,”²¹ he disregards natural laws as “higher laws” and likens them to, for example the natural laws of carpentry.²² In doing so he rejects the Christian doctrines of natural law, the seventeenth and eighteenth century rationalist doctrines of natural rights, and does not subscribe to a system of absolute values.²³

Not content in following these existing schools of philosophy,²⁴ Fuller uses the term morality in a different sense from most theorists. His morality is said to lie in procedure rather than religion, and his version of natural law is not concerned with the substantive aims of legal rules, but “with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be”.²⁵ Fuller’s internal morality therefore does not claim to accomplish any substantive ends, apart from the excellence of law itself.²⁶ He focuses on what he regards as a long-neglected aspect of the law, namely its internal morality, drawing attention to the procedural rather than the substantive issues.²⁷

It is this extension of the traditional analysis which is believed to be Fuller’s main and “lasting contribution to jurisprudence.”²⁸ By providing a ‘viable alternative perspective on law and morality,’ he redirects attention to a whole range of fresh questions,²⁹ and stimulates speculative thought about the law.³⁰ Consequently, he appears to reawaken interest in natural law theory which was dormant until well after the Second World War,³¹ in a period when positivism was riding high, and attempts to overcome the ‘is’/‘ought’ hurdle that has undermined natural lawyers in the past.

Not only does Fuller offer an alternative approach to the connection between law and morality, he takes these ideas which appear abstract and difficult, and makes them interesting and more accessible by illustrating them with a ‘a series of fascinating hypotheticals.’³² Fuller displays a ‘striking proficiency in constructing narratives and in coining apt metaphors.’³³ For example, devising a story in which a King named Rex fails in eight particular ways to make law,³⁴ he illustrates his eight principles of the internal morality of law which are ‘the morality that makes law possible.’³⁵

²⁰ P Nicholson, ‘*The Internal Morality of Law: Fuller and His Critics*’ Ethics (1974) Vol 84, No 4, p 311.

²¹ Fuller (n 11) 96.

²² “*They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it.*” Ibid 96.

²³ Freeman (n 1) 124.

²⁴ Sacks (n 19) 349.

²⁵ Fuller (n 11) 97.

²⁶ R Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press, 2005) p155.

²⁷ J Ellis & A Fitzgerald, ‘*The Precautionary Principle in International law: Lessons from Fuller’s Internal Morality*’ McGill Law Journal, Aug 2004, Vol.49, Issue 3, p 785.

²⁸ Freeman (n 1) 125.

²⁹ Nicholson (n 20) 326.

³⁰ E Griswold, ‘*Lon Luvois Fuller-1902-1978*’ Harv. L. Rev. (1979) Vol 92, p 352.

³¹ Freeman (n 1) 123.

³² Sacks (n 19) 349.

³³ M Kramer, (Review) ‘*Rediscovering Fuller: Essays on Implicit Law and Institutional Design*’ MLR (2001) Vol 64, issue 4, p 643-655.

³⁴ Fuller (n 11) 33.

³⁵ Ibid.

Regarding the nature of law, Fuller starts from the assumption that law per se is morally good,³⁶ and without law, morality would not be possible. Stating that “the moral precept...must of necessity rest on standards borrowed from the law; without support it could not achieve reality in the conduct of human affairs,”³⁷ he believes law and morality are already one.³⁸ The goodness and moral purpose of law are simply part of its meaning, just as obligation is part of the meaning of promising.³⁹

Fuller, observing that legal philosophers usually fail to clarify the meaning of morality itself,⁴⁰ employs the ancient distinction between the “morality of duty” and the “morality of aspiration.” The morality of duty “lays down the basic rules without which an ordered society would be impossible,” while the morality of aspiration is “the morality of the Good Life, of excellence, of the fullest realization of human powers.”⁴¹ However, this raises the issue of *which* and *whose* morality should prevail?⁴²

The significance of the distinction between the two moralities is that Fuller’s eight principles are “largely a morality of aspiration.”⁴³ According to Fuller, his eight principles are to be acknowledged as goals if a system is to qualify as a legal system. It is a question of fact whether all eight principles are adhered to, and the criteria are cumulative in effect. The fewer of the eight criteria that a legal system meets, the further away it is from an effective functioning legal system.⁴⁴

Procedural Morality & Injustice

Critics have argued that Fuller confuses the internal morality of law with efficiency. Are his eight principles merely principles of good craftsmanship?⁴⁵ Are they to be viewed simply as ‘maxims of legal efficacy?’⁴⁶ Is he blurring the question of competency and morality?⁴⁷ These questions are particularly significant given that his eight principles are described as ‘aspirations.’

If Fuller is proposing what is in essence, a set of procedural standards, then this may only ensure that a legal system functions effectively, not that it is moral.⁴⁸ Hence observance of Fuller’s internal morality may still result in an unjust law or legal system. Indeed it is arguable that in pursuit of efficacy, a wicked legal system might actually seek to fulfil Fuller’s principles.⁴⁹ For example, although Hitler is described

³⁶ Nicholson (n 20) 316.

³⁷ Fuller (n 11) 205.

³⁸ Nicholson (n 20) 316.

³⁹ Ibid 322.

⁴⁰ Ibid 308.

⁴¹ Fuller (n 11) 5.

⁴² L Lustgarten, ‘*Taking Nazi Law Seriously*’ MLR (2000) Vol 63, Issue 1, p 132.

⁴³ Fuller (n 11) 43.

⁴⁴ Ibid 199.

⁴⁵ HLA Hart, ‘*Book Review: The Morality of Law by Lon L. Fuller*’ Harv. L. Rev. (1965) Vol 78, p 1281.

⁴⁶ RS Summers, ‘*Professor Fuller on Morality and Law*’ J. Leg. Ed. (1966) 18, p 129.

⁴⁷ M Cohen, ‘*Law, Morality and Purpose*’ Villanova Law Review (1965) 10, p 651.

⁴⁸ Wacks (n 26) 28.

⁴⁹ MH Kramer, *In Defense of Legal Positivism: Law Without Trimmings*. (Oxford University Press 1999) p 67.

as ‘seizing power’, we cannot escape the fact that he became chancellor through constitutional means.⁵⁰ Also, South African law under apartheid may broadly have conformed to Fuller’s inner morality.⁵¹ Therefore, it may appear that observance of the internal morality of law may be “compatible with very great iniquity.”⁵²

These points were the focus of the famous 1958 debate between Fuller and the legal positivist H.L.A Hart. Attempting to deal with the Nazi past through the law and judicial procedure their arguments in the debate highlighted the fundamental differences between naturalist and positivist thought.

Hart, adhering to the idea that law should be understood as a social or political entity rather than a natural entity, argues that we should distinguish law as it is, from what it ought to be.⁵³ Therefore, for Hart, the Nazi laws of 1934 were valid and the fact they were immoral did not make them any less a law. They were simply to be described as bad laws. However, Fuller contends that since Nazi laws were often made in secret or bypassed altogether, they deviated so far from internal morality that they failed to qualify as law.⁵⁴

The debate served to highlight Fuller’s views on the concept of law and morality, and the concept of his internal morality of law. However, it is important to recognise that Fuller’s position does not commit him to treat a legal system that complies with his eight principles as necessarily immune to criticism. The Fullerian stamp of approval does not place a legal system beyond moral reproach. It may still be an unjust legal order but, crucially, this is less likely.⁵⁵ As Fuller states, his procedural natural law “*limits the substantive aims that can be achieved through law.*”⁵⁶ So the eight principles will be influential in practice. The legislator cannot enact unjust laws from behind a cloak of secrecy; instead he would have to explain and justify such laws.⁵⁷

However, it is also argued there are practical limits as to what his principles can achieve. To name a few examples, it may be impractical or foolish to try and educate every citizen on the full meaning of every law, and conflicting moral demands may mean the requirements of his internal morality may clash.⁵⁸

In fact, it is argued that his eight principles are merely a restatement of the Rule of Law.⁵⁹ Fuller himself states the principles “*suggest eight distinct standards by which excellence in legality may be tested.*”⁶⁰ However, even if his principles *are* a restatement of the rule of law, the whole purpose of the rule is to protect citizens

⁵⁰ Lustgarten (n 42) 128.

⁵¹ “Fuller would probably say that compliance with the eight principles is logically consistent with the pursuit of evil aims in very much the same way that armed robbery is logically consistent with a scrupulous concern for paying one’s debts.” NE Simmonds, *Central Issues In Jurisprudence* (2nd edn, Sweet & Maxwell 2002) p 236.

⁵² HLA Hart, *The Concept of Law*. (1961, Oxford University Press) p 202.

⁵³ Ward, I. (2004) *Introduction to Legal Theory*. (2nd edn, Cavendish Publishing 2004).

⁵⁴ L Fuller, ‘Positivism and Fidelity to Law-A Reply to Professor Hart’ *Harv. L. Rev.* (1958) vol 71, p 630, 645.

⁵⁵ Wacks (n 26) 55.

⁵⁶ Fuller (n 11) 4.

⁵⁷ *Ibid* 157-9.

⁵⁸ Nicholson (n 20) 310.

⁵⁹ Freeman (n 1) 126.

⁶⁰ Fuller (n 11) 42.

against arbitrary and harsh acts of government. Ideal fidelity to law, as Fuller has shown, must mean more than allegiance to naked power.⁶¹ In fact, by encapsulating ‘virtually all of the essential characteristics of the rule of law,’⁶² he may have assisted in the elucidation of the concept of the rule of law.⁶³

Fuller’s principles are loosely framed ideals rather than fixed and specific duties and therefore their performance cannot be legally required and enforced.⁶⁴ In fact, one critic states that by attempting to show that law partakes of an ‘inner morality’ he manages to ‘obfuscate the contours of the concept’⁶⁵ of the rule of law.

Despite these criticisms, Fuller details instances of the internal morality of law working *against* immoral laws. For example, the requirement of congruence between declared rule and official action excludes laws which are not enforceable; the requirement of promulgation forces law makers to assume public responsibility for their laws; and the requirement of intelligibility cuts out laws whose targets cannot be identified.⁶⁶ Principles such as the internal morality will incline the legislator towards the making of just laws, and “[limit] the kinds of substantive aims that may be achieved through legal rules[?]”⁶⁷ However, does this also mean that the success of Fuller’s internal morality of law must be left largely to the “energy, insight, intelligence, and conscientiousness”⁶⁸ of lawmakers? What about an immoral judge?

Therefore, according to Fuller, some legal systems may operate better or worse, or even fail to exist according to the degree to which they may or may not follow these principles.⁶⁹ However by saying the existence of a legal system is a matter of degree, he seems to be rejecting a finite definition of law.⁷⁰ How useful is a theory which cannot tell us whether something is law or not, or whether a society has a legal system?⁷¹ Nevertheless, Fuller’s concept of the internal morality of law has often been used as a *guide* in other disciplines. In international law, in assessing what is called the ‘precautionary principle,’⁷² Fuller’s concept of the internal morality of law was a “...useful guide to determining when a particular method of operationalizing of [a] principle is problematic.”⁷³ The principle was analysed through the lens of Fuller’s internal morality of law.

The wider role of law

⁶¹ Fuller (n 54) 634.

⁶² Kramer (n 33).

⁶³ Ibid.

⁶⁴ Nicholson (n 20) 309.

⁶⁵ Kramer (n 33).

⁶⁶ Nicholson (n 20) 315.

⁶⁷ Fuller (n 11) 4.

⁶⁸ Ibid 145.

⁶⁹ Freeman (n 1) 127.

⁷⁰ Ibid 125

⁷¹ Ibid.

⁷² “Under this principle, possible uncertainty about a cause-effect linkage between an activity and harm must not be a reason to postpone taking measures to protect the environment when risks of harm exist.” Ellis & Fitzgerald Alison (n 27).

⁷³ Ibid.

Regarding the role of law in our society, Fuller describes law as the purposive ‘enterprise of subjecting human conduct to the governance of rules’.⁷⁴ For Fuller, law has a significant role in society, stating that in order for men “to live together successfully they need rules that will keep peace among them, make them deal justly with one another, and enable them to collaborate effectively.”⁷⁵ Therefore, he seems to be characterising law in terms of *rules* guiding human conduct. However, this does not commit Fuller to saying that law consists *solely* of rules.⁷⁶ In fact, his definition of law is ‘remarkably congenial to the sociological perspective’.⁷⁷ To see law as an ‘enterprise’ is sociologically significant as it draws attention to the fact that the legal order is more than a set of principles or norms.

According to Fuller, his “view treats law as an *activity* and regards a legal system as the product of a sustained purposive effort.”⁷⁸ Therefore law is an ‘activity’ carried on by men in living situations, subject to all the external pressures and constraints, and all the inner sources that frustrate ideal ends.⁷⁹ In addition, to present law as a way of accomplishing something is to stress the variable nature of that achievement.⁸⁰ Law thus understood is not uniquely associated with the state, and legal order is not a mode of social power but a way of decision making guided by distinctive standards and ideals.⁸¹

Fuller’s approach is also based on what is sometimes referred to as an “interaction thesis.”⁸² This draws attention to the implication of individual actors in a legal system. Rather than a legal system that imposes itself upon society, Fuller envisages a legal system whereby its successful functioning depends upon the acts of human judgement at every level of the system. Not only legal officers but the laws addressees are expected to take the law into account in their every day affairs,⁸³ there should be “a kind of reciprocity between government and citizen with respect to the observance of rules.”⁸⁴ This is reflected in Fuller’s definition of law, as the ‘enterprise of subjecting human conduct to the governance of rules.’

Even Hart, Fuller’s main critic, attempts to restate a natural law position from a semi-sociological point of view, suggesting that certain substantive rules need to be followed if human beings are to live continuously together in close proximity. He concludes there is a ‘minimum content’ of natural law.⁸⁵

Therefore, according to Fuller law is not just a system of rules inflicted on the citizenry by a superior, but is a matter of “providing the citizenry with a sound and

⁷⁴ Fuller (n 11) 106.

⁷⁵ L Fuller, *Anatomy of the Law* (Frederick A. Praeger 1968) p 14.

⁷⁶ Fuller (n 11) 106.

⁷⁷ P Selznick, ‘Reviewed Work: “The Morality of Law by Lon.L.Fuller’, *American Sociological Review*, Vol 30, No 6 (Dec 1965), 947-948.

⁷⁸ Fuller (n 11) 106.

⁷⁹ Selznick (n 77).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² GJ Postema, ‘Implicit Law’ in Willem J. Witteveen and Wibren van der Berg (eds) *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999) p 225, 260.

⁸³ Ellis & Fitzgerald (n 27) 785.

⁸⁴ Fuller (n 11) 39.

⁸⁵ Hart (n 52).

stable framework for their interactions with one another.”⁸⁶ Whatever the substantive purpose, a legal system is bound to comply with certain procedural standards, and in the absence of this compliance, what passes for a legal system is merely the exercise of state coercion.⁸⁷

Conclusion

Ultimately it appears that Fuller rests his view of law on fundamental assumptions that the law is good, a purposive cooperative enterprise between ruler and subject, and that this goodness is law’s primary feature.⁸⁸ In this narrow sense Fuller represents a thoroughly modern natural lawyer. However, there are many criticisms of his theory, the main being his failure to properly establish a real connection between law and morality; Fuller uses morality in a different sense to traditional natural lawyers and hopes that emphasis upon procedural integrity will ultimately lead to morally upright laws. For these reasons he does not establish a new school which other philosophers can join.⁸⁹ Yet, Fuller is still described as *the* ‘leading natural lawyer,’⁹⁰ having made one of the most ‘significant contributions to natural law thinking’.⁹¹ For many, his impact on jurisprudence does not grow out of his convincing that his *answers* are right, but in convincing us that his *questions* are right and they deserve careful thought.⁹² In doing this, he forces many into ‘greater articulation’ about the concept of law and morality and contributes to the ‘development of our consciousness.’ More than half a century on, his writings such as *The Case of the Speluncean Explorers* retain their ‘piquancy and relevance,’⁹³ and are likely to continue to do so in the future.

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⁸⁶ Fuller (n 11) 210.

⁸⁷ Wacks (n 26) 154.

⁸⁸ Nicholson (n 20) 322

⁸⁹ Sacks (n 19).

⁹⁰ RWN Dias, *Jurisprudence*, (5th edn, Butterworths 1985) p 491.

⁹¹ Freeman (n 1) 124.

⁹² Sacks (n 19) 350.

⁹³ Wacks (n 26) 11.

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