Bolstering the Rule of Law: Reason, Moral Duty and Finnis' Views on Practical Rationality

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Versterking van die Beginsel van die Regstaat: Rede, Morele Plig en Finnis oor Praktiese Rasionaliteit

Die begronding van die regstaat in die wil van die mense, die handhawing van orde in die samelewing, doelmatigheid of die mens se politieke of juridiese welsyn kan breedweg beskryf word as pogings om die beginsel van die regstaat aan te wend vir doeleindes van "eudemologiese egoïsme". Die beginsel van die regstaat transponeer die fundamentele wet van syn ("being") in juridiese terme. Deur die beginsels van waarheid, geregtigheid en die morele plig van welwillendheid juridies te vertolk word die beginsel van die regstaat "versterk" tot die mate dat dit kan dien as die primêre wet van juridiese ontologie.

1. Introduction

Academic discourse on the rule of law and constitutional authority in Africa is currently largely overshadowed by debates concerning the

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minutiae of the functioning of constitutional mechanisms rather than the broader philosophical contexts and epistemological concerns related to constitutionality, the authority of the rule of law and the possibilities for positing general criteria for rationally penetrating, interpreting and applying constitutional notions.[1] In South African legal-philosophical

1 Broadly speaking literature in the form of articles on the rule of law with an African and Southern African focus from the late 1980s to the present can be divided into three categories: firstly, studies reflecting on the rule of law and legal culture (including historical contexts): e.g. Menski "Human rights, the rule of law and development in Africa by PT Zeleza and PJ McConnaughay" (book review) 2008 *Journal of contemporary African studies* 111; Nmaju "The case against Taylor's asylum: a review of Nigeria's domestic and international legal obligations" 2007 *African journal on conflict resolution* 11; Nyongo'o "Good governance for whom?: how presidential authoritarianism perpetuates elitist politics in Africa despite elections and the opportunities and challenges for change that 'NEPAD' offers" 2007 *African journal of development studies* 23; Molutsi "Beyond the state: Botswana's democracy and the global perspective" 2006 *Journal of African elections* 41; Storey "Normative Power Europe?: Economic Partnership Agreements and Africa" 2006 *Journal of contemporary African studies* 331; Kagwanja "Power and peace: South Africa and the refurbishing of Africa's multilateral capacity for peacemaking" 2006 *Journal of contemporary African studies* 159; Scholtz "The anthropocentric approach to sustainable development in the National Environmental Management Act and the Constitution of South Africa" 2005 *TSAR* 69; Lewis "Executive-mindedness reinvented?" 2005 *SAJHR* 127; Du Plessis "The democratic deficit and inflation targeting" 2005 *South African journal of economics* 93; Gumedze "Human rights and the rule of law in Swaziland" 2005 *African human rights law journal* 266; Sachikonye "The land is the economy: revisiting the land question" 2005 *African security review* 31; Ogowewo "Self-inflicted constraints on judicial government in Nigeria" 2005 *Journal of African law* 39; Riahi-Belkaoui "Are you being fooled?: quality of earnings and quality of government" 2004 *SA journal of accounting research* 25; Moodley "Constitutionality of the rule of primogeniture in the customary law of succession" 2004 *Codicillus* 83; Hund "Globalisation and the rule of law: socio-economic reflections" 2004 *SAPR* 25; Van Niekerk "Law, anthropology and land reform in Southern Africa: the case of Zimbabwe" 2003 *Anthropology Southern Africa* 99; Mason "Legal aid in Nigeria: using national youth service corps public defenders to expand the services of the legal aid council" 2003 *Journal of African law* 107; Van Niekerk "A note on two Zimbabwean land cases" 2002 *Codicillus* 73; Baker "When the Bakassi Boys came: Eastern Nigeria confronts vigilantism" 2002 *Journal of contemporary African studies* 223; Leon "Economic diplomacy and political leadership: an alternative foreign policy vision for South Africa" 2001 *The South African journal of international affairs* 27; Mqeke "Myth, religion and the rule of law in the pre-colonial Eastern Cape, 2001 *De Jure* 87; Mqeke "The rule of law and African traditional courts in the new dispensation" 2001 *Obiter* 416; Derbyshire & Butcher "Rules remain king: employee benefits – update; Levelling the playing fields: medical aid – overview; Medihelp really cares: employee benefits – sponsored case study" 2001 *Professional management review* 11; secondly, contributions on rule of

discourse this trend has manifested itself particularly since the inception of the interim South African Constitution in 1994, with the perceived demise of the legal-philosophical discourse[2] overshadowed by the meta-

law and the wider perspective of constitutionalism e.g. Lenta "Constitutional interpretation and the rule of law" 2005 *Stell LR* 272; Ferreira & Ferreira-Snyman "Die teoretiese grondslag van die regsgebondenheid van die owerheid (2)" 2005 *THRHR* 192; Ferreira & Ferreira-Snyman "Die teoretiese grondslag van die regsgebondenheid van die owerheid (deel 1)" 2005 *THRHR* 20; De Ville "The Vanity of Public Law, edited by D Dyzenhaus" (book review) 2005 *SAPR* 238; Hopkins "Constitutional values and the rule of law: they don't mean whatever you want them to mean" 2004 *SAPR* 433; Botha "Freedom and constraint in constitutional adjudication" 2004 *SAJHR* 249; Albertyn "Re-imagining justice: progressive interpretations of formal equality, rights and the rule of law, by RL West" (book review) 2004 *SAJHR* 501-505; Grote "The scope of judicial review of administrative action and the changing rule of law: some comparative reflections" 2004 *SAPR* 513; Corder "The ultimate rule of law, by DM Beatty" (book review) 2004 *SALJ* 677; Mubangizi "HIV/AIDS and the South African Bill of Rights, with specific reference to the approach and role of the courts" 2004 *African journal of AIDS research* 113; Evans "Deference with a difference: of rights, regulation and the judicial role in the administrative state" 2003 *SALJ* 322; Priban & Van Marle "Recalling law, politics and justice in post-authoritarian societies" 2003 *Codicillus* 32; Robbers "Arguing justice at the Federal Constitutional Court of Germany" 2002 *Stell LR* 109; Bronstein "Drowning in the hole of the doughnut: regulatory overbreadth, discretionary licensing and the rule of law" 2002 *SALJ* 469; Priban "Opening the gaps in legality: the rule of law, its legitimation and political dissent from the post-Communist and South African perspective" 2002 *De Jure* 253; Burns "A rights based philosophy of administrative law and culture of justification" 2002 *SAPR* 279; Hund "Constituting democracy, by H Klug" (book review) 2001 *CILSA* 430; Botha "The legitimacy of legal orders (part 3): rethinking the rule of law" 2001 *THRHR* 523; Corder "Prisoner, partisan and patriarch: transforming the law in South Africa 1985-2000" 2001 *SALJ* 772; Ellmann "To live outside the law you must be honest: Bram Fischer and the meaning of integrity" 2001 *SAJHR* 451-476; Davis "Administration of justice: 2000" 2000 *ASSAL* 877; Rugege "African case law review" 2000 *LAW, DEMOCRACY & DEVELOPMENT* 109; Serfontein "Ironic victory: liberalism in post-liberation South Africa, by RW Johnson" (book review) 2000 *SAJHR* 153; Govender "Administrative justice" 1999 *SAPR* 62; Currie "Bill of rights jurisprudence" 1999 *ASSAL* 33; Roederer "Transitional justice and the rule of law in new democracies, edited by J McAdams" (book review) 1999 *SAJHR* 75, and thirdly, philosophical discourses on the rule of law e.g. Woolman "Metaphors and mirages: some marginalia on Choudhry's The Lochner era and comparative constitutionalism and ready made constitutional narratives" 2005 *SAPR* 281; Raath "The idea of the state subject to law: lessons from the German experience 1840-1940" 2004 *Tydskrif vir Christelike wetenskap* 23; Du Plessis "Perspectives on narratives of (dis)continuity in recent South African legal history: book review" 2004 *Stell LR* 381.

2 I.e. theorizing on philosophy of law, inclusive of the philosophy of justice, relative to the philosophy of politics and with particular emphasis on the epistemology of law.

jurisprudential arguments[3] produced by the likes of Finnis[4], Raz[5], Dworkin[6], Derrida[7] and Habermas.[8]

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3 I.e. with the focus on the relevance of ethical and metaphysical considerations to determine the nature of law and the connection between objective moral and legal judgements, or put differently: investigating the epistemic and ethical premises in jurisprudence, without sacrificing notions such as truth and objectivity.

4 See his *Natural law and natural rights* (1980).

5 E.g. *The concept of a legal system: An introduction to the theory of a legal system* (1980); *The morality of freedom* (1986); "The Purity of the Pure Theory" in Mario Jori (ed.) *International library of essays in law and legal theory (Schools 7) legal positivism* (1992) 117.

6 See e.g. "Philosophy and the Critique of Law" in Wolff (ed.) *The rule of law* (1971); "Hard Cases" 1975 *Harvard law review* 1057; "No Right Answer?" in Hacker & Raz (Eds) *Essays in honour of H.L.A. Hart* (1977); *Taking rights seriously* (1977); "Seven Critics" 1977 *Georgia law review* 1201; "Law as Interpretation" 1982 *Critical Inquiry* 179; "Law as Interpretation" in Mitchell (ed.) *The politics of interpretation* (1983) 249; *A matter of principle* (1986); "Liberal Community" 1989 *California law review* 279; "Equality, Democracy, and the Constitution: We the People in Court" 1990 *Alberta law review* 324.

7 Rubenfeld "Freedom and time" 1998 *Acta Jur* 291; Van der Walt "The language of jurisprudence from Hobbes to Derrida" 1998 *Acta Jur* 61; Bohler-Muller "On the deconstructibility of the law from a South African perspective" 2004 *Obiter* 164; Lenta "Do lawyers need philosophy?" 2003 *South African journal of philosophy* 81; Lenta "Justice, law and philosophy – an interview with Jacques Derrida" 1999 *South African journal of philosophy* 279; Lenta "Just gaming? The case for postmodernism in South African legal theory" 2001 *SAJHR* 173; Van der Walt "Law: the sacrificial tension between justice and economics" 2005 *Stell LR* 244; Boshoff "Constitutional interpretation: between past and future" 2001 *Stell LR* 357; Malan & Cilliers "Deconstruction and the difference between law and justice" 2001 *Stell LR* 439; Van der Walt "Die toekoms van die onderskeid tussen die publiekreg en die privaatreg in die lig van die horisontale werking van die grondwet (deel 2)" 2000 *TSAR* 605, see also 2000 *TSAR* 416; Malan *Justice and the law: a perspective from contemporary jurisprudence* M.A. dissertation Stellenbosch (2000); Hamman *Poststructural ethics and the possibility of a general ethical theory* M.Phil. dissertation Stellenbosch (2000); Van Marle *Reconstructive feminism: an investigation into the right as male structure and the possibility of transformation with specific reference to pornography* [Rekonstruktiewe feminisme: 'n ondersoek na die reg as manlike struktuur en die moontlikheid van transformasie met spesifieke verwysing na pornografie] L.L.M. dissertation University of South Africa (1995); Van der Walt *The twilight of legal subjectivity: towards a deconstructive republican theory of law* L.L.D. thesis Rand Afrikaans University (1995).

8 *The Theory of Communicative Action* (1984); "Philosophy as Stand-In and Interpreter" in Baynes *et al.* (eds), *After Philosophy* (1987); Strydom "A shameful mess or the best we can expect?" 2005 *Discourse* 22; Van Niekerk "Waardes as norme en as meta-norme/beginsels" 1987 *Koers* 48; Moellendorf "Consensus and Cognitivism in Habermas's Discourse" 2000 *South African journal of philosophy* 65;

The absence of critical meta-legal philosophical debate has, in a certain sense, left fundamentally important issues outstanding on the agenda of the South African constitutional scene. This critical albeit tentative observation does not detract from the theoretical contributions made by Chaskalson[9], De Waal[10], Devenish[11] and others in their comments on notions of paramount constitutional significance. The observations of some of these South African constitutional commentators – within the broader setting of legal discourse – could be used as "connecting points" for reflecting on the "weight" (or "authority") of the rational or volitional comprehension of fundamental constitutional notions and the possibility of formulating general principles reflecting "weight" (or "authority") in matters of constitutional supremacy and the rule of law. In a fundamental sense the question could be asked as to whether a general (rational) descriptive theory could be formulated for understanding the rational dimensions of the rule of law. With the appearance of John Finnis' works *Natural Law and Natural Rights* (1980), and *Aquinas: Moral, Political and Legal Theory* (1998)[12], a stronger current of duty-oriented

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Duvenhage "Geregtigheid en heterogeniteit. Oor die etiese wending in die postmoderne" 1997 *South African journal of philosophy* 101; Van der Walt "The relation between law and politics: a communitarian perspective" 1994 *SALJ* 152; Boshoff "Constitutional interpretation: between past and future" 2001 *Stell LR* 357; Van der Merwe "A rhetorical-dialectical conception of the common law: an introduction" 2001 *TSAR* 428; Muller *Dialogue and truth: a critical philosophical analysis of models of dialogue in western spiritual history* [Dialoog en waarheid; 'n krities-wysgerige analise van modelle van dialoog in die westerse geestesgeskiedenis] MA dissertation Stellenbosch (1991); Van Wyk *Ethics and dialogue: the problem of formalism in the discourse ethics of Jurgen Habermas* [Etiek en dialoog: die formalismeprobleem in die diskoersetiek van Jurgen Habermas] MA dissertation University of Port Elizabeth (1989); Duvenhage *Hermeneutics and practice: post-modern perspectives in contemporary philosophy* [Hermeneutiek en praxis: post-moderne perspektiewe in die kontemporêre filosofie] MA dissertation University of Pretoria (1989); Romm *A critical examination of Habermas' and Marcuse's attacks on positivism, with particular reference to the implications of the attacks for sociology* MA-dissertation University of Cape Town (1982).

9 Note e.g. Chaskalson, Davis & Johan de Waal "Democracy and Constitutionalism: The Role of the Constitutional Court" in Van Wyk, Dugard, De Villiers, Davis (eds) *Rights and Constitutionalism: The New South African Order* (1994).

10 De Waal, Iain Currie & Gerhard Erasmus, *The bill of rights handbook* (1999).

11 See e.g. Devenish, *A commentary on the South African constitution* (1998).

12 For shorter discussion of the works of Finnis see: Sigmund "Aquinas: Moral, Political and Legal Theory" (book review) 2001 *Philosophical review* 129; Raz "The Defense of Natural Law: A Study of the Ideas of Law and Justice in the Writings of Lon L Fuller, Michael Oakeshott, FA Hayek, Ronald Dworkin and John Finnis by Charles Covell" (book review) 1993 *Political studies* 718; Seidler "The Disintegration of

jurisprudential theory arguing in favour of such descriptive universals attached to practical rationality, based on Aquinas' natural law theory, was introduced into jural-philosophical discourses – at that point in time experimenting with the novelties of postmodernism and the liberal notion of individual rights limiting the intrusion on the enclaves of liberty

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Natural Law Theory: Aquinas to Finnis by Pauline C. Westerman" (book review)1999 *International Philosophical Quarterly* 223; also note the following book reviews and notices: Doig "Aquinas: Moral, Political, and Legal Theory, by John Finnis" (book review) 2000 *International philosophical quarterly* 123; Murphy "The Defense of Natural Law: a Study of the Ideas of Law and Justice in the Writings of Lon L Fuller, Michael Oakeshott, FA Hayek, Ronald Dworkin and John Finnis by Charles Covell" (book review) 1995 *Philosophical quarterly* 399; Conley "Aquinas: Moral, Political, and Legal Theory by John Finnis" (book review) 1999 *Theological studies* 761; Henry, Cottingham, Schuhmann, Coates, Schuurman, Pooley, Mormino & Bonwick "The Methaphysics of Creation: Aquinas' Natural Theology in Summa Contra Gentiles II by Norman Kretzmann, Aquinas' Moral, Political, and Social Theory by John Finnis, Insight and Inference: Descartes' Founding Principle and Modern Philosophy by Murray Miles" (book review) 2000 *British journal for the history of philosophy* 553; Brock "Aquinas: Moral, Political, and Legal Theory by John Finnis" (book review) 2001 *Ethics* 409; Nederman "Aquinas: Moral, Political, and Legal Theory by John Finnis" (book review) 1999 *American political science review* 700; Lisska "Clear but Complicated, "Aquinas: Moral, Political and Legal Theory by John Finnis" (book review) 2000/2001 *Cross currents* 571; Gahl "From the virtue of a fragile good to a narrative account of natural law" 1997 *International philosophical quarterly* 457; Casey, Hattab, Wright, Ameriks, Inwood, Bates & Cooper "History of Philosophy" 2000 Philosophical Books 104; Bradley "John Finnis on Aquinas 'The Philosopher'" 2000 *J. M. Heythrop journal* 1, in which the commentator legitimately questions Finnis' equating the attaining of the ensemble of basic human goods ('integral human fulfilment') with Aquinas' notion of *beatitudo imperfecta* or this-worldly happiness and validly remarks that throughout the book, Finnis' exegesis of Aquinas is slanted towards bolstering Finnis' own Thomist philosophical ethics; Kerr "Knowledge and Faith in Thomas Aquinas/Aquinas" (book reviews) 2000 *Philosophical quarterly* 117 contains reviews on philosopher Thomas Aquinas' beliefs: Knowledge and Faith in Thomas Aquinas, by John I. Jenkins & Aquinas: Moral, Political, and Legal Theory, by John Finnis; Gardner "Moralizing the law" (book review) 1992 TLS reviews the book Natural Law Theory: Contemporary essays George (ed.), a collection of essays by an eminent group of scholars that discuss the important issues raised by Grisez, Finnis, Boyle and their adversaries; Finnis "NATIONALITY, ALIENAGE AND CONSTITUTIONAL PRINCIPLE" 2007 *Law quarterly review* 417; Schall "NATURAL LAW AND NATURAL RIGHTS" (book review) 1981 *Theological studies* 160 reviews the book Natural Law and Natural Rights by John Finnis; Tuck "Natural Law and Natural Rights" (book review) 1981 *Philosophical quarterly* 282-284, reviews the book Natural Law and Natural Rights by John Finnis; MacCormick "Natural Law and Natural Rights" (book review) 1980 *Political Studies* 651 reviews the book Natural Law and Natural Rights by J. Finnis; Tierney, Finnis, Kries, Douglas & Zuckert "Natural Law and Natural Rights Old Problems and Recent Approaches" 2002 *Review of politics* 389; Finnis "Natural Law and the Ethics of Discourse" 1999 *Ratio Juris* 354; La Torre "On Two Distinct and Opposing Versions of Natural Law: 'Exclusive' versus 'Inclusive'" 2006 *Ratio Juris* 197; Iglesias-Rozas "Reasons for Action" (book review) 2000 *International journal*

inherent to the legal system.[13] However, in South African legal discourse, Finnis' views have remained largely unattended to.[14] Although Finnis has been criticised for his "inappropriate" reliance on Aquinas, for example for equating the attaining of the ensemble of basic human goods ("integral human fulfilment") with Aquinas' notion of *beatitudo imperfecta* or this-worldly happiness, and for being slanted towards his own (Finnis') Thomist philosophical ethics, the meta-jural[15] and moral views posited in his works remain noteworthy and provide valuable perspectives on the discourse of meta-jural ethics.[16]

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of philosophical studies 2 reviews the book Aquinas: Moral, Political and Legal Theory by John Finnis; Molnar "Tedium" (book review) 1983 *Modern age* 211 reviews the book Natural Law and Natural Rights by John Finnis; Kenny "Thomists for today" (book review) 2000 *TLS* 10 reviews books on Saint Thomas Aquinas: The Metaphysics of Creation: Aquinas' natural theology in Summa contra Gentiles II by Norman Kretzmann, Aquinas: Moral, political, and legal theory by John Finnis; Neuhaus "WHILE WE'RE AT IT" 1997 *First things: A monthly journal of religion & public life* 61.

13 For the "moral" impact of Finnis' arguments note Smith's comments regarding the value of Finnis' theory in acknowledging the "competing goods" and his application thereof to the case of United Autoworkers v Johnson Controls ("Finnis on Nature, Reason, God, Legal" 2007 *Legal theory* 285).

14 Comments related particularly to Finnis' moral theory and his views on moral obligation are dealt with in the following noteworthy articles: Green "The Duty to Govern" 2007 *Legal theory* 165; Murphy "Finnis on Nature, Reason, God" 2007 Legal Theory 187; Smith "Persons Pursuing Goods" 2007 *Legal theory* 285; Beck-Dudley & Conry "Legal reasoning and practical reasonableness" 1995 *American business law journal* 91; Batnitzky "A seamless web? John Finnis and Joseph Raz on practical reason and the obligation to obey the law" 1995 *Oxford journal of legal studies* 153; Aiyar "The problem of law's authority: John Finnis and Joseph Raz on legal obligation" 2000 *Law and philosophy* 465; Rodriguez-Blanco "Is Finnis Wrong? Understanding Normative Jurisprudence" 2007 *Legal theory* 257. For Finnis' views on duty and jural obligation see: Finnis "On reason and authority in Law's Empire" 1987 *Law and philosophy* 357; Finnis "On 'positivism' and 'legal rational authority'" 1985 *Oxford journal of legal studies* 74; Finnis "The responsibilities of the United Kingdom Parliament and government under the Australian constitution" 1983 *Adelaide law review* 91. The following shorter note on Finnis' work is useful for reflecting on morals and rationality: Williams "An Ethics Ensemble: Abortion, Thomson, Finnis and the Case of the Violin-Player" 2004 *Ratio Juris* 381.

15 "Jural" gives expression to the idea of "duty-basedness".

16 Note the constructive critiques of Finnis' work by Roderiguez-Blanco, "Is Finnis Wrong? Understanding Normative Jurisprudence", 2007 *Legal theory* 257-283; Green "The Duty to Govern" 2007 *Legal theory* 165-185; Murphy "Finnis on Nature, Reason, God" 2007 *Legal theory* 187-209; Rosen "Perry on Law and Obligation" 2005 *The American journal of jurisprudence* 297-303, and George "Symposium on Natural Law and Natural Rights: Introduction" 2005 *The American journal of jurisprudence* 102-108.

Generally speaking the central theme in this essay concerns the "thin"-ness of current rule of law views and specifically identifies the need for bolstering Finnis' use of the rule of law in strengthening the "base" of his rule of law-theory. Given the formulation of the principle of constitutional supremacy in section 2 of the South African Constitution, it could furthermore rightfully be asked whether a "bolstering" of the notion of the rule of law could not meaningfully contribute towards a strengthening of the culture of truth, justice and the moral duty of benevolence needed for giving fundamental moral direction in the application of the relevant provisions in the constitution in particular and jural discourse generally. For purposes of the opening of the discourse on the "weight" of the rule of law reflective of rational or volitional authority two diverse views in South African legal literature could serve as examples. An analysis of the Lockean view of the state subject to law, exposes the limitations in both Dicey's and Finnis' rule of law statements.

2. Rationality and the volitional enterprise of the rule of law

2.1 Rationality, institutional morality and the rule of law

The Lockean idea that the moral and rational strength of law is grounded in its contribution to empower individuals to lead a free and fulfilling life through the protection of their individual rights, surface in rule of law statements as diverse as those of Dicey and Finnis. However, it has to be noted that whereas the Dicean rule of law view reflects a strong reliance on the principle that the basis of authority of rulers flows from the consent of the governed, Finnis' approach betrays Austinian elements of authority depending on the sheer fact of likely obedience. The main difference between their respective rule of law approaches reflect that whereas the classic rule of law statements by Dicey are mainly concerned with technical measures to limit state power, Finnis makes the rule of law something of an "arrangement" between rulers and their subjects to act rationally.

The idea of the state subject to law in a philosophical sense in the modern period received a strong impetus from the classical liberal views on natural rights and justice in Locke's theory of the state. In more than one sense the Lockean view of the state's power limited by law served as a stimulus for the Dicean (and later) models translating Locke's philosophy into practical mechanisms and principles of the rule of law. Arguably the dynamics in theoretical paradigms of the state subject to law have changed since Locke mainly to give birth to specific formulations of the rule of law

in the form of technical procedures and mechanisms to protect individual liberty in the quest for justice.[17]

Locke describes his view of political freedom of subjects under law as the freedom of men under government, which is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it, "a liberty to follow my own will in all things, where that rule prescribes not"; and not to be subject to the "inconstant, uncertain, unknown, arbitrary will of another man: as freedom of nature is to be under no other restraint but the law of nature".[18] To Locke the civil state (political society) is composed to preserve life, liberty and property. Therefore, though men, "when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislature, as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse) the power of the society, or legislature constituted by them, can never be supposed to extend farther than the common good; but is obligated to secure every one's property …"[19] The supreme power of the legislative authority forms the apex in Locke's philosophy of the state under law – whoever has the legislative or supreme power of any commonwealth, is bound "to govern by establishing standing laws, promulgated and known to the people, and yet not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home, only in the execution of such laws".[20]

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17 See Hommes, *Major trends in the history of legal philosophy* (1972) 135 no 1.

18 *Two treatises on civil government,* 2 4 22. Also note Hommes' comment: "The state is now considered to be the public community of law, within which political power is to be exercised in the public interest, subject to general legislation. There is no absolute and unlimited sovereignty, but a power limited by the very purpose of the body politic, viz. the protection of innate human rights. Since the state finds its natural legal justification in the protection of these natural rights we may consider this convention an instance of the (early-)liberal idea of the law-state" (*Major trends* (1979) 137).

19 *Second treatise*, 2 9 131.

20 *Two treatises*, 2 9 131. Although Locke, in his *Essays on the law of nature* (1954) 111, alludes to the "title of right reason", to which everyone who considers himself a human being lays claim "and reason not meant here that faculty of the understanding which forms trains of thought and deduces proofs, but certain definite principles of action from which spring all virtues and whatever is necessary for the proper moulding of morals" and "(f)or that which is correctly derived from these principles is justly said to be in accordance with right reason" (Lecture I), he does not transcend

Dicey's[21] classical formulation of the rule of law as a technical instrument of constitutionality[22] clearly appeals to the traditional Lockean idea of the state subject to law manifestations which culminated in rule of law statements on both a supra-national and a national level. The idea of the rule of law is supposed to serve as both a national benchmarking effort to limit state power and a supra-national concept of legal-moral standards representing ideals of legal limits appertaining to government. In its supra-national manifestation, the rule of law is normally regarded to presuppose the following principles: all branches of government should be guided in all actions by a respect for fundamental human rights; all individuals should be equal before the law; all law should be certain; certain minimum standards of justice should be observed in judicial and quasi-judicial proceedings; wide and centralised powers of government should be

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the narrow limits of rationality in his natural law views, for elsewhere he says: "Neither is reason so much the maker of that law as its interpreter ..." He quotes Aristotle's *Nicomachean ethics* (1 7) in support, where Aristotle says that "the special function of man is the active exercise of the mind's faculties in accordance with rational principle" (transl Rackham (1943) 20). The light of reason has no self-testifying power in Locke's philosophy. In his *Essays on the law of nature* (113-115) (Lecture I) he says: "But while we assert that the light of nature points to this law [law of nature] we should not wish this to be understood in the sense that some inward light is by nature implanted in man, which perpetually reminds him of his duty and leads him straight and without fail whither he has to go" (Lecture II). In Lecture IV (149) he continues: "(T)his light of nature is neither tradition nor some inward moral principle written in our minds by nature, there remains nothing by which it can be defined but reason and sense-perception. For only these two faculties appear to teach and educate the minds of men and to provide what is characteristic of the light of nature ... for without reason, though actuated by our senses, we scarecely rise to the standard of nature ..." Because of the strength and self-testifying authority of the first moral law of the light of reason, Locke devotes most of his efforts in his *Essays on the law of nature* to divert the authority of the light of being to the faculties of reason and sense-experience. In Lecture IV (149) he states: "By reason here we do not mean some moral principle or any propositions laid up in the mind as such, that if the actions of our life fitly correspond to them, these are said to be in accordance with right reason; for right reason of this sort is nothing but the law of nature itself already known, not the manner whereby, or that light of nature whereby, natural law is known; it is only the object of reason, not reason itself; that is to say, it is such truths as reason seeks and pursues as necessary for the direction of life and the formation of character".

21 Dicey, *An introduction to the laws of the constitution* 10 ed. (1959).

22 Thus oriented towards "legality" in the sense of maintaining the "supremacy throughout all our institutions of the ordinary law of the land" (Dicey, *Introduction*, 471). This view produced three important observations on an empirical, rather than a principal, level: firstly, ensuring the liberty of the subjects; secondly, the courts of law should determine what a breach of law is, and the punishment of "illegalities" by the courts.

limited; and finally, the principle of an impartial and independent judiciary and legal profession should be upheld.[23]

From the plethora of views expressed on the rule of law after the inception of the interim Constitution in 1994, Devenish, for example, from a liberal perspective, charges the rule of law to provide for a "weak form" of constitutionalism in the sense that "respect for the rule of law might inhibit the legislature" from passing unjust laws. Devenish relies implicitly on Jowell's subscription to the rule of law as a principle of "institutional morality", in so far as the furtherance of the ideals of justice within a legal culture may support the rule of law[24] and by and largely reflects the traditional Dicean perspective of the rule of law as a technical instrument within the system of positive law for limiting state power. His position differs manifestly from the volitional based notion of the rule of law of Davis, Chaskalson and De Waal.

2.2 The idea of the volitional matrix of the rule of law

Davis, Chaskalson and De Waal[25] conflate the meaning of the rule of law – in a wide sense – with the ideal of constitutionalism, reflecting the inherent dichotomy of the binding quality of rights, trumping the outcome of unjust decision-making on the one hand and giving expression to the will of the people on the other: "When 'we the people' have formulated a constitutional choice, it binds the more limited authority of government, however constituted." The people are the source of constitutional values, but the government is not "the people", for a constitutional structure which separates the powers of the legislative and executive arms of government from that of the judiciary with a constitutional power of review prevents one branch of the government from being able authoritatively to represent 'we the people'".[26]

Constitutionalism to Davis *et al.*, proclaims that there are characteristics fundamental to the democratic enterprise which cannot be amended or destroyed even by a majority government. However if "we the people" set

23 The rule of law as a supra-national concept of legal and moral standards pertaining to national governments particularly was strongly promoted by the International Commission of Jurists. Also *cf.* Yardley *Introduction to British constitutional law* (5th ed. 1978) 1ff. Lon Fuller's rule of law-based attack on legal positivism reflects a more recent response in similar vein.

24 Devenish, *A commentary on the South African constitution* (1989) 11.

25 "Rights and constitutionalism" in Van Wyk, Dugard, De Villiers & Davis, *Rights and constitutionalism* (1994) 11-2.

26 1-2.

down principles in a constitutional document, the onus is placed upon the judges to preserve these principles against incursions by government.[27] On its part, the bill of rights enjoys particular status as a link between the political morality and aspirations of a society on the one hand and positive law on the other. Consequently a particular set of political convictions gains the imprimatur of positive legal authority; thus "it constrains competing moralities with which it is inconsistent in the name of 'the people', from whom the document draws its sovereign authority.[28] Furthermore, unlike ordinary legislation, a bill of rights talks to society and informs it, not only of what kind of society it is, but also of the one which it ought to be. It contains not only constraints but also aspirations."[29]

Particular points of difference between Devenish's statement of the rule of law and that of Davis *et al.* concern the authority of the rule of law as a practical mechanism for securing justice. In the views of Davis *et al*. the issue of constitutionality is to be solved by the converging of the two "axes" of fundamental rights and popular sovereignty respectively, whereas to Devenish the rule of law represents the authority of a legal culture to refrain from or guard against injustice. For Devenish, the subjects in civil society represent small "enclaves" of liberty and rights worthy of protection in the quest for maintaining justice, whilst Davis *et al*. conflate constitutionalism and the rule of law to secure the entities (persons), metaphorically speaking, as shipmates in a tumultuous sea of democratic upheavals against moral shipwreck by establishing the moral duties of political seafarers *inter se* to prevent them from putting their undesirable passengers overboard.

To Devenish, inherent to the intricacies of modern liberal systems of constitutionalism, there are elements of "institutional morality" serving as a regulatory "conscience" against injustice, whereas according to the statements of Davis *et al.* the "political volition" of the "shareholders" in the democratic enterprise has to be counterbalanced by the duties implicitly contained in the bill of rights. In addition, whereas to Devenish justice is paramount in the statement of the rule of law, moral duty and the protection of persons (personhood) are reflected as primary notions in the efforts of Davis *et al.* to ground the rule of law volitionally.

Although the divaricating views above implicitly or explicitly allude to the requirements of justice, the entities (persons) subject to law and the moral

27 2.
28 2.
29 2-3.

duties informing law, no settlement of the issue as to which are the more fundamental notions in a constitutional system is possible without setting a standard for determining the relative "weight", "rightness" and "authority" of the key-elements shaping the moral context of law. Finnis' enterprise of practical rationality endeavoured to provide such a general methodology for "weighing" and evaluating the fundamental notions in the domain of constitutional discourse.

3. Practical rationality and the rule of law

3.1 Finnis' enterprise of practical rationality

Finnis' statement of a theory of practical rationality is directed at the universal understanding of constitutionalism (the authority of the constitution and the rule of law).[30] Within the purview of the authority exerted by the principle of constitutionalism, the rule of law figures as a "convenient label" to express the manner according to which authority is to be exercised in a community based on the principles of natural law. The close relatedness between Finnis' use of the rule of law and principles of natural law is suggested by his alluding to Aristotle's "suggestive but teasing notion" of the "rule of law and not of men".[31] To Finnis this is expressed by the distinctiveness of legal authority in terms of predictability, persistence, continuing relevance and so forth,[32] subject to the authority of the principles of natural law, and in addition to the requirements of justice and the common good, for providing an account of the conditions from which it can reasonably be said that the legal system is "working well". In selecting the "indicators" for determining whether a legal system exemplifies the rule of law, Finnis has recourse to the typical rational-liberal rule of law statements, such as prospectivity and promulgation, representing a virtue of human interaction and community because individuals can only 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".[33] The intricate attachment of constitutional government to the rule of law is expressed by Finnis as an "overlap" between the guarantee

30 *Natural law and natural rights,* 15-16.

31 See *Politics* 3 15 9 (1286a): "not acting against the law", i.e. only acting against the law in cases where it [i.e. the law] must necessarily be defective. See Franz Susemihl, *The Politics of Aristotle* (1894) and Finnis *Natural law*, 250 n159.

32 *Natural law and natural rights,* 164ff.

33 *Natural law and natural rights,* 272.

that rulers will not direct the exercise of their authority toward private or partisan objectives, with the rule of law as a virtue[34] – the idea of constitutional government itself forming one aspect of the idea of the rule of law, whilst the rule of law constitutes one of the requirements of justice and fairness.[35]

In his response to Lon Fuller's critical question whether a tyranny devoted to pernicious objectives can pursue its ends through a "fully lawful rule of law", Finnis allows for the rule of law to be informed by more fundamental principles of rationality which provide for the departure, temporarily, from the constitution in order to secure the values by the genuine rule of law and authentic constitutional government, based on practical and reflexive corollaries respectively.[36] Whereas the "practical" corollary is the judicially recognised principle that a written constitution is not a "suicide pact", and its terms should therefore be both "constrained" and "amplified" by the "implicit" prohibitions and authorisations necessary to prevent its exploitation by those devoted to its overthrow, the "reflexive" corollary implies that authority, of which legal rulership is one species, is the responsibility that accrues by operation of the law of nature.[37]

Finnis' efforts at formulating the enterprise of practical rationality presuppose considerations of fundamental moral value. He says, for example, that an explanation of the limits of the rule of law is an exploration not only of judicial methodology developed to embody and buttress the rule of law, but also of the "general theory of law" which, even when eschewing all concern with "ideologies" and "values", "faithfully mirrors that methodology and thus, willy-nilly, the concern for values that informs the methodology".[38] A judge, for example, insensitive to the preceding moral values will necessarily be unconscious of the limits of a methodology or the demands of practical rationality, thereby taking the circular position that a court which derives its existence from a written

34 *Natural law and natural rights,* 272.
35 *Natural law and natural rights,* 273.
36 *Natural law and natural rights,* 275.
37 *Natural law and natural rights,* 273. In its essence Finnis portrays the rule of law so to speak as a "bugle" through which the voice of reason is transmitted to the audience of political rulers: "(I)t [the rule of law] is a matter of doing what can be done to see that the state is ruled by *'reason*', i.e. by law which is a prescription of reason {dictamen rationis}, or by somebody who acts according to reason (rather than by men, i.e. according to whim and passion)."
38 *Natural law and natural rights,* 275.

constitution cannot give effect to anything which is not law when judged by that constitution.[39]

The main thrust of Finnis' quest for stating the requirements of practical rationality, however, entails that the act of "positing" law (whether juridically or legislatively or otherwise) is an act which can and should be guided by "moral principles and rules"; that those moral norms are a matter of objective reasonableness, not of whim, convention or mere "decision", and that those same moral norms justify the very institution of positive law, the main institutions, techniques and modalities within that tradition, and the main institutions regulated and sustained by law. Not only does morality affect law, but it also seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges and citizens.[40] In spite of Finnis' appeals to the moral authority of reason, the rule of law, to him, does not rise higher in the moral order of being than Devenish's appeals to institutional morality or Locke's venture of "limiting" political governance; neither does he adequately state the moral weight of jural concepts for the sufficient regard of human dignity attached to personhood.

Without venturing too deeply into the epistemological and ontological entanglement suggested by Finnis' arguments concerning rationality, moral duty and constitutional government, for purposes of our reflections on the universalising of intellective and rational criteria, a number of critical points arise: What is the epistemological status of natural law principles in the quest for universalising standards of rationality?; can rational theories of the rule of law be strengthened by pre-rational principles for determining the weight of moral-jural arguments?; is the rule of law merely an eudemological "tool" for judging the manner according to which authority is to be exercised?; at which level of critical discourse does the eudemological argument, for example the promotion of the common good, and the satisfaction of the citizens' needs in the public domain, figure?; is the idea of "subsisting identity" exhaustive of the fundamental moral dignity of subjects?; are Finnis' arguments not "too soft" on the fundamental issues at the root of common human rationality?; should an investigation into the quest for practical rationality not take as its primary aim a critical analysis into the first principles of institutional

39 *Natural law and natural rights,* 275.
40 *Natural law and natural rights,* 272.

morality?; and so forth. For purposes of this article only the second and partially the third issue will receive attention.

3.2 Transcending the fluidity and insecurity of human rationality

3.2.1 The first law of human judgment

Diverse natural law traditions took the enterprise of transcending the inherent limitations of natural reason further by the quest to formulate a basic (or fundamental) law of universal understanding with reference to the ontological notion of being and the primary moral law for judging human actions. Cicero's perspectives on the inhering idea of being innate in all human beings, functioning as a law for judging human actions, are conveyed in the idea of the "light of reason". The Ciceronian statement of such a primary moral law[41] for judging human actions represents the exemplar of the necessary conditions for applying a common standard of moral judgment transcending the precepts of natural law in all human beings, namely first, that the notion of fundamental truth inheres in the mind of all rational beings; second, that the subject applying the notion of fundamental truth must be aware of its suitability as a standard for moral judgments; and third, that the notion of fundamental truth must in fact be applied by the subject to the actions judged. In Ciceronian terms the primary law of human judgement manifests itself as a foundational idea or notion for forming moral judgments, not originating with the learned, nor with the decrees of the peoples; it is something eternal, a wisdom with authority to command and forbid, governing the whole world and possessed by nature.[42] The idea of being representative of the primary moral law from which all ideas and human thoughts originate and are formed by is described by Jerome in terms of its "natural holiness" impressed on the human soul by God, residing in the highest part of the spirit, where it judges between what is right and what is wayward.[43] The

41 The fundamental primary moral law which is common to all individuals, irrespective of race, sex, nation, culture or religion, binds everyone without exception.

42 *De Legibus*, II: "hanc video sapientissimorum fuisse sententiam, legem neque hominum ingeniis excogitam, nec scitum aliquod esse populorum sed aeternum quiddam, quod universum mundum regeret, imperandi, prohibendique sapientia."

43 See *Ep. Ad Demetriad* 8: "Et in animus nostris quaedam sanctitas naturalis a Deo impressa, quae veluti in arce animi resideris, pravi et recti judicuum exercet." In Patristic thought Justin writes in support of the idea of a first moral law of truth in the human intellect: "In the beginning He [God] made the human race with the power of choosing the truth and doing right, so that all men are without excuse before God; for they have been born rational and contemplative" (*First apology*, 28 313). He also refers to the "original principles" remaining in the human mind.

idea of the rational law transcended by a higher moral law of judgement also surfaces in the medieval statements of Thomas Aquinas' *Summa*: human reason is not itself the rule of things, but the principles naturally inserted in reason provide general rules and measures of all that is done by rational beings.[44] In the reformational tradition Melanchthon's early modern views on the *notitiae* transcending human rationality represents an even stronger formulation of the basic moral law and represents a turning point in German legal and social thought in the early modern period.[45] The common benefit shared by these views is contained in the shift from rational to pre-rational principles, some reflecting universal moral authority.

The effects of transcending the rational precepts of natural law by identifying a more basic or "first generation" moral law of human judgment forces rule of law statements to be more "backward"-looking. This entails answering the fundamental ontological question regarding the "weight" of *legal authority* and the moral nature of the rule of law before engaging in "futuristic" arguments regarding the possible outcomes of the *application* of the rule of law.

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44 Note his remarks in *De Veritate*, Q(11) A(1): "Similarly, we must say that knowledge is acquired in the following way. Certain seeds of knowledge, that is, the first conceptions of the intellect, pre-exist in us. These are known immediately through the light of the acting intellect by means of the species abstracted from phantasms." Although Aquinas's philosophy predominantly reflects Aristotle's commitment to the autonomy of reason, Thomas does provide for the light of being providing the seat of man's intellective life; the first law of all judgments, the light of reason. For a very illuminating discourse on the "intelligibilities inherent in nature, including the pre-rational components of our shared human nature" see Porter "A Response to Martin Rhonheimer" 2006 *Studies in Christian ethics* 379 380.

45 See e.g. *Corpus reformatorum* 13 150 647; *Corpus reformatorum* 11 920-921. Also *cf.* Wilhelm Dilthey's comments in *Weltanschauung und Analyse des Menschen seit Renaissance und Reformation: Gesammelte Schriften* (1921) 193. He calls Melanchthon "the ethicist of the Reformation" and the "greatest didactic genius of the [sixteenth] century, [who] liberated the philosophical sciences from the casuistry of scholastic thought … A new breath of life went out from him" (Berman *Law and revolution II* (2003) 77). Also *cf.* Petersen *Geschichte der Aritotelischer Philosophie im Protestantischen Deutschland* (1921) 71-72 for Melanchthon's statement of the common grounds of human knowledge: "Die Prinzipien sind mit uns geborene Kenntnisse, die Samenkörner der einzelnen Wissenschaften. Wie das Licht in den Augen geschaffen ist, die Körper wahrzunehmen, so sind diese Kenntnisse gleichsam ein Licht im Verstande, das uns Einsicht gewährt in die Zahlen, die Ordnung, die Verhältnisse und Figuren, das uns hilft, erste Urteile, wie z.B.: das ganze ist gröser als ein seiner Teile, oder: die Ursache ist nicht nach ihrer Wirkung, zu verbinden und zu beurteilen. Die Einteilung der Prinziepien in spekulative, auf denen sich Physik uns Mathematik aufbauen, uns praktische, die das sittliche Verhalten des Menschen regeln, geht auf Ciceros Schrift über die Pflichten zuruck und srammt hier aus dem Stoiker Parätius."

3.2.2 Human judgement and the acknowledgement of being

The shift from transcendental justice to justice in the earthly realm, the emphasis on human personhood as the focal point of human dignity and the positing of moral duty as a requirement for fundamental right, were largely inspired in early modern German thought by Melanchthon through his discourses on the "inborn elements of knowledge" (*notitiae nobiscum nascentes*).[46] These "notitiae" represent a "light from above," a "natural light", "rays of divine wisdom" inhering in the human intellect for making individual and communal life possible in civil society.[47] Apart from the "theoretical principles" of logic, dialectics, geometry, physics, law and other sciences, the "notitiae" are representative of certain "practical principles" ("principia practica") in ethics, politics and law that represent natural elements of knowledge: that human beings were born for civil society, that offences which harm society should be punished, that promises should be kept – through their authoritative "testimony" providing the "starting points" for social life and learning in the earthly kingdom and to be valued as natural elements of knowledge concerning morals that undergird life and law: "This knowledge divinely taught both by the light that is born in us and by the divine voice, is the beginning of the laws and of the political order …"[48] These *notitiae* are composed of

46 Berman, *Law and revolution II* (2003) 79 regards Melanchthon's contribution to natural law discourse as "a radically new theory of the ontology of natural law, that is, its origin in the essential nature of man". For Melanchthon's pioneering work in the field of natural law and human nature, see Bornkamm "Melanchthons Menschenbild" in Elliger (ed) *Philip Melanchthons Forschungsbeiträge zur Vierhundersten Wiederkehr seines Todestages* (1961) 77-90.

47 Melanchthon *Corpus reformatorum* 13 150 (*Lieber de Anima*). These "nodal points" of human knowledge enables human beings to worship God and love their fellow-men: "Omittio plura exempla, ac tantum obtestor discentes propter gloriam Dei, qui veritatem et amat, et nobis praecipit, ut veras sententias discant, et agnitam veritatem constanter amplectantur, et deinde insita voluntatem Dei ..." These "nodal points" ("notitiae") make knowledge possible: "Principia sunt notitaie nobiscum nascentes, quae sunt semina singularum artium divinitus insita nobis, ut inde artes extruntuantur, quarum usus in vita necessarius est, ut noticia numerorum, ordinis, proportionum, et multarum propositionem." Melanchthon dealt with the nodal points of human knowledge in more detail in his *Dialectics Ratio* (1520) and his *Loci Communibus Ratio* (1526).

48 In his *Dialectica*, Melanchthon already in 1520 stated the nodal points of certainty in human knowledge: "In Philosophia et omnibus artibus, de quibus lux humani ingenii per sese indicat, tres sunt normae certitudinis: Experientia universalis, Principia, id est, noticiae nobiscum nascentes, et ordinis Intellectus in iudicanda consequenta." Melanchthon adds his indebtedness to the Stoic tradition for his insights. Also note his remarks in *Corpus reformatorum* 11 920-921 (*De Legum Fontibus et Causis*). To Melanchthon this "light from above" represents a "natural light," without which

facts and facets of human nature, forming innate knowledge that is placed in the human mind at creation; they are beyond the power of even the purest reason[49] to prove or disprove. To Witte this represents a deliberate departure from conventional scholastic propositions that human reason can prove moral propositions that are consistent with divine revelation.[50]

By cutting through the obtruse medieval casuistry Melanchthon appealed to the common perfect natural knowledge of moral good in the human intellect; albeit distorted by suppressing the "light" provided by the acknowledgement of being.

Although there is no systematic delineation of the boundaries between natural law and the notions of the intellect[51] in Melanchthon's thought, his continuance with the Ciceronian and Patristic agenda of "right reason"[52] manifested itself in the statement of the moral weight of intellectual propositions reflected in the human intellect as a "light of reason" preceding the human faculties of reflection and volition.[53] The *notitiae* demanding respect for the dignity of personhood, to refrain from harming others by giving each his due, and the demand for performing our moral obligations, provide a "moral lifeline" transcending the limits of all laws and human constitutions and posit a moral "escape route" in case of a

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human beings could not find their way in the earthly kingdom (see Bretschneider and Bindseil (eds) *Philippi Melanchthonis Opera Quae Supersunt Omnia*, in *Corpus reformatorum* 13 150, 647. Melanchthon calls these elements of knowledge "a natural light in the intellect [*naturalis lux in intellectu*]," "a light of the human faculty [*lux humani ingenii*]," "a divine light ingrafted in the mind [*lumen divinitus insitum mentibus*]"

49 Because reason is the faculty with which the human spirit – fallible and often erring – applies the idea of being.

50 *Law and Protestantism* (2002) 124.

51 E.g. these *notitiae* also include certain moral concepts, such as that God is good, that offences which harm society are to be punished, and that promises should be kept [*Corpus reformatorum*, 21: 117], in addition to the "laws of nature". From his examples it appears though that these principles deal primarily with the "moral weight" of being e.g. God is good, the laws of nature should be obeyed etc.

52 For Cicero's influence on Melanchthon's thought, *cf.* Dilthey *Gesammelte Schriften II* (1914) 61; Kusukawa *The transformation of natural philosophy. The case of Philip Melanchthon* (1995) 72; Peters *Geschichte der Aristotelischer Philosophie im Protestantischen Deutschland* (1921) 20ff, 36, 45, 93, and Maurer *De junge Melanchthon* v 2 (1968) 287-288.

53 In the author's inaugural lecture of 1996 he was sceptical about the possibilities of "externally binding" ethics and law in support of natural law theory. However, since then it has become clear to him that Melanchthon does not endeavour to state the internal authority of human reason as such. See Raath *Federale oopheid en legitimiteit: Rekonstruksie van die publieke sfeer* inaugural lecture, University of the Free State (1996) 36-37.

moral shipwreck in society at large and in a constitutional system in particular. The moral catastrophes facing legal systems include instances where a moral catastrophe faces or "hits" a legal system, for example when the dignity of being[54] is prejudiced: not showing respect for the religious convictions of others; circumventing constitutional provisions for the protection of rights, liberties and human dignity; disregarding justice and indulging in arbitrary confiscation of property – in other terms the host of jural principles and procedures demanding the respect of being. Not only are the moral principles in the human intellect a "moral lifeline" in the midst of a possible moral shipwreck, but they also provide a universal point of reference in the human intellect for moral discourse on issues related to the principles and mechanisms for protecting the jural integrity of a legal system. Furthermore the first law of being in the human intellect in a concrete and practical sense appeals to the "common sense" of all human beings in its demands that each person should receive his due, that human personhood not only has dignity and demands respect, and that each person should submit to the "weight" of the moral duty of benevolence demanded by the acknowledgement of being through the respect for the rights of others.

From this point of view the rule of law, as a primary notion undergirding systems of rights and jural integrity therefore, is much more than a convenient label for measuring the political performance of civil authorities; it is the jural appeal to the fundamental law of being[55] by demanding respect for truth, submitting to the demands of justice[56] and accepting the "weight" of the moral duty of benevolence towards personhood in the jural domain.[57]

4. Between "eudemonistic[58] instrumentalism" and ontological truth

Melanchthon's positing of notions of truth, justice and benevolence inhering in the human spirit as necessary knowledge representing simple, universal and immutable essences having the "weight" of showing what is

54 Personal dignity depends upon our acknowledgement of being.
55 The moral law is dependent upon the notion of being.
56 In this sense justice means acting in accordance with the first moral law described by Cicero as the "ratio summa, insita in natura, quae iubet ea, quae facienda sunt prohibetque contraria".
57 Ontology investigates the nature and essential characteristics of being.
58 Eudemonology is primarily concerned with a person's happiness, including personal rectitude; whereas ethics has an "outward" look at that which is just and upright.

to be respected, necessarily precedes all laws in the moral order. This "first law" for judging the exigency of things in the order of the mind is different from other laws demanding authority. However, such a fundamental law of judgment does not only provide the human mind with a standard of necessary truth, it also obliges human beings to acknowledge and respect the dignity of being universally. Not only does this law of the exigency of being reflect the dignity of being, it also obliges to respect and value being for what it is in the moral order.

This primary moral law of human understanding concerns the acknowledgement of being as such. The knowledge of being in the human mind precedes other knowledge in the moral order; it is a source for judging the exigency of things, different from the will of the Creator, the will of the people, a sovereign ruler or any superior whatsoever. The law of the "exigency of being" precedes the acts of the human will[59] because the first apprehension of objects is not subject to the power of the will, but acts in us spontaneously, in virtue of the laws governing human understanding. If the human faculty of free judgment (acknowledgement) is in agreement with the necessary knowledge apprehended as a first act of understanding, it will acknowledge the degree of goodness (truth, justice and benevolence) apprehended in the objects. This freedom of acknowledgement of moral worth presents the human mind with the true value of the dignity and degree of excellence reflected by being, whereas the power of the human passions has the power to distort, obscure and darken the act of acknowledgement of truth to the point of denying the inhering dignity and truth of being apprehended by human cognition.[60] The first element in the process of acknowledging being entails regarding being in its "wholeness".[61] The importance of the apprehension of being in its totality in the quest for true knowledge surfaces in a wide range of philosophical traditions. For example, Dooyeweerd's critique of the Kantian critical philosophy of theoretical thought[62] commits itself to view that the errors produced in the human mind are due to human reflexive

59 The will is the "active power" operating according to the reasons present to the mind and proposed by the human intellect.

60 The *duty* preceding *right* is imposed by the *object*, whereas *right* springs from the *subject* – just as the *object* has an existence independent of the human *subject*, so *duty* has an existence independent of *right*.

61 "Wholeness" seems to be closely aligned with "openness" towards reality. *Cf*. Raath "Oopheid van hart – die kroon op die lewensarbeid van HG Stoker" 1994 *Koers* 529-557 and Raath *Federale oopheid* 22-24.

62 *Cf.* Dooyeweerd *A new critique of theoretical thought* (1979) v 1.

cognition not being sensitive to the acknowledgement of being in its totality ("wholeness") before abstracting any specific "modal elements" in the object.[63] In Dooyeweerdian terms this means that a clear distinction has to be drawn between naïve experience and the scientific knowledge gleaned by abstracting the specific modal moments (or aspects of being) in their distinctness from and relatedness to the totality of being. The first act of knowledge consists in perceiving and apprehending the objects perceived as a whole and in their entirety, taking nothing from them; the second act of knowledge distinguishes the different modes of the objects perceived by the human mind and judges their individual qualities.[64] The theoretical and practical implications of the refusal to acknowledge justice for what it is are adequately reflected in Cicero's and Lactantius' statements of Carneades' famous argument against justice. Although a person may apprehend the phenomenon of being (Carneades' affirmation of justice confirming his necessary knowledge of justice), that same person may refrain from acknowledging justice for what it is (Carneades' denial of the worth (or "weight") of justice by calling it stupid), thereby destroying perceptions of justice as consequences of the directedness of his reflections and will.[65]

63 In this sense being is "that which is" in its totality – this view of being, similar to Heidegger's views, regards the world as a synthetic complex of instrumental realities inasmuch as they point one to another in ever widening circles, and inasmuch as human persons make themselves known in terms of the complexes which they are (see Heidegger *Qu'est que la metaphysique* [What is metaphysics?] (1938)).

64 See Dooyeweerd *A new critique* v 1 Prolegomena 83: "Philosophy must convert the datum of naïve experience into a fundamental philosophic problem. For it is evident, that by maintaining the attitude of naïve experience one would never be able to account for that datum philosophically. Consequently, since philosophy is bound to the theoretic attitude of thought, its transcendental ground-Idea is also bound to the theoretical gegenstand-relation in which temporal reality is set asunder in its modal aspects."

65 Carneades argues that the principle of justice is constituted by utility – either our own or by another's. If it is our own, we are simply aware of acting to our own advantage; if it is another's, we are simply acting stupidly, because we would often harm ourselves by helping others, and would foolishly put another's utility before our own. See Lactantius *Divine institutes* 5 16, 17. Lactantius argues that Carneades sensed the nature of justice, but was unable to go further and safeguard it from the stupidity to sometimes promote harm. Carneades concluded that truth was hidden, and beyond the capacities of human perception. Lactantius reflects the substance of Carneades' arguments as follows: "That men enacted laws for themselves, with a view to their own advantage, differing indeed according to their characters, and in the case of the same persons often changed according to the times: but there was no natural law: that all, both men and animals, were born by the guidance of nature to their own advantage, therefore that there was no justice, or if it did exist, it was the greatest folly, because it injured itself by promoting the interests of others." In Plato's

From a jural perspective the acknowledgement of being (the light of reason[66]) carries important ontological and epistemological consequences in its wake: it provides the human mind with the principle of morality;[67] the principle of morality emerges where the principle of choice manifests itself; the fundamental law of morality functions as the supreme norm for guiding human choice and freedom in its various undertakings; consequently the first voluntary acknowledgement of objects we apprehend is the first moral act impressed in the form of right reason (or the upright ("good") exercise of moral freedom). Not only is the human being awarded with the freedom of choice but also with the possibility of being attached to moral dignity by acknowledging the dignity of being universally. The argument for the moral exigency of being as such is principally opposed to views grounding duty and dignity in sensism, subjectivism or materialism. Thus, because eudemonists are, practically speaking, egoists[68] who campaign for the usefulness of their own happiness – not in the concept of duty, the highest aim of the human will – eudemonistic good is relative and cannot be the destiny of man or the guiding idea of a legal and political system to the extent that it makes human co-existence impossible. The genuine limitation and determination of right cannot succeed through rules of prudence, because such limitations can only be moral.

5. Is the rule of law merely a "convenient label" to express the manner in which power is to be exercised?

5.1 The rule of law and the centrality of human personhood

In spite of the obligatory nature of apprehending being on human volition, the act of acknowledgement as a consequence of volitional choice informed by the human intellect often results in disregarding being in spite

Republic Glaucon puts the case that morality is a matter of expediency, an agreement made for mutual convenience, that human beings are only moral because it pays them, but given the chance all human beings behave extremely badly. He adds: "For anyone who had the power to do wrong and was a real man would never make any such agreement with anyone – he would be mad if he did" (*Republic* 1 2 359(b); "We shall catch the just man red-handed in exactly the same pursuits as the unjust, led on by self-interest, the motive which all men naturally follow if they are not forcibly restrained by the law and mark to respect each other's claims (*Republic* 1 2 359(c). Therefore, he concludes that morality is nothing more than social approval.

66 More correctly, the light of the intellect, because the innate light of the intellect becomes the notion which we use to produce all moral judgements.

67 "Morality", in the sense of determining human action with the force of obligation.

68 *CF* Kant, *Metaphysics of ethics*, 2 Preface.

of its ontological "weight". The negation of the centrality of human personhood (as the capacity for right) in the history of law has often culminated in the denial of dignity to certain categories of human beings, for example slaves, whereas the personhood of foreigners was in certain instances severely marginalised in the moral order of being, and whereas beasts were in some instances awarded the status of moral personhood.[69]

By restoring the centrality of personhood[70] to its status as a notion of primary significance in its relatedness to the notions of justice and law, Stoicism largely succeeded in gaining significant ground in its quest for restoring human dignity as a fundamental notion in the order of being. The fundamental moral bond by right entails a superiority of person over all the other powers of human nature. Together with moral excellence and superiority which contribute towards the uniqueness of *being human*, morality and right share the same source of the light of reason which source the human will follows by acting in virtue of knowledge.

A philosophical view "weak" on human personhood tend to relativize human dignity as such or uproots society and its moral relations. The moral weakness on human personhood in Kant's critical philosophy in the determination of rights and the orientation of the moral subject's regard of moral dignity in others destroys society as such. Kant's principle of the determination of rights states that a human being is made aware by his own feelings that he cannot avoid self-contradiction unless he undertakes to accept others of the human species as "persons".[71] Kant does not clarify

69 See e.g. Van der Vyver and Joubert *Persone- en familiereg* (1980) 40-41 for examples awarding personhood to animals, retaining legal subjectivity after the death of a person etc. Also see Hahlo and Kahn *The South African legal system and its background* (1973) 104, 473.

70 The close relatedness of dignity to person is described as follows by Aquinas in his *Summa Theologica* (*ST*) P(1) Q(29) A(3) RO(2): "(A)s famous men were represented in comedies and tragedies, the name 'person' was given to signify those who held high dignity ... And because subsistence in a rational nature is of high dignity, therefore every individual of the rational nature is called a 'person'. Now the dignity of the divine nature excels every other dignity; and thus the name 'person' pre-eminently belongs to God."

71 Kant *Fundamental principles of the metaphysics of ethics* (transl. Kingsmill) (1949) section 2. This is the supreme objective practical principle from which all the laws of the will can be deduced: "Act so as to treat humanity, in your own person as well as everyone else's, always as an end and never as a mere means." This statement of the categorical imperative in Kant's philosophy provides a "moral basis" for the doctrine of the rights of man. The violation of the duty to respect man as an end in himself is most conspicuous in attacks on liberty and property, where the intention is the treatment of fellow-human beings as mere means (instruments) rather than as beings themselves capable of participating in the ends of the action in question

whether this is a moral duty, a logical rule or a rule of prudence by which human subjects note that their neglect to limit the use of their faculties would cause others to do the same with consequent loss of their entire freedom. Without recognising the centrality of moral personhood in the domain of the first moral law, it is impossible for individuals, guided by their personal interest, to persuade themselves that their own personal interest would always gain some advantage from the respect shown to the personal interests of others.

5.2 The rule of law and the centrality of justice

In its essence the "weight" (or "authority") of justice to regard being in its true nature, represents itself as a simple albeit primary principle to the human mind. Thus the simple, universal and immutable essence of justice testifies as a force independently of our rational faculty. Opposing the primary moral law by not acknowledging the nature of justice and the truth it reflects deviates from moral good. Acknowledging the authority of the primary moral law confirms the inherent "weight" of justice and the force with which it makes itself felt. Cicero succinctly formulates the inhering authority and truth of justice as follows: "For if we have only made some real progress in the study of philosophy, we ought to be quite convinced that, even though we may escape the eyes of the gods and men, we must still do nothing that savours of greed, of lust or of intemperance."[72] The reciprocity inherent to justice, furthermore appeals to the reality of moral personhood. The obligation to act justly flows from the demands of the primary moral law of being; therefore justice is a moral value attached much closer to the dignity of being. Therefore Aristotle declares that justice cannot be destructive of the state because all laws are subject to the demands of justice.[73]

In the tradition of the German critical philosophy, Kant not only understated the centrality of moral personhood relative to the idea of the rule of law, he tried to separate right from morals as such. He defines external legislation as that which provides a motive from outside the law for observing the law: in other words external force, for example punishment, provides the motive for obedience to law, which is not a

(*Fundamental principles of the metaphysics of morals*, section 2 – covering the transition from popular moral philosophy to the metaphysics of morals).

72 *De Officiis* 3 8 37.

73 *Politics* 3 10.

moral motive at all. Right is defined by Kant as the complex of conditions which makes external legislation possible"[74] – in other words, those conditions which make possible the institution of punishment and reward for those breaking or observing the law. In Kant's system right is separated from internal, moral motives of action. Thereby right, being separated from morals loses its lifeblood and the moral dignity of personhood is relativised by the degree of force used for ensuring obedience to the law.[75]

5.3 The rule of law and the centrality of the moral duty of benevolence[76] towards personhood

A critical analysis of the Scholastic epistemological tradition within which Finnis orientates his theory of law, right and the rule of law, brings to light a preponderance of the authority of human reason at the expense of man's intellective faculty and its power in the domain of law and morals. The Scholastic confusion of intellect, reason and human nature culminates in Thomas Aquinas's argument that the human soul can be the form of the human being, and his conclusion that the "intellective soul is indeed the form of the human body according to its essence, but not according to its act of understanding", adding that "understanding is the kind of act which is done entirely without the instrumentality of a bodily organ".[77]

74 See his work *On perpetual peace*.

75 Hommes *Major trends* 179 observes: "Kant's theory of rational law, despite appearances to the contrary, is a defense of legal positivism, which attributes the status of law to all that the state's rulemaker (legislative, judge) declares to be law, regardless of the content of the rule. Rational law, for Kant, can have no real validity next to positive law. Kant's theory of rational law, just like Hobbes' theory of the *leges naturales* and Rousseau's theory of natural human rights, is beyond the scope of traditional theory of natural law."

76 Jonathan Edwards in his ethical works (*Works* v 8: Ethical Writings (1989) 424) introduced the sensitivity for being through benevolence into American philosophical discourse by stressing the "regard for being" as a universal moral law "in all actions and proceedings, determinations and effects whatever, whether creating, preserving, using, disposing, or destroying", which regard also includes "estimation" of the Being of God. Edwards' ethics discerned the general moral sense common to all mankind as a "universal" law of moral discourse. In Edwards' terms true virtue "most essentially consists in benevolence to Being in general"; or, as he explains: "(T)o speak more accurately, it is that consent, propensity and union of heart to Being in general, that is immediately exercised in a general good will" (*Works* v 8 540). In the light of this Ramsey ventures to formulate Edwards' definition of benevolence as "consent, propensity and union of heart".

77 Three aspects of Aquinas's reflections on intellect, reason and bodily form need to be noted. In *ST* P(1) Q(76) A(1) O(1), he states: "It seems that the intellectual principle is not united to the body as its form, for the Philosopher says, … that the intellect is 'separate', and that it is not the act of any body. Therefore it is not united to the body

Confronted by the Western philosophical duality in defining the human being, Thomas follows the Aristotelian approach of rationality as the fundamental human element, in opposition to Plato's statement of the human intelligence as the foundational human element in being human.[78] The Platonian description of the human being as an intelligence aided by bodily organs, clothes the intellective human element with a kind of *receptivity*, whereas the volitional part represents the *activity* of human being, in which the human personality is located. On the other hand Aristotelian views on the essence of being human give expression to the *rational* but not the *volitional* part of the being of human beings.[79] The additional appropriateness of the Platonian typification of "being human" situated in an intellective rather than a rational faculty reflects the

as its form." Because of the indeterminate nature of the intellect, he adds (P(1) Q(76) A(1) O(2): "… if the intellect were united to the body as its form, since every body has a determinate nature, it would follow that the intellect has a determinate nature; and thus it would not be capable of knowing all things …" The ability of the intellect to know universals is explained thus (P(1) Q(76) A(1) O(3): "But the form of the thing understood is not received into the intellect materially and individually, but rather immaterially and universally: otherwise the intellect would not be capable of knowledge of immaterial and universal objects, but only individuals, like the senses." At P(1) Q(76) A(1) O(5) he adds that the intellectual principle has *per se* existence and is not united to the body as its form; "because a form is that by which a thing exists: so that the very existence of a form does not belong to the form itself. But the intellectual principle has '*per se*' existence …"

78 Plato distinguishes between the function of *intellectus* from observation by the senses, see e.g. *Republic*, 7 5 476f, 8 7 533f, *Theaetetus*, 210A. In *Republic*, 7 5 476f Plato draws a distinction between *knowledge* produced by the intellect, and *opinion* formed through sensual observation. Dialectic is the exercise of pure intellect; its vision is the object of the good; of truth itself. "Dialectic, in fact, is the only procedure which proceeds by the destruction of assumptions to the very first principles" (*Republic* 7 6 511b). Plato adds: "Then when I speak of the other sub-section of the intelligible part of the line you will understand that I mean that which the very process of argument grasps by the power of the dialectic; it treats assumptions not as principles, but as assumptions in the true sense, that is, as starting points and steps in the ascent to something which involves no assumption and is the first principle of everything; when it has grasped that principle it can again descend, by keeping to the consequences that follow from it, to a conclusion. The whole procedure involves nothing in the sensible world, but moves solely through forms to forms, and finishes with forms." Different to that which is studied by sciences, which treat their assumptions as first principles, and through reason proceed *from* "assumptions and not to a first principle"; dialectics pursue the path of the intellect in finding first principles.

79 Aristotle's distinction between passive intellect which receives the forms ("Einheid der Vernunftsanalogen") and the active intellect, the "actual" realization thereof, the spiritual power of realization, the power of thought, which actualizes the power of thought which are contained in the passive intellect in potential form, is important at this point – see *De Anima* 3 5 430a.

precedence of intellect to human reasoning. Also Thomas Aquinas somehow had to concede that it is the human intellect that first intuits what is given to us: "Every rational, discursive act depends upon the intuition of principles. This intuition pertains to the intellect."[80] The faculty of reason is, therefore, not the first human power, but originates from the intellect. Because the human intellect forms part of the human subject in a foundational sense, without the intellect, the subject of human understanding disappears. The volitional human capacity acting on the necessary knowledge provided by the human intellect, reflected upon by reason, therefore, follows the faculties of the intellect and human reason. The knowledge upon which the human will acts presupposes the human being as an intellective subject feeling and perceiving universal being, not to be found in the subject but in universal being and objectivity as such. The volitional capacity is preceded by the intellective and the rational functions central to the domain of moral duty.[81]

The critical connection of intellect, reason and will, is determinate in the field of moral duty, moral freedom and moral truth. In the moral order, according to Cicero, the first law of being has a power to govern human choice: "I find that it has been the opinion of the wisest men that Law is

80 In *ST* P(1) Q(79) A(4) he quotes Aristotle, *De Anima* 3 5 who compares the active intellect to light "Wherefore the human soul derives its intellectual light from Him [God], according to Psalm 4:7 ["The light of Thy countenance, O Lord, is signed upon us"]. This observation forms part of Aquinas' broad view that the faculty of reason is not the first human power, but originates from the intellect (*ST* P(1) Q(79)). In *ST* P(I-II) Q(91) A(3) O(2)) Aquinas makes it clear that human reason is not itself the rule of things, but the principles naturally inserted in reason are so many general rules and measures of all that is to be done by human beings. Fundamentally obligations therefore does not come from *reason* as a human faculty, but from the light inherent in the intellect by nature; – a light which takes the name and form of different principles as a result of various applications. Thus the natural principles known *per se* are rules and measures of everything to be done by human beings. Therefore, also, the rule of moral actions is not the natural law that springs from human nature of human reason and is dictated to us intellectively. In spite of Aquinas' sympathetic remarks towards the authority of the intellect, such authority apparently remains very limited according to some interpretations, e.g. Porter "Response" 385-386 – the intellect is infallible with respect to its proper objects, namely the quiddity, that is to say, the essential form of a specific kind of thing, grasped as instantiated in some particular matter, and first principles such as the law of non-contradiction, or the practical principle that good is to be pursued and evil is to be avoided. If Aquinas' "soft" statement on the intellect is accepted, it implies that practical reason generates moral norms through its own spontaneous functioning, without any foundational grounding in speculative apprehension of human nature.

81 The distinction between intellect and reason finds strong paralels in the medieval thought of Scotus. Scotus and his followers distinguish between the "intellectus" (or

not the product of human thought, nor is it any enactment of peoples, but something eternal which rules the whole universe by its wisdom and prohibition."[82] The Patristic tradition, following the same moral view, regards this law inhering in human nature reflective of a "natural holiness", where it judges between what is right and what is wayward; all ideas and human thought originate from it and are informed by it; it is the source of intellectual life; in other words, the apex of the soul. This idea of right enables human beings to distinguish the just from the unjust; it is the light of reason by which the human mind is informed by the idea of being; the first idea having objective good as its term, not subjective moral good as far as the instincts of human beings lead them and which stimulates their own pleasure and happiness. In opposition to this "restrictive" (even self-directed) benevolence, the aim of the objective good is more elevated – it informs the human mind with a vision of universal being, and moral judgments are informed by universal love – the love of beings. The light of reason finds its expression in the obligation to love all being; therefore the primary formal principle of universal being and truth, is the object of the intellect.[83] The intellect thus moves the will with a movement directed at universal benevolence. In this sense the primary moral law, therefore, could be formulated as the notion of being obligating human beings with the duty of universal benevolence.[84] Moral

"intelligentia") as the ability to experience truth and the essentials of reality from the "discursive" *ratio* (*De divis. Natur.*, II, 23).

82 *De Legibus* 2 4 8.

83 *ST* P(I-II) Q(9) A(1). In spite of following Aristotle's commitment to reason, Thomas concedes to being and truth as the first formal principle, which is the object of the intellect: "On the other hand, the object moves, by determining the act, after the manner of a formal principle, whereby in natural things actions are specified as heating by heat. Now the first formal principle is universal 'being' and 'truth', which is the object of the intellect. And therefore by this kind of motion the intellect moves the will, as presenting its object to it."

84 The complex interplay between justice and benevolence to being makes itself felt as an inclination to justice in a universal sense. Edwards' insights on the "spontaneous" fashion in which the benevolence appeals to the human being's sense of justice and proportion is explained in a lengthy comment in his ethical writings: "Tis true that Benevolence to Being in general, when a person hath it, will naturally incline him to justice, or proportion in the exercise of it. He that loves Being, simply considered, will naturally ... love particular beings in a proportion compounded of the degree of being and the degree of virtue, or benevolence to being, which they have. And that is to love beings in proportion to their dignity. For the dignity of any being consists in those two things. Respect to Being, in this proportion, is the first and most general kind of justice; which will produce all the subordinate kinds. So that, after benevolence to Being in general exists, the proportion which is observed in objects

obligation does not originate from human reason but from the principles naturally inserted in human reason; obligation does not proceed from reason as a human faculty, but from the light inherent in reason by nature, as Thomas says, "a light which takes the name and the form of principles as a result of its various applications."[85] This natural light of human reason needs no other light of revelation or grace in order to *induce obligation*; it provides human beings with the natural principles known *per se*, the essential constituents of human reason for discerning order amongst beings.[86]

From the history of jural ideas it surfaces that efforts to ground moral duty in sensism,[87] utilitarianism, or political authority have failed continuously because of not acknowledging universal being for what it is in the moral order. Spinoza,[88] for example, reverts to utility for stating the norm for moral good. After having expressed the necessity of natural law, he formulates the law governing the whole of human nature in the form that no one should omit anything he judges good, except with the hope of greater good; or for fear of greater harm, no one should prefer an evil except for avoiding a greater evil or obtaining a greater good. If human beings are not obliged by that which is useful, there is no reason why another's usefulness should be regarded higher than our own. Nor could Hobbes, for example, succeed in deducing the first moral norm from

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may be the cause of the proportion of benevolence to those objects: but no proportion is the cause or ground of the existence of such a thing as benevolence to Being. The tendency of objects to excite that degree of benevolence which is proportionable to the degree of being, etc. is the *consequence* of the existence not the ground of it" (*Works* v 8 571). Not only does the tendency of general benevolence produce justice, there is also the tendency of justice to produce effects agreeable to general benevolence, "both render justice pleasing to a virtuous mind. And it is on these accounts *chiefly* that justice is grateful to a virtuous taste, or a truly benevolent heart" (Edwards *Works* v 8 572).

85 *ST* P(I-II) Q(91) A(3) O(2): "Further a law bears the character of a measure … But human reason is not a measure of things, but *vice versa*, as stated in *Metaph* X text 5. Therefore no law can emanate from human reason."

86 All the objects of human apprehension are placed in their natural order by the human act of acknowledgment. They are regarded according to their inherent dignity to the value they merit. Related to the practical acknowledgement of being is benevolence – the principal moral duty. The first moral duty, therefore, is benevolence. Self-directed egoism subjects the acknowledgement of being and culminates in sensism.

87 British empiricism denies the existence of ideas; the inability to distinguish between sense and judgement, and the refusal to grant anything to the intellect other than the sensations culminated in the rejection of universals and the propagation of sensism and materialism.

88 *Tractatus theol. pol.*, Ch. 6.

human association, or the social contract, or adequately explain the validity and authority ("weight") of such association or agreement without reference to a deeper substratum of authority and justice.[89] Utility and the fear of evil or harm cannot import any validity to human agreements in the absence of a meaningful reflection of justice, personhood and moral duty. Neither can the formation of society give rise to duty, appreciation of personal dignity or justice if these did not exist prior to the formation of society.

Restoring the human intellect to its rightful place in the moral order of being is an important enterprise for the interior identification of duty and moral obligation. Restoring the human intellective faculty necessarily implies opposing the Kantian school of philosophy, with the German school in its wake, and other philosophical traditions, which elevated reason to a position superior to the intellect.[90]

6. Does Finnis "come in too low"?

Let us return to the metaphor of the moral shipwreck: the options available under Devenish's rule of law statement would be either to conform to the morals of those occupying the lifeboats or to drown – the "pockets" of "institutional morality" do not provide a standard of moral reference to appreciate or value the dignity ("weight") of being, neither do they provide the sufferers of injustice with a moral platform of appeal to a general duty of benevolence to avert egoistic self-interest. Subjection to the will of the majority in their voluntaristic experience of democratic freedom in Davis *et al.*'s volitionally-based idea of constitutionalism and the rule of law and the possibility of its *pre-empting* a moral shipwreck[91] does not provide for a moral duty of return to search for survivors by the crew occupying the life-boat – eudemonistic self-interest could preclude a

89 *Cf.* Hobbes, *De Cive* 1 6. Also see Raath & Henning "Huber, natural law and the reformational basis of the *iurisprudentia universalis*" 2005 *JRS* 30 36-50 and "Political covenantalism, sovereignty and the obligatory nature of law: Ulrich Huber's discourse on state authority and democratic universalism" 2004 *JRS* 15-55 for Huber's criticism of Hobbes' views.

90 Kant considered reason as the power of the absolute and placed it above the power of concepts (the intellect).

91 Note e.g. Davis *et al.*'s exclusion of the idea of divine being from moral-jural authority as such at 15: "(W)ho is the authoritative expounder of natural law in any of its formulations? It used to be God, but He is now dead, or perhaps living in the Sun Belt", added to the negation of "moral and political doctrine (built) upon the conception of a universal human nature" (15) and "our society does not accept the notion of a discoverable and objectively valid set of moral principles" (15).

full-blast life-saving operation in so far as the rule of law does not appeal to a standard of truth beyond human volition. More than that, the question whether human life is worth saving is oriented towards determining that which is *regarded as worth saving* by those occupying the life-boats, and, in addition, the moral duty of benevolence has no authority beyond the immediate needs of those sailing for the beach.

Does Finnis come in too low? Yes, he credits rationality with too much moral authority! The authority of being disappears from Finnis' horizon of rationality. He credits natural law with more than it can perform not only having the weight of *reflecting universal standards of* justice but also eliciting its own *moral authority*. Bolstering Finnis' statements on the rule of law by increasing the "weight" of moral argument at a pre-rational level[92] and elevating the rule of law to its position as the first jural law of morality oriented towards being has the potential to enhance Finnis' arguments concerning justice substantially: firstly, statements of the rule of law cannot circumvent the answer as to the fundamental moral rule making possible a (common) regard for the weight of personhood, justice and duty; secondly, all rule of law statements presuppose a common regard for moral duty, personhood and justice; thirdly, the law of universal being makes itself heard prior to any discourse on justice, rights, democracy or constitutionalism; fourthly, a statement regarding the intellective weight of personhood, justice and fundamental moral duty is presupposed in order to translate the first moral law's acknowledgement of being to the domain of jural discourse; fifthly, the rule of law is a statement of the first fundamental law of jural ontology oriented towards universal being and translating it into jural terms; sixthly, the jural statement of the universality of being acknowledges justice, personhood and moral duty of benevolence as the fundamentals for further discourse on constitutional matters; seventhly, the jural statement of the acknowledgement of being precedes any and all discourses on constitutionalism – including the founding provisions of the South African Constitution – in its efforts to appeal to fundamental notions of right and rights; eighthly, the enterprise of formulating the general requirements of practical rationality should be extended into an effort of investigating the general requirements of *practical judgement* – such a judgement is a general decree of the will, generated by the intellect and perfected in the depths of the human spirit; ninthly, such a judgement is only possible by

92 See e.g. Plato *Republic* V, 533f; Alexander of Aphrodisias *De Anima* I, f. 139.

submitting to the demand of the duty of benevolence – thereby particular moral judgements are made, bridging the link between the primary universal law of being and particular acts of benevolence in the jural domain of right and rights.

Are there "connecting points" in Finnis' own work for bolstering his overtly rational grounding of the rule of law? Yes! As indicated above Aquinas' albeit brief sympathetic reflections on the authority of the intellect and the quiddity, as well as his understanding of "ens" in its relatedness to the intellect, could convince Finnis of the need to reflect more "open-ness" towards being as such, rather than proceeding along the avenue of positing that the authority of legal rules is soleley dependent on the sheer fact of likely obedience, in spite of his admission of the "recipocity" between rulers and ruled as the foundation of the moral demands of legality.[93] A sympathetic "tempering" of Finnis' "rationalism" could soften the prevailing impression of his lack of sensitivity towards being and his rather uncritical accommodation of the Austinian position of commands.[94]

Within the wider discourse on jural-moral obligation, the rule of law as the primary jural-ontological law of appeal to the acknowledgement of being enters into crucial debates on the fundamentals of jural life and existence in society. Y.H. Malan's[95] observation, arguing from Derrida's views and those of other post-structuralists, that the concept of justice tends to be too narrowly defined as distributive justice or as a mechanism to maintain social order, should be supported, because of its too narrow statement of justice and because it is inadequately being informed by the moral demands of truth and benevolence. Restoring justice to the level of a fundamental principle of being opens up perspectives justifiably campaigned for also by post-structuralists. For example J.N. Hamman's[96] efforts in arguing the case for a post-structuralist ethics based on friendship lucidly confirm the need for re-establishing fundamental notions like truth, justice and benevolence to the centre of moral-jural debate and make a study of the first moral laws governing judgment indispensable for the post-structural discourse on these issues.

93 Finnis *Natural law and natural rights* 274.
94 Cotterell *The politics of jurisprudence* (2003) 142.
95 Malan M.A. dissertation Stellenbosch (2000).
96 Hamman *Poststructuralist ethics and the possibility of a general ethical theory* M.Phil. dissertation Stellenbosch (2000).

Because truth, justice and the moral duty of benevolence *are* the first elements to enter the construction of every society and because society itself is the effect of these "ground principles" of being, politicians who are responsible for governing society *must* also be aware of the first moral law of jural ontology. When politics goes its own way, cut off from truth, justice and moral duty – whose servant it is – it is imaginable that the consequences could be devastating. Once again alluding to the metaphor of the moral shipwreck and while pondering on this complex issue we are metaphorically speaking, continuously reminded by a broader – albeit political context – of looming catastropies: *Our special correspondent in Beira reports that the passenger boat,* Zimbabwe*, which has been much in the news lately has run aground in high seas near Maputo. Insurers of the vessel, currently in an urgent meeting to decide on the fate of the boat, stated that their first duty is to decide on the future of the vessel and whether the cost involved in getting the* Zimbabwe *afloat is justified. Meanwhile the South African holiday cruiser,* Democracy 4U*, is reported to have been spotted in the same area without its rudder. The captain has stated telephonically that there is no reason for 'immediate concern' and that the annual* Democracy *ball to be held on board tonight will be staged as scheduled. The South African captain added: "Our slogan on the magnificent trip thus far has been: Don't worry – be happy! To conduct work on the rudder in the open sea would send the wrong message to the passengers who are enjoying their trip so far. Keeping the morale of the passengers and the crew high is now our first concern."*

7. Summary

Grounding the rule of law in the will of the people, the purpose of maintaining order in society, the good of utility or man's political or legal welfare can broadly be described as efforts at applying the rule of law for purposes of "eudemological egoism" in order to seek "happiness" not in the principles of truth, justice or moral duty of benevolence, but by "understating" the rule of law as an instrument to secure human good. Because eudemological good is relative it cannot – in the terms of Kant – reflect the destiny of man in any fundamental sense – this can only be accomplished through fundamental moral duty. However, Kant's statement of moral duty is also limited because of its explicit basis of rationalism. The destiny of man in a philosophical sense should be sought in a primary moral law which also determines the "weight" of notions of fundamental importance in the jural sphere. The rule of law translates the first moral law of being into jural terms. By introducing the principles of truth, justice and the moral duty of benevolence into the jural sphere the

rule of law is "bolstered" to a position of serving as the primary law of jural ontology. This essay reflects on Finnis' "understatement" of the rule of law, the possibilities for bolstering it to the position of being such a primary law of jural ontology and for fruitfully engaging in discourses both within the broader philosophical spectrum of South African views on constitutionalism and the rule of law. Does the fact that Finnis' over-statement of the moral authority produced by reason produce serious flaws in his moral-jural arguments? The answer is explicitly "no"! Although it is denied that considered in themselves, human desire, choice and action can be analyzed in terms of inclinations towards basic goods, which can be grasped as such by reason, independently of any speculative theoretical account of human nature, Finnis' basic assumptions are good and his statement of natural law principles reflecting moral universality are valuable lifelines in high seas of self-directed egoism irrespective of creed or ideological commitment.