

**THINKING OF THE ECtHR CASE LAW ON SAME-SEX MARRIAGE FROM  
THE PERSPECTIVE OF MODERN NATURAL LAW:  
AN EVALUATION BASED ON THE RIGHT TO MARRY UNDER THE ECHR**

by

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Modern Natural Law:**

**An Evaluation Based on the Right to Marry Under the ECHR**

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## ABSTRACT

This thesis explores the applicability of modern natural law concepts to the European Court of Human Rights (ECtHR) judgements on same-sex marriage. Drawing on the theories of leading modern natural law scholars Lon Fuller and Ronald Dworkin, the study contrasts modern natural law philosophy against traditional natural law approaches, focusing on the individual-based perspectives that form the core of modern natural law.

The research provides a comprehensive examination of two ECtHR judgements on same-sex marriage through the lens of Fuller's "Morality of Aspiration", "Internal Morality of Law", and "Reciprocity", as well as Dworkin's "Right Answer Thesis" and "Law as Integrity". It critically assesses the ECtHR's heteronormative approach, the interpretation of equal marriage rights for same-sex couples, and the Court's use of the doctrines of "European consensus" and "margin of appreciation".

Through the conceptual and doctrinal legal research methodology, the thesis reinterprets modern natural law theories to highlight the gaps in the ECtHR's decision-making process regarding same-sex marriage. It seeks to identify innovative interpretation methods that may address these gaps, aiming to engender a paradigm shift in the legal discourse surrounding same-sex marriage under Article 12 of the ECHR. Ultimately, this study hopes to contribute to the evolution of ECtHR judgements in line with modern natural law philosophy.

**Key words:** European Court of Human Rights, Modern Natural Law, Same-Sex Marriage, Morality of Aspiration, Internal Morality of Law, Reciprocity, Right Answer Thesis, Law as Integrity.

## ÖZET

Bu tez, modern doğal hukuk kavramlarının Avrupa İnsan Hakları Mahkemesi (AİHM) tarafından eşcinsel evlilik hakkında verilen kararlara uygulanabilirliğini araştırmaktadır. Çalışma, modern doğal hukukun önde gelen hukuk felsefecileri Lon Fuller ve Ronald Dworkin'in teorileri çerçevesinde modern doğal hukuk felsefesini, bu felsefenin çekirdeğini oluşturan birey temelli perspektiflere odaklanarak, geleneksel doğal hukuk yaklaşımlarıyla karşılaştırmaktadır.

Araştırma, Fuller'ın "Arzu Ahlakı", "Hukukun İç Ahlakı" ve "Karşılıklılık" kavramlarına, ayrıca Dworkin'in "Doğru Cevap Tezi" ve "Hukukun Bütünlüğü" prensiplerine bağlı olarak, eşcinsel evlilik hakkında iki AİHM kararını kapsamlı bir şekilde incelemektedir. AİHM'nin heteronormatif yaklaşımını, eşcinsel çiftler için eşit evlilik haklarının yorumlanmasını ve mahkemenin "Avrupa konsensüsü" ve "takdir marjı" doktrinlerinin kullanımını eleştirel bir şekilde değerlendirmektedir.

Kavramsal ve doktrinel hukuk araştırması metodolojisiyle tez, modern doğal hukuk teorilerini yeniden yorumlayarak AİHM'nin eşcinsel evlilik hakkındaki karar verme sürecindeki boşlukları vurgulamaktadır. Bu boşlukları ele alabilecek yaratıcı yorumlama yöntemlerini belirlemeyi hedeflemekte ve AİHS'nin 12. maddesi altında eşcinsel evlilik hakkındaki hukuk söyleminde bir paradigma değişimi yaratmayı amaçlamaktadır. Nihayetinde, bu çalışma, AİHM kararlarının modern doğal hukuk felsefesi ile uyumlu bir şekilde evrimine katkıda bulunmayı ummaktadır.

**Anahtar kelimeler:** Avrupa İnsan Hakları Mahkemesi, Modern Doğal Hukuk, Eşcinsel Evlilik, Arzu Ahlakı, Hukukun İç Ahlakı, Karşılıklılık, Doğru Cevap Tezi, Hukukun Bütünlüğü.

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## **ABBREVIATIONS**

|                   |                                       |
|-------------------|---------------------------------------|
| <b>Art.</b>       | Article                               |
| <b>ECHR</b>       | European Convention on Human Rights   |
| <b>ECtHR</b>      | European Court of Human Rights        |
| <b>UDHR</b>       | Universal Declaration of Human Rights |
| <b>UN Charter</b> | United Nations Charter                |



## INTRODUCTION

Throughout the evolution of natural law, it has served as a convenient tool for authorities to justify their actions when creating and applying laws to their citizens, regardless of the era or the changing forms of natural law. This situation was highlighted by Scandinavian realist Alf Ross, who famously stated, “like a harlot, natural law is at the disposal of everyone.” At times, it has been employed to legitimize revolutions, such as during the French and American revolutions. Conversely, it has also served as a collection of principles used to reinforce the legitimacy of divinely established order, as was the case in Ancient Greek city-states.<sup>1</sup>

As one delves into the historical landmarks of natural law, from Ancient Greece to the present, the sources of its legitimacy have evolved substantially. These sources have included nature, god, or human nature, as well as reason, which is often viewed as the means of understanding the precepts of natural law. Some theories even argue for the self-evident nature of these precepts, asserting that they stem from human nature. However, most theories present a combination of these sources, in line with the permitted frameworks of their respective eras. To be precise, categorizing natural law theories from different periods can be challenging due to the ambiguity in defining natural law. This lack of clarity stems from the fact that the sources from which natural law originates aren’t singular. The elements that constitute natural law vary, considering that all these sources are somewhat incorporated into every theory. The difference between these theories often lies in the prioritization of these sources when constructing the theories, depending on the demands of the era in which the theories were developed.

Therefore, to illustrate with examples, in Ancient Greece, the primary source was often nature and its rational observation, although the concept of god was also present as a standard for philosophical sentiments. As the understanding of natural law evolved into the hands of theologian thinkers during the Medieval Age, the focus shifted from nature to god. Although nature wasn’t eliminated, god became more prominent in the narratives of natural law.

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<sup>1</sup> See Alexander Passerin d’Entrèves, *Natural Law: An Introduction to Legal Philosophy* (3rd edn, Routledge 1994) 13.

As the idea of natural law developed further, the stage was set for theories of natural rights, with social contract theorists leading the charge with a more nuanced analysis of a secular version of natural law. This was a departure from the religious context of natural law, which had persisted since the advent of religious natural law during the Medieval Age, particularly evident in Catholic theories such as those found in Aquinas' writings on natural law. However, nature and god, as the content byproducts of these theories, were still present in the social contract theories of these thinkers, as seen in the works of Grotius, Hobbes, Locke, and Rousseau.

Conversely, the natural rights theorists laid the groundwork for the formulation of theories put forth by modern natural law theorists post-1945. In this context, the pioneers of this new wave, such as Fuller and Dworkin for our current purposes, proposed theories on natural law that emphasized different facets of law within the frame of their legal or social theories. These include procedural and principal aspects of law, which form the main components of Fuller and Dworkin's theories. This approach is contrary to the political or moral theories of traditional theorists, ranging from the Ancient Age to the Age of Enlightenment.

Furthermore, defining natural law in a broader context has been a contentious issue from ancient times to the present. However, a distinct characteristic of modern natural law, which is the focus of this thesis, was highlighted by Hugo Grotius in his renowned work *De Jure Belli Ac Pacis*: "Even if God did not exist, the natural law would exist with its content."

In this respect, this thesis will primarily concentrate on this potent characteristic of modern natural law. It will utilize its revolutionary nature to formulate reliable solutions, drawing upon the key principles of Fuller and Dworkin's theories. These solutions will address research questions concerning the ECtHR's judgments on same-sex marriage within the context of the right to marry under Art. 12 of the ECHR, as much as the scope of the thesis permits.

### **A. The Scope of the Research**

This thesis implies the perspective of modern natural law concepts in thinking about the ECtHR judgements on same-sex marriage in a philosophical way. In this interpretation, decisive concepts and theories of forerunner scholars, who are Lon Fuller

and Ronald Dworkin, in modern natural law philosophy are used in the light of perspectives enhanced by these natural law philosophers.<sup>2</sup> In this line, why they are selected for this purpose is their pivotal place in the realm of modern natural law philosophy, which has emerged from the 20th century until present. In this stage, it might be asked why modern natural law is more qualified than traditional natural law for intended reasoning? To answer this required question, it is crucial to deeply understand the differences between them.

The first significant difference lies in the fact that traditional natural law philosophers developed their theories primarily as moral or political theorists, focusing on communal interests. In contrast, modern natural law scholars espouse individual-based approaches, formulating socially regulatory law theories and offering guidance for human conduct. These modern theories emphasize principles considered self-evident and promote human flourishing as central tenets of their views.<sup>3</sup>

On another note, a further difference is that modern natural law theorists have created approaches that better accommodate the diverse nature of humanity through more rational principles. These modern theories don't rely solely on the ultimate authority concept (such as nature, human nature, or god) found in traditional natural law.<sup>4</sup> Detailed examinations of these differences through the perspectives of natural law theorists will be explored in the first chapter titled "Natural Law and Modern Natural Law", and further in the second chapter titled "Modern Natural Law Theories".

In terms of applying modern natural law philosophy to the examination of ECtHR judgments on same-sex marriage, key concepts from the theories of modern natural law

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<sup>4</sup> Fuller and Dworkin have been emphasized by many modern scholars in different ways in their writings which expounded on the general context of natural law. Hence, their theories are more qualified for the purposes of the thesis than other scholars in this area. For their aspects in some modern studies, see Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press 2005), Brian Bix, *Jurisprudence: Theory and Context* (6th edn, Sweet & Maxwell 2012), Nigel E. Simmonds, *Central Issues in Jurisprudence* (4th edn, Sweet & Maxwell 2013).

<sup>3</sup> Brian Bix, 'Natural Law: The Modern Tradition' in Jules L. Coleman & Scott Shapiro (ed), *the Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 63.

<sup>4</sup> To understand this difference, the methodological offer of McCoubrey and White in jurisprudence can be used : An approach to a jurisprudential issue should be reviewed in its historical and cultural context. In this vein, classical naturalists lived in a world where religion was prevailing, and the self flourishing of an individual was less important than society as a whole, and this was naturally reflected in their theories. For the details of this methodology, see Hilaire McCoubrey & Nigel D. White, *Textbook on Jurisprudence* (Oxford University Press 1999) 7-8.

scholars, specifically Fuller and Dworkin, will serve as foundational pillars. These notions will be used to draw inferences from the perspective of these theories regarding same-sex marriage. Key concepts include “Morality of Aspiration”, “Internal Morality of Law”, and “Reciprocity” from Fuller’s *Morality of Law*, as well as the “Right Answer Thesis” from Dworkin’s *Taking Rights Seriously* and “Constructive Interpretation” from his *Law’s Empire*.

The assessment of the ECtHR case law on same-sex marriage, using these concepts, will be confined to the right to marry based on the concept of marriage under the ECHR. This is because same-sex marriage remains a prevalent and contested issue in ECtHR case law.<sup>5</sup> In this regard, the third chapter titled “Modern Natural Law Interpretation of ECtHR’s Judgements on Same-Sex Marriage Based on the Right to Marry under the ECHR” will undertake this evaluation based on the concepts derived from the theories of Fuller and Dworkin.

## **B. Research Questions**

The primary research question of the thesis is: what could be the perspective of modern natural law philosophy concerning same-sex marriage, particularly in terms of granting marriage status, a topic that has been hotly debated worldwide in recent years? The associated questions following the main question are as follows:

Is the heteronormative approach of the ECtHR to same-sex marriage compatible with the modern natural law theories developed by Fuller and Dworkin? <sup>6</sup> In this examination, the first step is to consider the key concepts mentioned above from these theories. Subsequently, the Court’s judgments will be evaluated within the context of these key concepts. Finally, the conclusions of these judgments will be scrutinized to determine if they align with the key notions that Fuller and Dworkin have proposed in their theories.

How should equal marriage rights for same-sex couples be interpreted in light of the key notions from the theories of two leading modern natural law scholars? More

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<sup>5</sup> ECtHR, ‘Guide to LGBTI Rights’ (2022) <[https://www.echr.coe.int/Documents/Guide\\_LGBTI\\_rights\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_LGBTI_rights_ENG.pdf) > accessed 20 May 2022.

<sup>6</sup> For the heteronormative approach of the ECtHR, see Masuma Shahid, ‘The Right to Same-Sex Marriage: Assessing the European Court of Human Rights’ Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights’ (2017) 3 Erasmus Law Review 184, 193.

specifically, what kind of interpretation would be anticipated from Fuller and Dworkin's theories if the ECtHR had ruled on same-sex marriage, based on the right to marry under Art. 12 of the ECHR, by employing these theories? To this end, the Court's judgements will be interpreted step-by-step within the context of these key notions, and an expected interpretation of the Court's judgements will be formed for each theory under the key notions of each theory.

Another related question is whether the ECtHR has legitimized its heteronormative approach based on the "European consensus" principle, arguing that there is no consensus among member states about the obligation to recognize same-sex marriage in domestic law. The consistency or inconsistency of certain aspects of the "European consensus" doctrine with related key notions will be discussed.

Furthermore, the "margin of appreciation" granted to member states is quite broad when it comes to legalizing same-sex marriage, despite a considerable number of member states having legally recognized same-sex relationships as marriages. At this point, the related question is whether the "margin of appreciation" doctrine used by the ECtHR regarding same-sex relationships under Art. 12 of the ECHR aligns with the key notions of the relevant theories. The "margin of appreciation" granted to member states in recognizing same-sex marriage will be examined under Art. 12 of the ECHR within the framework of modern natural law theories presented by Fuller and Dworkin, considering the related key notions of these theories.

Lastly, for the purpose of drawing conclusions in the anatomy of the thesis, the final research question could be: How can the future legal position of same-sex relationships be effectively contemplated and shaped in terms of equal marriage rights in the ECtHR case-law compared to opposite-sex relationships under the scrutiny of modern natural law, as embodied by Fuller and Dworkin's theories? In this regard, general aspects of theories will be taken into consideration to envision a probable future for same-sex marriage in the ECtHR judgements.

In summary, the last chapter of the thesis will attempt to provide reasonable answers to these questions, in line with the modern natural law perspective proposed by Fuller and Dworkin, with the aim of generating new approaches or doctrines to the legal problems identified in the ECtHR judgements on same-sex marriage under Art. 12 of the ECHR.

### **C. Research Methodology**

The thesis is based on the mergence of conceptual and doctrinal legal research. Since the researcher examined the current theories of modern natural law and evaluated them to develop new concepts for a determined legal problem through the case law and other doctrinal materials by the library-based analysis. In this regard, a theoretical and conceptual framework was constructed by the relevant concepts, as explained above, of selected modern natural law theories.

Moreover, these cases were examined and reinterpreted to tackle the legal issue surrounding the ECtHR's judgments on same-sex marriage concerning equal marriage rights, which the ECtHR has not extended to same-sex couples. This analysis considers interpretative principles the Court has employed since its inception, such as the "margin of appreciation" and "consensus analysis". Through the application of these legal research methods, the ultimate aim is to highlight the inadequacy of the ECtHR's approaches in resolving this issue and to propose innovative strategies for rectifying the less persuasive judgments. These strategies are aligned with select modern natural law theories and apply specifically to the ECtHR's judgments on same-sex marriage..

In this vein, to achieve this proposed research outcomes, conceptual and doctrinal legal research has been used for taking some key notions, such as "Right Answer Thesis" in Dworkin, and "Internal Morality of Law" in Fuller, as the evaluating tools in uncovering the legal problems in the ECtHR judgements on same-sex marriage, which are associated with the moral inquiry of these key notions founded in the theories of Fuller and Dworkin.

For the purpose of analyzing the right to marry under Art. 12, two ECtHR judgments on same-sex marriage were selected. To take place this conceptual evaluation for every case, first of all, the judgments' facts have been explained briefly. Then, the assesments of the Court about the cases were submitted along with delivered decision for every judgement.

Upon establishing this groundwork, each case was then scrutinized through the lens of the core concepts of the theories, identifying how the theories' anticipated responses diverge from the current court rulings. Lastly, innovative interpretations for ECtHR that don't align with the theoretical solutions of Fuller and Dworkin were

suggested. These forward-thinking approaches were applied to legal dilemmas in the ECtHR judgments related to same-sex marriage under Art. 12 of the ECHR, issues deeply intertwined with the moral investigation under contemporary natural law.

## **I. NATURAL LAW AND MODERN NATURAL LAW**

### **A. The Brief Overview of Traditional Natural Law: From the Ancient Age to the Enlightenment**

Natural law, as a deeply profound concept, concurrently emerged with the advent of philosophy. Hence, the idea of natural law must have commenced along with the appearance of philosophy.<sup>7</sup> In general, the natural law theories constructed by philosophers from the age of Ancient Greece until the middle of the 20th century has been classified as “traditional natural law” theories<sup>8</sup>.

All natural law theorists regarded in this tradition have a common trait: the source of natural law is based on a higher authority being unquestionable even if the attributes of higher authority have changed in time depending on the conjuncture in world history. Some philosophers, such as Aristotle, Plato and Thomas Aquinas, construed this higher authority, as the source of natural law principles, as the god, human nature or nature in the Ancient and Medieval Ages. In contrast, renaissance and enlightenment philosophers, from Hugo Grotius to Jean Jacques Rousseau, constructed their natural law theories referring to human nature relying on the individualistic manner of human beings.<sup>9</sup>

On the other hand, contemporary natural law philosophers, in the way of Lon Fuller and Ronald Dworkin as well-known modern legal philosophers, have aimed at contemplating self-evident natural law principles, which can be deduced from reasoning or our observations in daily life, not referring to a higher authority or higher law concept utilized by traditional natural law theorists.<sup>10</sup> However, it should note that the sources of

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<sup>7</sup> Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (Thomas R. Hanley tr., Liberty Fund 1998) 3.

<sup>8</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford University Press 2005) 17-24.

<sup>9</sup> Brian Bix, “Natural Law Theory” in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley & Blackwell 2010) 211.

<sup>10</sup> Ibid 211-226.



natural law existed somewhat in all ages, from Ancient Greece to the Age of Enlightenment. Thus, the main difference among these ages was the prioritization of the sources of natural law principles. Put it differently; one was weighing the nature as the source of natural law along with other sources in Ancient Greece and Roman Ages, while one was giving utmost importance to divine reason of god in the Medieval Age as well as other person was coming up with a new natural law theory using the self-evident concept, which is based on self-evident principles themselves, in modern times. All concepts have existed, but their order of importance has changed in time as well as all theories have been closely connected with each other.<sup>11</sup>

In this regard, the concept of natural law will be elucidated, using traditional interpretations to guide the discussion. Initially, the notion of natural law in Ancient Greece and the Roman period will be scrutinized. This analysis aims to comprehend the inception of the natural law concept, which is deeply rooted in its traditional sources: nature, god, and human nature. Following this, the transformation of these diverse sources into one prevailing origin - human nature - will be explored. This shift was further articulated during the Age of Rationalism, where human nature and its characteristics were reframed as natural rights.

Finally, a brief exposition on the decline and revival of natural law will be presented. The aim here is to understand the transition from traditional natural law to its modern incarnation, particularly after the Second World War. It should be clarified that this discussion is not intended to be strictly chronological. Instead, the goal is to highlight pivotal shifts in the understanding of traditional natural law, and to recognize key figures in this enduring tradition. It's also crucial to note that the concept of natural law has not been static; it has exhibited fluidity, to the extent of resisting unilateral definition.

## **1. Natural Law in Ancient Greece and Roman Period**

The celebrated passage for the traditional natural law is found in the play of Sophocles, which is *Antigone*. In this play, the unchangeable form of natural law is strongly emphasized by Antigone against the commandments of Oedipus the King, who is Creon, when she does not comply with the King's punishment that Polynices, who is Antigone's brother, will not be buried as a consequence of his treachery as he attempts to

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<sup>11</sup> Rommen (n 7), 27-29, 119.

capture the city of Thebes, which Cren took over the rule. The most vital component of this passage for natural law is that Antigone mentioned that “even you are king, the unwritten laws of gods are implemented for centuries are indispensable and binding all the time prevailing over the positive law enacted by the king.”<sup>12</sup> In this regard, the first conflict may have been released between natural law and positive law, along with Antigone’s objections against Creon’s order.<sup>13</sup>

Indeed, the conception of natural law had appeared before the play of Sophocles at the beginning of cutting-edge philosophical thoughts of pre-Socratic philosophers, who are Thales, Anaximander, and Anaximenes, in the 6th century BC. In advance, Parmenides and Heracleitus conceptualized “natural law” in the light of their own philosophical sentiments, not referring to natural law directly. Aftermath of the pre-socratic birth of natural law, the Sophists, such as Protagoras and Gorgias as well-known defenders, reflected the natural law as “a revolutionist instrument” against the sanctity of the nomos (laws) of city-state.<sup>14</sup> Until this, the overall picture is obvious that the natural law was mentioned somewhat by various philosophers from the beginning of philosophy in Ancient Age. Subsequently, Plato and Aristotle contributed to the development of natural law by putting it into ethical questions regarding justice. Accordingly, their framework in the context of natural law was highly different from the pre-socratic philosophers.

On the other hand, when searching for the history of natural law theories, the first emergence of natural law as a notion can be observed in the books of Marcus Tullius Cicero, the statesman, orator, and lawyer in the Roman Empire. Cicero pointed out how to attain the nature of law using reason when we consider that law is the primary outcome of reason, which is rooted in nature. Hence, the proper law is consistent with the reason being the focal component of nature we live in.<sup>15</sup> In this context, Cicero stands as a prominent figure in the discourse on natural law, marking a milestone in the Roman

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<sup>12</sup> Oktay Uygun, *Hukuk Teorileri* (Oniki Levha Press 2017) 1-2.

<sup>13</sup> Nico P. Swartz & Obonye Jonas, ‘The Superiority or Integrity of Natural Law for Our Time’ (2012) 1 *International Law Research* 119, 120.

<sup>14</sup> Michael Bertram Crowe, *The Changing Profile of the Natural Law* (Springer 1977) 1-13.

<sup>15</sup> Richard Nobles & David Schiff, ‘The Evolution of Natural Law’ in James Penner, David Schiff and Richard Nobles (eds), *Jurisprudence & Legal Theory: Commentary and Materials* (Oxford University Press 2005) 45-46.

Period. Therefore, a deep dive into his thoughts on defining the concept of natural law, as used in the Roman Age, will be undertaken. In alignment with this approach, the views of Plato and Aristotle on natural law will be briefly expounded upon first. Following this introduction to their abstract thoughts on natural law, attention will be directed towards Cicero, the first philosopher who contemplated natural law in a more concrete manner.

### **1.1. Plato and Aristotle**

As explained above, natural law appeared in the works of Plato and Aristotle. However, they, too, did not refer to natural law directly but implied it using their ethical questions in respect of justice and the good life. Both contended that what good and bad law mean would be reasonably inferred by the rational observation of nature, not giving importance to the source of good or bad law.<sup>16</sup> Yet, they substantially differentiated from each other in defining concepts that conformed to the notion of natural law when it comes to their means utilised to expound the concepts. Plato, as Socrates did, made out some implications from universal justice, which is seen as a virtue being equal with lawfulness in general. In contrast, though he rendered the general justice as our just acts to issues of people, Aristotle came up with the notion of justice, arranging the justice between the perpetrator and the victim of injustice.<sup>17</sup>

### **1.2. Justice as Transcendental Value: Plato's Law in the Virtuous Life**

Plato appealed to his idealistic thought, as an immutable form of appearance of perceivable things, in reaching out his contention on the good law, which is guidance leading the people to be acted virtuously by clarifying the guidance role for the citizens as the functional dimension of law beyond the coerciveness as well as reduced it to the second rank after the commands of an enlightened dictator in the formation of perfect society described by him in *Republic*. By doing so, the natural law as the good law was embedded into his idealistic world as a concept of law exceeding the phenomenon of law in the world of phenomena.<sup>18</sup> Having described the law in line with his general philosophy of being ethical and idealistic, in *Laws*, Plato pointed out the justice as one of

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<sup>16</sup> Hilaire McCoubrey & Nigel D. White, *Textbook on Jurisprudence* (3rd edn, Oxford University Press 1999) 61.

<sup>17</sup> Charles M. Young, 'Justice' in Georgios Anagnostopoulos (ed), *A Companion to Aristotle* (Wiley-Blackwell 2009) 457.

<sup>18</sup> Ibid 62-63.

the absolute values along with beauty and virtue that law should aim if it would be formulated to be good law.<sup>19</sup> In this way, Plato positioned justice as a universal value transcending our phenomenal world and as a measure to determine whether the laws in the world are arranged in line with this universal value.<sup>20</sup>

### 1.3. A Handy Concept to Natural Law: Aristotle and Natural Justice

In *Politics*, Aristotle emphasized the inner strength of people as “politikon zoon (political animal)” is rooted in their nature, not outside of the real world like Platon thought, to achieve their potential and good life. In this context, the proper and good law is the best instrument to construct this framework which enables the people to be acted truly towards their ultimate purpose to be pursued during their life span.<sup>21</sup> By doing so, he directly applied the teleological analysis emanating from his philosophy to his thoughts concerning good law.<sup>22</sup>

On the other hand, Aristotle, too, rendered the notion of justice as Plato did. Yet, there is a fundamental difference between their conceptions when it comes to a comprehension of justice as a notion sailing on the board of rational and empiric tools, respectively, used by Plato and Aristotle in obtaining the knowledge of justice as a virtue in their ethical framework into which their general philosophies incorporated. In terms of making an analogy, natural justice, emphasized by Aristotle, is the most appropriate concept for natural law since it is omnitemporal, so it is not subjected to a particular context referring to particularism, but is an example of universalism.<sup>23</sup> Contrary to natural justice, legal justice, which it might be regarded as positive law in the present time, is dependent on the circumstances dictated by the existing time it is laid down.<sup>24</sup> Aristotle, in his discourse on justice, distinguishes between distributive and corrective justice, understood as universally valid norms, and legal justice, which is subject to change and particular to each political context. In this respect, while the principles of distributive and

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<sup>19</sup> Nobles & Schiff (n 15), 39.

<sup>20</sup> Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (6th edn, Oxford University Press 2021) 22.

<sup>21</sup> McCoubrey & White (n 16) 67-68.

<sup>22</sup> See Aristotle, *Nikomakhos'a Etik* (Furkan Akderin tr, Say Press 2022), 1094a.

<sup>23</sup> Ibid 1135a.

<sup>24</sup> Ibid 1135a.

corrective justice provide a universally valid moral compass, the practical application of these principles through legal justice is subject to the peculiarities of different political environments and timeframes. Therefore, the task of realizing justice as per Aristotle's philosophy relies significantly on the ability of legal systems to adapt and effectively translate these timeless principles into context-specific legal norms.<sup>25</sup>

#### **1.4. Natural Law as the Highest Reason: Cicero's Natural Law**

The definition of natural law has yet to be evident, thanks to its changeable form. However, we are fortunate to have concretized some leading points in defining the natural law, mainly exporting the meaningful pieces of Cicero's definition. More importantly, Cicero denominated this higher law as natural law, in Latin terms *lex naturae*.<sup>26</sup> According to Cicero, one law is binding worldwide, and it is intertwined with reason. When it comes to the management of human actions, true law being compatible with nature comes to the forefront by tackling the issues. All of us have the ability to obtain this true law using our reason already found in how nature rules its structure. At the same time, there is no escape entirely to repeal its effectiveness over us given that this means the denial of our nature emanating from this true law, which can be expounded as natural law we referred to repeatedly.<sup>27</sup> Furthermore, Cicero designated the law as the highest reason directing the human actions in their life, commanding things that are allowed and forbidden, and this phenomenon can be discerned by every human being if he or she amplifies them in their minds considering that god ordained this attribute to humans. In other words, gods and humans have the same reason, and they share the right reason, which is natural law.<sup>28</sup> In addition to all contentions on the natural law to be recognized as the core of all laws that are written down by human beings, Cicero addressed the notion of justice, equating it to the obedience of natural law as the true reason. Since justice could not have been provided if decision-makers had enacted the laws under their ulterior motives or the popular votes of the masses during history, even if everyone must not have

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<sup>25</sup> O. Vahdet İşsevenler, *Doğal Hukuk Sorunu: Aristoteles'in Politikası & Hobbes'un Leviathan'ı* (Pinhan Press 2021) 50.

<sup>26</sup> J.E Penner & E. Melissaris, *McCoubrey & White's Textbook on Jurisprudence* (5th edn, Oxford University Press 2012) 19.

<sup>27</sup> Cicero, *On the Commonwealth and On the Laws* (James E.G. Zetzel ed, Cambridge University Press 1999) 71-72.

<sup>28</sup> Ibid 111-113.

carried such motives or destructive contemplations. Therefore, there is one law that is complied with nature, and the description of proper law is the law giving a rational standard of behaviour to lead their subjects to a virtuous and honourable life in the manner of justice, compared to laws that can not be regarded as proper laws, since they can not direct their subjects towards the graceful acts, and they inevitably cause injustices for this reason .<sup>29</sup>

In his brief expression of *ius naturale* (natural law), Cicero remarkably pointed out that the mind of the god is the true law in the regulation of acts of humans, bestowing this law to the human, which is discoverable by human reason being a part of the divine reason. More importantly, he equated reason with natural law along with the god, and this reason is found in nature. Thus the natural law, which brings the good life and justice to their subjects, can not be annulled by anyone in no way, whereas written laws can be revoked through formal procedure at any time.

All in all, the interpretation of natural law presented by Cicero suggests an inherent sense of justice and morality universally applicable. By correlating natural law with divine reason, a philosophy transcending the subjectivity and cultural particularities of human-made law is proposed. The timeless and universal nature of natural law, as described, establishes it as unalterable and perpetually binding. Furthermore, the emphasis placed on reason as the means of understanding and implementing natural law denotes the necessity for human wisdom and reflection. This perspective adds an additional layer of complexity to the relationship between divinely sanctioned natural law and its human interpretation and application.<sup>30</sup> As the exploration continues into the views of thinkers like St. Thomas Aquinas, this tension is addressed and further understanding of the evolution of natural law theory throughout history is offered, with the intention of contributing to a comprehensive understanding of contemporary jurisprudence.

## **2. Natural Law in the Medieval Age**

Different views or theories on natural law have sparked diversely, kicking off the question of what the legitimate pillar for the concept of natural law is. As is seen in the

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<sup>29</sup> Ibid 120-121.

<sup>30</sup> Ibid 132-135.

preceding titles under this chapter, this legitimacy reflected itself as a bunch of observable higher principles from nature, overruling manufactured rules humans made in the sense of Plato and Aristotle as well as complying with nature in the guidance of reason and god were the basis of Roman Age in constructing the idea of natural law if we take into account of Cicero's *De Re Publica (On the Commonwealth)* and *De Re Legibus (On the Laws)* indicating the overall picture of general discourse at this age as he is considered to have defined the very concept of natural law for the first time as we rendered before.

The interpretation of the notion of natural law evolved significantly during the Medieval Age, compared to the dynamics of the Ancient Age. It is not difficult to predict this distinctiveness as the supreme authority of God and its commands in written form, which is enriched by benefitting from the bundle of stoic natural law, which is concentrates on the human reason bestowed by God to human beings to obtain the natural law as the highest reason.<sup>31</sup>

When the religious doctrine seized the idea of natural law, medieval scholars reconciled and entrenched the foundation of natural law with the commands of sacred texts.<sup>32</sup> A new understanding of natural law came forth apart from the initial comprehension of natural law in the age of the Greco-Roman Periods. For this reason, religion is thought to have remained the central role in the explanation of natural law till the present, relating the fundamentals of natural law to the prescriptions of religion.<sup>33</sup> For instance, St. Augustine came up with an idea of natural law overhauling the Plato, Aristotle, and Cicero's thoughts on natural law. Afterwards, he converted some fundamental notions, which are Aristotle's deistic reason, Plato's idealism, and Cicero's right reason in compliance with nature, into the creator god, the conception of god, and personal god, respectively.<sup>34</sup> Moreover, in *Decretum Gratian*, who is the founder of canon law, distinguished the natural law and positive law as the former is found in scriptures

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<sup>31</sup> See Rommen (n 7) 31.

<sup>32</sup> Ibid 31.

<sup>33</sup> John Igbogo Ebeh, 'Thomas Aquinas' Thought on Natural Law: A New Look at An Old Issue' (2016) 9 *Quaestio Iuris* 2041, 2043.

<sup>34</sup> See Rommen (n 7), 33.

and Bible, whereas the latter is enacted by humans, referring the former is superior to the latter when there is a contradiction between them.<sup>35</sup>

However, as the renowned theologist and natural law theorist, the appearance of natural law at this time can be truly comprehended from the views of St. Thomas Aquinas since he provided a far-reaching explanation of natural law in terms of Christianity giving importance to it by putting it to the second rank after eternal law as well as impacted the modern natural law as the School of New-Thomism founded in the 20th century.

## **2.1. St. Thomas Aquinas: A Theological Approach to Natural Law**

In Aquinas' perspective, rational beings, or humans, partake in the eternal law through their conformity to natural law (*'participatio legis aeternae in rationali creature'*).<sup>36</sup> On the other hand, for Aquinas, in his celebrated work of *Summa Teologica*, the importance of positive law is vital to direct the subjects of law to achieve a good life as Aristotle's teleological analysis of law's function in the City-State.

Therefore, if the positive laws are not laid out pursuant to this end, they will be regarded as defective laws.<sup>37</sup> In this regard, Aquinas reiterates Aristotle's thoughts on the definition and object of law, saying that law is to be made rational standards for human actions in the ambit of guidance role, and its function is to be ensured the common good of community.<sup>38</sup> In accordance with this approach, Aquinas constructed order of priority among divergent laws.

## **2.2. Hierarchy Among Various Types of Laws in Aquinas**

Delving into Aquinas's classification of law, a unity becomes apparent between the secular view and the religious doctrine of natural law, notably in the framework of Aristotelian terminology. A brief overview of this classification is provided below.

### **2.2.1. Lex Aeterna (Eternal Law)**

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<sup>35</sup> Wacks (n 20) 27.

<sup>36</sup> Ibid 24.

<sup>37</sup> McCoubrey & White (n 16) 24-25.

<sup>38</sup> St. Thomas Aquinas, *Selected Political Writings* (C.H. Wilson & R. B. McCallum ed, J. G. Dawson tr, Blackwell 1959) 109-113.



Eternal law is the divine reason belonging to god to rule over the universe. The eternal law is the law aiming at achieving itself passively, whereas other laws serve a goal actively. In other words, the eternal law is the divine reason of god as well as law-making, and the promulgator of an eternal law is god. As the basis of other laws, without acting under the eternal law, there will be no legitimacy on the side of these laws.<sup>39</sup>

### **2.2.2. Lex Naturalis (Natural Law)**

According to Finnis, Aquinas, in his natural law definition, implied that natural law is the only means to grasp the divine reason as well as it is a kind of participating in the eternal law, which means that human beings as rational creatures have an intrinsic quality granted by god making them participating in eternal law<sup>40</sup>. In this line, it can be said that God's divine light in our nature is to be involved in our ultimate goal determined by eternal law as discerning the good from evil in our actions. As wise beings, we can achieve the understanding of eternal law by our nature.<sup>41</sup> In this vein, we must obey natural law as it lays out the principles directing us towards the realization of specific goods, such as knowledge, procreation, society, reasonable conduct, and we know by our nature to apprehend them as well as we have the propensity to achieve them naturally. Hence, acts in this line are regarded as right actions, though Aquinas did not think he could make a list of universal right actions. On the other hand, actions aimed at achieving good are central to the understanding of Aquinas rather than fulfilling the right acts. Turning to the evaluation of the acts as to whether which acts are right or wrong depends on the circumstances in which acts were taken place, but to him, in natural law, some definite acts are forbidden in an accurate manner, such as killing innocent, lying, blasphemy, taking part in adultery, and sodomy in his judgements.<sup>42</sup>

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<sup>39</sup> St. Thomas Aquinas, *Selected Philosophical Writings* (Timothy McDermott tr, Oxford University Press 1993) 417.

<sup>40</sup> John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 3.

<sup>41</sup> Aquinas (n 39) 419.

<sup>42</sup> Wacks (n 20) 23-24.

### **2.2.3. Lex Divina (Divine Law)**

Divine law is the script in which God's commands are written through revelation. It's given to all people due to the fact that divine law is determined on many specific matters, being bounded to be blanket in the judgment of humans when enacting laws as well as human beings do not live only to reach out a good life, but also, they live up to eternal blessedness in their life. Thus, the divinely given law ensures this end to be properly taken place, which natural law and positive law can not. More importantly, determining the evils in the world is an uneasy assignment for the former and latter, given that there are no certain provisions laid out by them. Since, there is a need to designate prohibited acts being sins, and this certainty can provide by only the divine law. Above all, natural law, along with convenient positive law, is not able to intervene in the inferior actions of humans. This intervention can be achieved by divine law.<sup>43</sup>

### **2.2.4. Lex Humana (Positive Law)**

In the views of Aquinas, positive law is required when regulating present-day conditions because other laws can not have particular provisions on these matters but designate general premises. Accordingly, the positive law must be convenient to higher laws in the hierarchy we addressed and must be benefitted from these general principles in setting out laws on how human beings act, enacted by other higher laws, which are eternal law, natural law, and divine law. In this regard, Aquinas refers to Cicero's words on the law: "law starts with what nature produces, then by use of reason certain things become customs, and finally things produced by nature and tested by custom are sanctified with the awe and religious weight of laws." As is seen from this quote, Aquinas gives foremost importance to the relationship between natural law and positive law, referring the strong statement of Cicero at the end of his conclusion.<sup>44</sup>

## **2.3. Precepts of Natural Law in *Summa Theologica***

For present purposes, it will be guiding to explain the thoughts of Aquinas about natural law particularly. The precepts of natural law, in this respective, can be inferred by logical deduction in the context of natural inclinations of human beings tend to want to

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<sup>43</sup> Aquinas (n 38) 117.

<sup>44</sup> Aquinas (n 39) 420-421.

good for themselves such as not to kill, not to injury, not to rob, to pay the debt you owed etc.<sup>45</sup> From this point, according to Aquinas, natural law has two leading features, which are universality and immutability. In this vein, these qualities will be respectively address in depth below.

### **2.3.1. The Universality of Natural Law**

Natural law is knowable through reason, but it is not the speculative reason as in the case of natural sciences, such as physics. It's the practical reason used to conceive the natural law emanating from the eternal law. Put it differently, the speculative reason is to find out the necessary truths from its general principles to more particular cases at hand, whereas, though the practical reason has general premises, they are not always fit the current circumstances as the general principles of speculative reason are. It can be mentioned that they are mostly consistent with the particular cases they came across, however, it's so expecting to see new standards for human actions, which are contrary to the main principles of practical reason, are underway due to the different particular implications of practical reason.

Because of this phenomenon, there can be arrived at unsurprisingly standards against the general criteria of practical reason in exceptional situations, for instance, as mentioned by Caesar in *De Bello Gallico*, robbery was not unusual for Germans at one time, and it was also not by the dictates of natural law. However, this is one of the relevant exceptions to general standards determined by practical reason when considering various conclusions deducted from general premises of practical reason through miscellaneous reasons belonging to persons being different from each other since the practical reason concerns the rightness of human actions. Hence, it's vulnerable to changing conditions of human beings at one point even though it has a truth in general manner discovering the natural law<sup>46</sup>.

### **2.3.2. The Immutability of Natural Law**

Natural law is unchangeable but evolutionary for Aquinas. The evolutionary nature of natural law is understood in two ways: additions made to it by the divine law

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<sup>45</sup> Bix (n 9) 213.

<sup>46</sup> Aquinas (n 38) 123-125.

and human law, on the one hand, and subtractions from its structure, on the other. As mentioned above, we have general principles and particular conclusions stemming from these general principles of natural law, which are comprehended by practical reason. In this regard, first, the natural law is immutable as far as general principles are respected and does not cease when anything is removed from the natural law. Second, in the deduction of particular conclusions from the general principles of natural law, natural law is not subject to any alteration so long as the general rule of natural law is valid in most of these matters. In all these situations, making some additions to the content of natural law does not mean that it's changed but evolved on the condition that its main components are not ceased.<sup>47</sup>

#### **2.4. The Legal Situation of Unjust Laws in Aquinas: Defective or Ineffective?**

In defining the problem of unjust law in the context of the moral obligation to obey, Aquinas pointed out that positive law is destructive if it is not fit to the divine law, and it must be appropriateness to the requirements of natural law to be law in the fullest sense.<sup>48</sup> In terms of natural law, the central tenet of these requirements is ensuring the common good of citizens in a state. If we ramify this central tenet, two parts of it are proper use of state authority by the lawgivers, on the one hand, imposing the obligations on the citizens justly, on the other. The Aquinas interprets the problem of unjust laws as follows:

“Every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law ; and [Unjust laws] are acts of violence rather than laws; because ... a law that is not just, seems to be no law at all.”<sup>49</sup>

According to McCoubrey and White, regarding the above explanation, Aquinas made a statement in *De Regimine Principum (Of the Government of Princes)* that unjust law is not a law in a legal and moral context, thus ineffective if it is not convenient to the divine law. However, if it does not fulfill the requirements of natural law, it is morally

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<sup>47</sup> Ibid 125-127.

<sup>48</sup> Penner & Melissaris (n 26) 25.

<sup>49</sup> Bix (n 9) 213.

invalid but remains legally valid as defective law as long as not obey to this unjust law triggers greater violence and instability in the system.<sup>50</sup> On the other hand, the proper interpretation of certain fundamental aspects of Aquinas's work remains a subject of debate within modern literature. For instance, the perspective shared by Bix highlights an enduring discussion about Aquinas' conceptualization of the genesis of moral norms. Uncertainty persists whether Aquinas proposed these norms could be explicitly drawn from the appreciation of human nature or natural inclinations' experience. Alternatively, these norms could potentially emerge from a pragmatic understanding derived through introspection and logical reasoning based on personal experiences and observations.<sup>51</sup>

### **3. Natural Law in Age of Rationalism and Enlightenment**

In the period of Renaissance, which is the early modern years in Europe, traditional natural law shifted from reasoning on human goods to be achieved by law based on nature or God to the discourse of natural rights limiting the government of states when the authority of government is abused by the sovereigns, not referencing the god as the authority or validity clause.<sup>52</sup> As a limitation grounds against the states, natural rights are marked as the guardian shield of citizens living in the relevant state in the social agreement theories constructed by Thomas Hobbes, John Locke and Jan Jacque Rousseau. More importantly, as the common point of all natural rights theorists, the source of these natural rights is human nature claiming that these rights are given before the formation of states in a state of nature.<sup>53</sup>

Another difference between Greco-Roman natural law theories and natural rights theorists, according to Michael Zuckert, who is an American political philosopher, is their language regarding the duties and liberties that Greco-Roman natural law theories captured the former while the natural rights theories elaborated the latter.<sup>54</sup> Furthermore,

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<sup>50</sup> Penner & Melissaris (n 26) 26; Also, as one of the recent influential legal theorist, Raymond Wacks shares the same interpretation on Aquinas' views on unjust laws in his recent book. See Raymond Wack, *Understanding Jurisprudence: An Introduction to Legal Theory* (6th edn, Oxford University Press 2021) 26.

<sup>51</sup> See Bix (n 9) 215.

<sup>52</sup> See Ibid 215.

<sup>53</sup> Jack Donnelly, 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 391, 398.

<sup>54</sup> Brian Bix, 'Natural Law: The Modern Tradition' in Jules L. Coleman & Scott Shapiro (eds), *the Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 70.

as an Italian philosopher and natural law historian, Alexander Passerin d'Entreves sets up three main features of natural rights theory which are rationalism, individualism and radicalism. First, they are rational because they can be detected by human reason as indispensable rights. Second, they are individualistic since civil rights are resonated in the language of these rights. Last, they are intensely radical since they are regarded as absolute and unalterable rights limiting the political institutions in the case of violation of these rights.<sup>55</sup>

In addition to this, he emphasized the influence of natural rights theory on the staggering revolutions, referring to American and French revolutions along with their declarations announcing the natural rights to be given to all people in virtue of their human being, and these natural rights are self-evident when evaluating the human nature through reason. Indeed, this is the remarkable capacity of natural rights theory from its predecessor natural law theories claimed by Plato, Aristotle, Cicero and Aquinas in formalizing the source of natural rights.<sup>56</sup> This phenomenon also reflects the three outstanding features of natural rights in the context of breakthrough revolutions and its declarations indicating the architectural structure of natural rights theory in making these instruments.

Additionally, in advance of the aforementioned political philosophers, Hugo Grotius, the proponent of secular natural law, placed the existence of natural law independently of god. For Grotius' definition of natural law, natural law is the dictate of *recreatio* (true reason) in the compatibility of a human action with the rational and social nature of human whether it's required in terms of moral manner.<sup>57</sup> In his characterization, however, Grotius did not remove the god from the scene, but reinterpreted its role in actualization of natural law when it comes to validity of natural law.<sup>58</sup> In other words, Grotius followed the preceding scholastic discourse in recognizing the god as the source of natural law, but his difference is to be rationalist compared to scholars involved in the

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<sup>55</sup> See Alexander Passerin d'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (3rd edn, Routledge 1994).

<sup>56</sup> Ibid.

<sup>57</sup> Hugo Grotius, *Savaş ve Barış Hukuku* (Prof. Seha L. Meray tr, Say Press 2011) 32.

<sup>58</sup> Bix (n 9) 215.

Christian doctrine, such as Aquinas.<sup>59</sup> Indeed, there is much more hypothetical argument in the famous passage of Grotius, since the importance of god is prevailing component with giving paramount place to god in the creation of the human nature based on the reason.<sup>60</sup>

Nevertheless, Grotius hypothesis turned out to be a thesis of subsequent philosophers' social contract theories grounding on the rationalism, individualism and radicalism, explained above, in the relationship between states and their subjects as is the case of Hobbes' and Locke's political theories when looking at the shift in the contract establishing the state from the public interest or security of state to natural rights of man. Hence, this is the turning point to be captured in the deep waters of secular natural law in the age of reason from other traditional natural law theories laid out by Plato, Aristotle, Cicero and Thomas Aquinas.<sup>61</sup> This initial overview will focus on exploring the unique contributions to the development of secular natural law by theorists such as Hugo Grotius, Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. Their various natural law theories will be analysed and understood.

### **3.1. Hugo Grotius and De Jure Belli Ac Pacis (Law of War and Peace) as the Trailblazer of Secular Natural Law**

The aftermath of an overall picture of secular natural law, as the forerunner of human nature- based natural law doctrine, Grotius' views ought to be understood in depth to overhaul the changing meaning of natural law from the Greco-Roman Age to the Age of Reason. Since he paved the way to liberalize human reason pushing god's intervention into the background for subsequent natural law theorists, this difference renovated the framework of natural law.<sup>62</sup> At this juncture, the examination of his natural law below theory should extensively examine the theory's source, nature, force and scope.<sup>63</sup>

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<sup>59</sup> Rommen (n 7) 63-64.

<sup>60</sup> Grotius (n 57) 20.

<sup>61</sup> See d'Entrèves (n 55).

<sup>62</sup> Celal Yeşilçayır, 'The Paradigal Transformation by Hugo Grotius into Natural Law' (2020) 30 *Journal of Philosophy and Social Sciences* 242, 248.

<sup>63</sup> Jon Miller, 'Hugo Grotius' *The Stanford Encyclopedia of Philosophy* (Spring edn, 2021) <<https://plato.stanford.edu/archives/spr2021/entries/grotius/>> accessed 20 November 2022.

### 3.1.1. The Source of Natural Law in Grotius: Recta Ratio Based on Human Nature

According to Grotius, the source of natural law is derived from human nature and its social and rational aspects. When evaluating the rightness of human action, the nature of humans should be distinguished instead of the divine reason of God.<sup>64</sup> His well-known hypothesis highlights his view on the source of natural law in prolegomena of *Law of War and Peace*:

“What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no god, or that the affairs of men are of no concern to him.”<sup>65</sup>

As is seen, this is not a challenge against god’s authority but positioning of its role as the source of natural law. Likewise, another passage from Grotius is to be counted as a breakthrough towards the secularization of natural law: “The Natural Law is so unalterable, that it cannot be changed even by god”.<sup>66</sup> However, it is not understood from this passage that Grotius does not include the god in his natural law theory. On the contrary, he reconciles the commands and prohibitions of God with recta ratio (true reason) principles laid out by natural law, referring to god as the creator of nature in this agreement between natural law principles and god’s divine reason.<sup>67</sup>

### 3.1.2. The Nature of Natural Law in Grotius: Pivotal Aspects of Human Nature

In the theory of Grotius, the nature of natural law is determined by the prominent features of human nature compared to other living beings. These features can be regarded as follows: self-preservation and the demand of living in a society (*appetitus societatis*).<sup>68</sup> These qualities are closely connected with each other since social impulse is restricted by self-preservation. Primarily, humans think their interests and work their well-being out.

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<sup>64</sup> Ibid.

<sup>65</sup> Meirav Jones, ‘Philo Judaeus and Hugo Grotius’ Modern Natural Law’ (2013) 74 *Journal of the History of Ideas* 339, 342.

<sup>66</sup> Grotius (n 57) 33.

<sup>67</sup> Ibid 32.

<sup>68</sup> Ibid 18-19.



Moreover, our preservation can be secured in pursuit of aims to be served to our flourishing under these two main properties. At this juncture, Grotius regards some natural tenets to be exerted in ensuring this preservation, some of them as follows: abstaining from what belongs to others, giving back the yields gained from these belongings, keeping your word, recovering loss caused by your fault and implementing punishments being deserved by the people.

### **3.1.3. The Obligatory Force of Natural Law in Grotius: Defender of Reason Based-Approach**

In the tradition of natural, most of the traditional natural law theorists refer to the god's commands to be obeying to natural law as the creator of all things including people in debating the force of natural law, and what basis we have to be subject to natural law in our life. This is understood as the voluntarist approach.<sup>69</sup> On the other hand, the opponents of voluntarist approach adopt the reason-based approach in which our obligation to obey natural law is stemmed from the compatibility of nature with our rational nature as a human.<sup>70</sup>

In this regard, Grotius takes the latter point to justify our obligation for obeying to natural law and clarify his point taking into account of our self-preservation, sociability and rationality when it comes to how we make out the obligatory force of natural law in reason-based approach, which is the opposite of voluntarist approach being intertwined with the god. To understand this approach truly in Grotius' views, we can give attention to his words: "If anyone denies my views, this person can not do it without denying his or her nature, since the principles of natural law is self-evident based on human nature." By this passage, we can claim that Grotius explains the obligation to obey natural law in the realm of human nature rather than belief and religion.<sup>71</sup>

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<sup>69</sup> Bix (n 54) 68.

<sup>70</sup> See Miller (n 63).

<sup>71</sup> Grotius (n 57) 26.

### **3.1.4. The Scope of Natural Law in Grotius: Collocutors and Contents of Natural Law**

In the scope of natural law, Grotius makes his statements on natural law by referring to all people as collocutors of natural law, not putting aside non-religious people, including non-Christians. This is a considerably rational point of Grotius' natural law theory compared to medieval natural law theorists predicating on religious people in constructing their theories' domain. For Grotius, a vital determinant is whether a person is a rational and social being? If yes, this person is bound by the natural law implanted in human nature.<sup>72</sup> Additionally, Grotius mentions the contents of natural law as the scope of natural law. His point of view on the contents of natural law is in connection with the reason-based approach and human nature as expected, and he renders the contents of natural law as not only things being out of the human will but also things born out of the acts of human will. According to him, for instance, recognition of the right to property by human will can not be taken back once it is accepted by positive law actualizing the human will.<sup>73</sup>

### **3.2. Thomas Hobbes and Leviathan: Dawn of Modern State in the Sovereign-Centered Social Contract Theory**

In the case of the social contract theory of Thomas Hobbes, we observe his radically different thoughts on the natural law and its relation with positive law than previous traditional natural law philosophers in the Ancient and Medieval Ages and other social contractualists such as Locke and Rousseau<sup>74</sup>. His natural law theory is so unique compared to the traditional natural law that came into existence in the Greco-Roman and Medieval Ages since Hobbes accommodates the sovereign into the center of the source of natural law, which is useless term without the will of a sovereign to implement the principles of natural law and converted the classical natural law to modern natural rights.<sup>75</sup>

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<sup>72</sup> See Miller (n 63).

<sup>73</sup> Grotius (n 57) 33.

<sup>74</sup> See Rommen (n 7) 68-73. Rommen also delivers insightful and concrete differences between Greco-Roman and religious natural law theories from natural rights theories that emerged in the Age of Rationalism, in which the main differences of these two separate views considerably conglomerate.

<sup>75</sup> Uygun (n 12) 59.

On the one hand, as mentioned by Heinrich Rommen, the German professional lawyer writing on the natural law, the distinguished properties of Hobbes from Rousseau can be articulated by considering the language of their political theories, referring to the omnipotent monarchy for Hobbes, and omnipotent democracy for Rousseau.<sup>76</sup> Likewise, Rommen also covers the differences between Locke and Hobbes by emphasizing their definition of a state of nature and place of natural rights in their social contract theories.<sup>77</sup> In this regard, at the qualities of social contract theory of Hobbes in the sense of human nature, natural rights, and natural law should be examined.

### **3.2.1. Human Nature Based on Passions in Hobbes: Homo Homini Lupus and Nature of Law**

The significant pillar of Hobbes' social contract theory is to place passions as the determinant component of human nature, contrary to theorists such as Locke, who stands for the reason to be regarded as the primary faculty of human nature.<sup>78</sup> According to him, all people are equal in both their strength of body and mind. Yet, this equality triggers us to attain our ends to be reached out in our life and counteract others demanding to achieve our ends. Hence, this equality induces competition between people. In this line, due to the passion of making ineffective others to attain our proposed ends or gain reputation among others, the competition causes a state of war between people. From these contemplations, three principal qualities of human nature causing quarrel and conflict are competition, diffidence, and glory. Of these properties, the inevitable consequence is a war being every man against every man (*homo homini lupus*), and these properties' benefits for humans are to obtain gain, safety, and reputation, respectively<sup>79</sup>. The question of how to quit this state of war is to engage not only in passion but also in the reason to secure peace instead of instigating the war through passion.<sup>80</sup>

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<sup>76</sup> Rommen (n 7) 72.

<sup>77</sup> Ibid 79.

<sup>78</sup> Thomas Hobbes, *Leviathan or the Matter, Forme, & and Power of a Commonwealth Ecclesiasticall and Civill* (London 1651) 78.

<sup>79</sup> Ibid 76-77.

<sup>80</sup> Ibid 79.

### **3.2.2 Natural Rights in Hobbes: Delivered Agents for Absolute Monarchy**

When we consider the definition of natural right in Hobbes, in the state of nature, every man has the right to everything against every man, including the right to kill another person.<sup>81</sup> This is because Hobbes' natural law doctrine is founded upon the person's right to protect oneself.<sup>82</sup> However, there is a requirement to find out a way to provide peace due to inconsistency of a state of war without an order. In this vein, for ending the state of war, reasonable enterprise to be taken place is to surrender our natural rights to the absolute sovereign by a social contract for the sake of our self-interests, which are used to maintain our preservation. By doing so, the obligation to the premises of natural law, such as justice, equity, modesty, and mercy being existed before the formation of state can be actualized through the authority and obligatory force of absolute monarch when there is a violation of all these natural law principles or natural laws derived from more general natural laws formed by the reason.<sup>83</sup>

### **3.2.3. Natural Law in Hobbes: Redefinition of Natural Law Under Sovereign-Centered State**

It's revolutionary that Hobbes redefined the natural law and deduced new ones from this general definition is not identical to the well-known traditional natural law along the line of Aristotle-Aquinas. The latter is associated with attainment of highest good for people in a virtuous life by doing things serving their potential, whereas the former rejects the highest good claiming that it's a disconcertingly dangerous notion to be utilised to commence disastrous events in an anarchical situation as he witnesses the English Civil War between 1642-1649. This is because human nature is not rational and social but irrational, passionate, and anti-social, according to Hobbes, which is the claim reversing the classical understanding of human nature as rational, reasonable, and social in the tradition of Aristotle-Aquinas. Since their nature is not rational, desiring the perfect good and character can not end in the span of people's life if the desiring of minimal good is not taken place, and natural outcome of this is to emerge a destructive and ceaseless chain

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<sup>81</sup> Ibid 79.

<sup>82</sup> Wacks (n 20) 31.

<sup>83</sup> See Hobbes (n 78) Chapter XIV and XVII.

of acts to reach out this highest and outstanding good, character or whatever things the people want.<sup>84</sup>

Thus, Hobbes redefined the natural law as the “right to self-preservation” in the basic form and deduced nineteen sub-natural laws being discoverable by the reason, from this general definition. The primary natural law principles producing other natural laws to Hobbes are in the pursuit of self-interest, the equality of people, causes of disagreements, the natural state of war and to seek peace.<sup>85</sup> Mutual manner of derivative natural laws or commands stemming from these principles are obedience to positive law, and avoidance of rebellion relying on a higher law as well as attaining minimal good for the people instead of pursuing the highest good.<sup>86</sup>

### **3.3. John Locke and Second Treatise of Government: Limited Government Model and Individual Rights Based on Natural Law**

In the hallmarks of Locke’s social contract theory, we can observe the dichotomy of natural law and natural rights, which is the former is more ultimate than the latter, while Hobbes’ theory is an enterprise to prevail the natural rights over natural law. Locke makes a theory working in a more traditional way than classical natural law used if we go through his views on duty, which is the indicative point of classical natural law in fulfilling the moral obligation to respect others’ rights. In the same way, Locke sets out similar arguments by referring to the duty of respect in our relationship with other people even we are in the nature of state as being described as tranquility and peace with the decline of this peace into the cliff of conflict due to the violation of people’s right to property. Moreover, after the foundation of the state, people had individual rights against the state, which already existed before the foundation of state.<sup>87</sup> For this reason, Locke’s theory is in contrast with the theory of Hobbes, the former defends the limited government and liberalism at the heart of the right to resistance against the illegitimate government,

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<sup>84</sup> Robert P. Kraynak, ‘Thomas Hobbes: From Classical Natural Law to Modern Natural Rights’ *Natural Law, Natural Rights, and American Constitutionalism* (2022) <<http://www.nlnrac.org/earlymodern/hobbes>> accessed 10 December 2022.

<sup>85</sup> See Hobbes (n 78) Chapter XIV.

<sup>86</sup> Kraynak (n 84).

<sup>87</sup> Steven Forde, ‘John Locke and the Natural Law and Natural Rights Tradition’ *Natural Law, Natural Rights, and American Constitutionalism* (2022) <<http://www.nlnrac.org/earlymodern/locke>> accessed 12 December 2022.

but the latter suggests the transfer of individual rights to an absolute sovereign. In this context, a brief consideration will be made regarding the dual nature of Locke's social contract theory, focusing on the dichotomy between natural law and natural right, which forms around the model of a limited government.

### **3.3.1. Natural Rights in Locke: Indispensable and Inalienable Rights in Before and After the Formation of State**

Natural rights in Locke's nature of state, and civil life which began with foundation of state is, in fact, reciprocal headwind against the Hobbes' pessimist discourse on the natural rights at the disposal of state's positive law, undermining their existence based on natural law, and duty to respect for others' rights in the state of nature. The utmost difference between them is Locke's willingness to describe the people as social beings unlike Hobbes's anti-social labelling of the people as well as Locke's prioritization of right to property and its defense against external intervention in the state of nature. Unsurprisingly, Locke's social contract theory is a consent of people to defend their right to property that can not be adequately protected, even if all people have a moral obligation to respect the others' right to property in the state of nature. Thus, natural law is brighter than natural rights in Locke's theory, as a shield against the culprits of infringements of natural rights compared to Hobbes' unlimited natural rights doctrine in the state of nature.<sup>88</sup>

### **3.3.2. Natural Law in Locke: The Review Mechanism on the State in the Protection of Natural Rights**

Finally, if we delve into the natural law understanding of Locke, we need to look up his formulation of the state divided into two phases: 'consent-based social agreement', and 'limited state'.<sup>89</sup> First, his state formulation is consent-based since all people agree upon the foundation of the state to quit the state of nature. Second, the transfer of executive and judicial powers of people to legislative or supreme power, which springs from the natural law, is bound to secure peace, safety, and public good of people.<sup>90</sup> From this perspective, Locke's central theme is to defend people's inalienable natural rights

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<sup>88</sup> R.E.R. Bunce, *Thomas Hobbes* (Bloomsbury Academic & Professional 2009) 76.

<sup>89</sup> Ibid 79-80.

<sup>90</sup> John Locke, *Two Treatises of Government* (Dublin 1823) 161.

and liberty handed down by the nature of state against the threat of excessive authority of the state.<sup>91</sup>

Moreover, it's clearly seen that Locke builds up a triple bond among legitimacy, consent, and natural law when judging the acts of the state. Consent first comes, but insufficient to legitimize the state's authority if consent is given on, for instance, the act of suicide since this consent is invalid given that the right to take oneself life is not granted to the people by the god, and the state should take measure to prevent it if this state at hand is legitimate. At this point, in the relationship of the legitimacy-consent couple, the supremacy of natural law is guiding which acts are permitted or forbidden in the acts of people and state, having passed on the civil life from the state of nature. In other words, qualified consent being compatible with the premises of natural law determines the legitimacy of the state.<sup>92</sup> Last but not least, as well said by Rommen, the notion of natural law led to the "Glorious Revolution" in the social contract theory of Locke, whereas it contributed to the concept of "Absolute Monarchy" in the view of Hobbes.<sup>93</sup>

#### **3.4. Jan Jacque Rousseau and The Social Contract: Fundamentals of Modern Republic in the Concept of General Will**

In the line of political philosophy floating on the sides of natural law, the social contract theory of Rousseau is primarily practical and influenced the Age of Rationalism, leading to the French Revolution. At the same time, this impact is adversely unusual, causing the creation of a reign of terror aftermath of the revolution. Yet, his theory of natural rights is stunningly central to the origins of current nation-states out of the waves of the French Revolution at the end of the 18th Century.<sup>94</sup>

Unlike Hobbes' absolute monarchy, and Locke's limited government model, Rousseau frames a government based on general will securing the natural rights. Besides, natural rights are at the forefront of his theory relative to natural law.<sup>95</sup> That is to say, his

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<sup>91</sup> Rommen (n 7) 79.

<sup>92</sup> Bunce (n 88) 80-81.

<sup>93</sup> Rommen (n 7) 80.

<sup>94</sup> See Wacks (n 20) 32.

<sup>95</sup> Ibid 32.

sentiment expresses more political questions as he draws out the overall picture of republican model of government, paving the way for French Revolution in the ambit of the general will, which is the notorious term utilised by Rousseau, and is claimed to have revealed a paradox as well as dragged into Rousseau to a dual position, which reflects the democratic, and totalitarian nature together due to ambiguous position of the general will as a concept.<sup>96</sup> Despite the aforementioned controversies, to glean meaningful insights from the transition from classical to modern natural law, it's imperative to delve into the substance of his social contract theory. This necessitates an exploration of his contemplations on human nature and the general will within the framework of a republican government model. Such a model serves as the benchmark for contemporary modern states, where natural rights, derived from natural law, play a pivotal role.

#### **3.4.1. Rousseau and Human Nature: Peaceful and Timorous**

In the language of Rousseau, the nature of humans is not as destructive as in Hobbes' theory. Adequately understood, human nature works on the ground of fellowship, amicable and faint-heartedness to take part in a state of war when it comes to the state of nature and survives in the hands of the heart rather than reason. As opposed to the stable situation in the state of nature, when civil life is constructed by the social contract, human learns from each other as they get engaged in social experiences feeding their adverse desires, such as wanting more than they have, as Hobbes' reference to being passionate frequently. Rousseau, in this regard, underpins the human's willingness to be self-protective, as Hobbes did. Yet, humans acquire this desire through the habit they involve in since the first attempt of human is to want to be healthy and unpainful.

Accordingly, a long-standing war of every man against every man suggested by Hobbes, though he accepts the greedy nature of human to the extent that it does not lead to a remaining and widespread quarrel, conflict, or war, is artificially deriving from the habits that existed in the social life of human beings. Still, the state of peaceable and tame men is natural. According to Rousseau, human tends to be latter rather than the former since being warrior is totally dependent on being a citizen at first as well. <sup>97</sup>As is seen, his

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<sup>96</sup> See Manjeet Ramgotra, 'Modern Theories of the State: Rousseau's Republican Project' (1994) 19 History of European Ideas 819.

<sup>97</sup> Bunce (n 88) 77-78.



description of the human nature in the state of nature is similar to the description of Locke, though many differences are present between their theories of natural rights.<sup>98</sup>

### 3.4.2. Rousseau and Social Contract Theory: General Will, Law and Government

As a social contractarian, Rousseau contemplates the meaning of political rights shaped by the natural law discourse, having been considered the cornerstone of legitimacy, sovereignty, and so many concepts since the Ancient Age. At this point, by changing the classical natural law discourse over the state and government, his political theory revolves around three central tenets, which are social contract, general will, and law. Following this, the republican project of Rousseau can be expounded in this way: first, the social contract is the foundation of civil society; second, the general will is the driving force of the civil society; and lastly, the law is the enforcement force of the general will.<sup>99</sup>

In this vein, as the notion of general will is vital to the integration of his theory, Rousseau puts the general will into the centre of justice, rights and liberties, unlike the classical natural law theorists take the natural law as the essence of justice, rights and liberties such as Cicero and Aquinas<sup>100</sup>. In this regard, Rousseau defines the general will separating it from the will of all as follows:

“There is often a great deal difference between the will of all and the general will. The latter considers only to the common interest, while the former takes private interest into account, and is no more than a sum of particular wills: But take away from these same wills the pluses and minuses that cancel one another, and the general will remain as the sum of the differences.”<sup>101</sup>

On the other hand, for Rousseau, the general will is also the exercise of sovereignty. It furnishes all interests in civil society as well as it is inalienable and

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<sup>98</sup> Most notable differences are that Locke focuses on the right to property to quit the state of nature to sign off a social contract, whereas Rousseau rejects the right to property and proposes a social compact between men to fend off natural obstacles of the state of nature. To learn more, see Rousseau, *the Social Contract*, and Locke, *Two Treatises of Government*.

<sup>99</sup> Ramgotra (n 96) 819.

<sup>100</sup> See Shivaraj Huchhanavar, ‘Introduction to Traditional and Modern Natural Law Theories’ (2016) SSRN.

<sup>101</sup> Jean Jacque Rousseau, *The Social Contract* (Sebahat Derin Atışkan tr, Karbon Press 2020) 30-31.

indivisible; for instance, it does not divide into some parts such as legislative and executive, and thus it should be divided in principle, not in its object. More importantly, the general will is not fallible as long as it serves the common interest of society, excluding the interests of partial societies in particular.<sup>102</sup> Furthermore, the law, as the last tenet of the republican model of Rousseau, is the engine power to enforce the general will and an act of general will as well. Law, in terms of structural qualities, is always general and does not arrange issues given it is the dictates of general will in the direction of people. In this regard, the lawmaker is the people being subjected to the laws.<sup>103</sup>

Considering the general will and law, they are kingmakers of the state, but not enough to construct a state due to the lack of intermediary agent between subjects and general will, which is the sovereign power. Then, according to Rousseau, this agent is government being executive power to move the state, and it is totally separated from the general will as the legislative power giving the moral cause to the state. What is more, the charges of government as the executive power are limited to particular issues and administration, i.e., making a law decree is personal and in control of the government, whereas the general will as the legislative power, deals with the universal and impersonal things, e.g. making laws being general and universal. All in all, how the state operates are concurrence of these two powers, which are general will and government; the former is moral director of the state, while the latter is the physical force of the state as the executor of the former's dictates.<sup>104</sup>

## **B. Decline and Revival of Natural Law: A Brief Summary From 19th to the Middle of 20th Century**

In the development of natural law ideas, the 19th Century was the turning point as it lost its credibility in the cohort of scientific environments thanks to the emergence of legal positivism influenced by the wave of empiricism and historical materialism on the social sciences at that time. In this section, a summary of the significant developments that took place after the Second World War will be presented. This exploration will pave

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<sup>102</sup> Ibid 30-36.

<sup>103</sup> Ramgotra (n 96 ) 820.

<sup>104</sup> Rousseau (n 101) 57-62.

the way for a comprehensive understanding of the evolution of modern natural law, a crucial element that will be further elaborated upon in the second and third chapters.

### **1. Decline of Natural Law: The Emergence of Legal Positivism**

Natural law as the idea is undervalued as the emergence of legal positivism. In this undermining, the foundations of modern state play out the most, along with an attitude excluding the reason-based approach belonging to the natural law idea. In the view of solid positivism, laws can only be considered through historical facts or phenomena, not the reason as an abstract means, denying the measurement of natural law used in evaluating whether a law is just or unjust.

Furthermore, clinching the idea of creator state laying down the law for legal certainty or of integration of system in which everything is accurate as they are, a value-free organization of law is strictly prevailed, boiling down its evaluation to the decisions of official incumbents in the state, beginning with judges, instead of the value-oriented mechanism of natural law, such as the value of justice.<sup>105</sup> For instance, as an infamous legal positivist, Jeremy Bentham was on this path when he criticized William Blackstone's argument that positive laws derive from their validity from the natural law. David Hume's *Treatise of Human Nature* brought the non-cognitive approach to ethics into the spotlight, triggering a debate on the connection between "ought" and "is". This argument questions the feasibility of deducing an "ought" from an "is", asserting that laws should ideally mirror human nature. As a consequence of this ongoing debate, the discourse surrounding natural law gradually receded, reaching its most vulnerable state in the 19th century amid the rising influence of legal positivism.<sup>106</sup>

### **2. Revival of Natural Law: Rising from the Ashes in the Legacy of the Second World War**

After dropping out of the scene in the 19th Century, the sentiments of natural law suddenly revived as the ubiquitous principles defended by the academic circles, which evolved with the newly emerged post-war atmosphere in the 1950s and 1960s.<sup>107</sup> The

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<sup>105</sup> Rommen (n 7) 109-118.

<sup>106</sup> Wacks (n 20) 34.

<sup>107</sup> Henry B. Veatch, *Swimming Against the Current in Contemporary Philosophy : Occasional Essays and Papers* (Catholic University of America Press 2018) 255.

conjuncture pushing the revival of natural law out is seemingly miscellaneous, when considering the adoption of leading human rights documents, including UN Charter, UDHR, ECHR as well as the foundation of relevant institutional architecture in conformity with the prevalent resonance on the concept of human rights. Probably, the most prompting part leading to this revival is the Nuremberg war trials as they meticulously rejected the absolute obedience to the positive law, proposing “the crime against humanity” against the defense of the obligation to obey the positive law put forward by the defendants as a cause of waiver for their heinous atrocities one way or another.<sup>108</sup>

In the light of this renaissance, natural law was taken as the basis for creating human rights as enshrined in the various human rights instruments. Subsequently, the modern language of natural law was no longer abstract and unalterable, unlike the traditional theories of the natural law. In this line, reflecting this building block, Rudolf Stammler, Giorgio Del Vecchio, Joseph Kohler, John Rawls, Lon Fuller, John Finnis, Ronald Dworkin, as not being limited list, constructed contemporary theories of natural law. As the proponent of natural law with variable content, Stammler pointed out that natural law has no particular content, and its principles are bound to evolve if necessary.

Likewise, Joseph Kohler reiterated the same things as rendering the changeable nature of cultural values and law in the sense of dynamic grounds of the world.<sup>109</sup> On the one hand, approaching to the traditional natural law in a conceptual context, Del Vecchio imported the “value of justice” as evaluating the conducts of state in his theory.<sup>110</sup>

Moreover, John Rawls contemplated on the “theory of justice” propounding an original manufactured position at the heart of his theory, which is the supplier of basic principles of justice and common good in a basic manner among people, setting aside the self-interests and luxury needs of people.<sup>111</sup> In conclusion, so many theories were developed after the Second World War in this contemporary manner. Yet, the modern natural law theories laid out by Fuller and Dworkin have gained a much more reputation

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<sup>108</sup> Wacks (n 20) 35.

<sup>109</sup> See Huchhanavar (n 100).

<sup>110</sup> Wacks (n 20) 35.

<sup>111</sup> See Huchhanavar (n 100).

among other modern natural law theories, excelling in their sphere.<sup>112</sup> In this regard, the second chapter delves into the exploration of two distinguished theories: Fuller's procedural natural law and Dworkin's principal natural law. Fuller's approach emphasizes the intrinsic link between the legality of a system and its adherence to procedural principles that are foundational to the notion of law. Conversely, Dworkin perceives law as intrinsically moral, mandating that each judicial decision adheres to and upholds the inherent moral principles ingrained in a judicial framework comprised of respective adjudicators.

Before delving into the exploration of modern natural law theories that form the core of this thesis, it's crucial to establish a clear understanding of the insights gleaned thus far. These insights will serve as the foundation for forthcoming chapters, which will articulate the theory of modern natural law and illustrate its implementation in legal practice, specifically within the context of the ECtHR. Throughout the history of natural law, two primary strands can be identified: traditional and modern natural law, as categorized by Brian Bix, a prominent contemporary legal philosopher.<sup>113</sup>

The influence of traditional natural law on modern natural law is particularly significant in regards to the moral components of modern natural law, which were largely inherited from its traditional counterpart. For instance, philosophers such as Aristotle and Plato have interpreted the concept of justice, a key idea in the theories of Ronald Dworkin and Lon Fuller. Moreover, Cicero introduced the concept of "right reason" (*recta ratio*), a critical tool for argumentation and evaluation in the development of modern natural law theories. This concept features prominently in the works of Dworkin and Fuller. St. Thomas Aquinas further incorporated this concept into the religiously-limited context of the Medieval Age, thereby securing its relevance for future interpretations.

Meanwhile, social contract theorists reinterpreted the notion of natural law as natural rights, advocating that individuals are free and equal under the law, with these rights originating from the state of nature. This theoretical perspective has significantly influenced the discourse on human rights within modern natural law, highlighting the inherent dignity and equality granted to humans simply by virtue of their existence.

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<sup>112</sup> Penner & Melissaris (n 26) 27.

<sup>113</sup> See Bix (n 3).

## **II. MODERN NATURAL LAW THEORIES**

### **A. Leading Modern Natural Law Theories: The Theories of Lon Fuller and Ronald Dworkin**

The central pillar of modern natural law, as is mentioned in the first chapter, is to establish independent, self-evident, and evaluative standards or principles, not relying on the higher law concept used by traditional school of natural law as well as in partly social contractualism, who take the human nature as their commencing point in which their social contract theories are constructed. This chapter explores these modern natural law principles through the lenses of Lon Fuller and Ronald Dworkin. It starts by examining Fuller's unique perspective on natural law. His methodology presents law as a purposive enterprise aimed at bettering human conduct. This is achieved through eight basic requirements known as "the internal morality of law." This chapter also investigates Fuller's theory of the "interactional view of the law," emphasizing the importance of reciprocity in maintaining legal order, not only among citizens but also between citizens and authorities. Further, this chapter delves into Dworkin's perspective on legal interpretation, distinguishing it as a social practice separate from scientific, artistic, or conversational interpretation. It emphasizes Dworkin's constructivist approach, which doesn't just reveal the creator's intention, but attempts to interpret the purpose of a law, thus making sense of it from the interpreter's perspective. The chapter will also cover the different stages of Dworkin's interpretation, particularly the concept of "law as integrity," and its divergence from pragmatism and conventionalism. It concludes with a detailed analysis of these stages within Dworkin's adjudication theory.

### **B. The Morality of Law and Lon Fuller: Internal Morality and Concept of Law**

In this modern conception of natural law, Lon Fuller, as the leading proponent of this newly emerged school of natural law, directed the natural law in his methodology from a one-way path to the fruitful garden of versatile and socio-legal architectural project, which aimed at contemplating the deeply omitted nature of law as the purposive enterprise directing the human conduct towards the realization of their best version. To take place the subjecting human conducts to the rules of governance, Fuller claimed and

contended the eight basic requirements of the rule of law, which he calls “the internal morality of law”, and legality in his well-famous work, which is *the Morality of Law*.<sup>114</sup>

According to Fuller, the reciprocity among citizens as well as between citizens and authorities, are also vital to exist the law in a way that the integrity of legal order remains as they act by their plausible anticipations from their reciprocal conducts at different levels under the legal order in regardless of whether these conducts refer to horizontal relationships among citizens or vertical ones between citizens and authorities. For him, this account of legal order that requires the reciprocal interaction among citizens as well as between citizens and officials is called the “interactional view of the law” in his theoretical perspective.<sup>115</sup> By this interaction, at first, the legal order functions appropriately through the corporate efforts of citizens and officials in enacting the laws if the law-giver lay down the laws, taking into account of citizens’ reasonable expectation that authorities will obey the laws they passed. Afterwards, the citizens among themselves respect rules stemming from these laws and respect each other’s prospects regarding the laws at hand.<sup>116</sup> In this regard, first, at the centre of these conceptual inquiries, Fuller’s internal morality of law as the procedural natural law will be explained considering the eight basic requirements of this morality. Following this, the external morality of law and substantive natural law will be tackled as argued by Fuller in the context of the relationship between the former and the latter, along with the reciprocity.

### **1. Procedural Natural Law as the Structural Core of Law**

The concept of natural law had involved the theories elaborating the substantive content of natural law as the most prominent intellectual endeavour from the Greco-Roman Period to the Enlightenment Age, before the foremost decline of natural law in the 19th Century, until Fuller pointed out the importance of procedural content of natural law in the middle of 20th Century. Having published his well-famous book, named *the Morality of Law*, including his lectures given at Yale Law School in 1963, so many criticisms were directed against his arguments in this book as well as these criticisms reflected the deep-rooted shift from the traditional version of natural law to modern and

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<sup>114</sup> See Lon L. Fuller, *the Morality of Law* (revised edn, Yale University Press 1969) 42.

<sup>115</sup> Pavlos Eleftheriadis, ‘Legality and Reciprocity: A Discussion of Lon Fuller’s *The Morality of Law*’ (2014) 10 *Jerusalem Review of Legal Studies* 1, 9-15.

<sup>116</sup> See *ibid* 10.

contemporary form shaping at the centre of question that how to deal with the separability thesis, which emphasizes the distinction of law and morality in the legal systems, claimed by legal positivists, namely H.L.A Hart who discussed with Fuller on this thesis.<sup>117</sup>

In this title, considering the Fuller's arguments on natural law are compound and ramified, Fuller's theory will be explained in the context of his central concepts to understand his main theme: basic requirements of legality as the internal morality of law or procedural natural law, external point of law or substantive natural law, and reciprocity between citizens and law-givers in terms of law-making process along with the obligation of mutual respect for these existing laws.

### **1.1. Eight Basic Requirements of Legality**

In *the Morality of Law*, Fuller gives an imaginative story to indicate the prospective outcomes of not having a well-functioned legal system. To illustrate this, he builds a story telling the failed attempts of King Rex to devise an effective legal system with its structure designating the laws. In the first stage, Rex appears that he can become a meritable law-giver as he wants to be remembered by the public as the reformer in his country.

Yet, the expected success never comes to the governance of Rex as Fuller explained. Then, what are these reasons reversing all things against the expectancies of Rex, who aims for welfare and well-being of his people? This is because Rex disobeyed the requirements of legality that will be handled under this title. In this regard, he overlooks the centrality of these when making laws as follows: he makes individual decisions without any laws checking them out. Then, Rex proposes a law controlling his decisions, but his decisions content is covered in a way that anyone cannot learn it. As he proceeds to avert the deficiencies, he promulgates the decisions to reveal their content to people while they are designed as being effective retrospectively. In this regard, to resolve the retrospective problem, he publishes the rules to be applied to people in future, whereas they need to be clarified to the extent that a law must not be.

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<sup>117</sup> For the serious criticism directed against Fuller from analytical legal philosophy, and his reply to his critics, see *the Morality of Law*, pp. 187-224; for his famous and instructive debate regarding the distinction of law and morality, and his reply against Professor Hart in the context of the new realm of legal positivism and natural law, see Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' 71 Harvard Law Review 630.



Afterwards, Rex exemplifies all of these provisions laid out in the rule. This time, the provisions contradict each other, creating so many discrepancies among them once they nullify each other. In the continuum of his efforts, he designates a clear and coherent law. Still, this law includes many provisions imposing impossible duties or obligations that an ordinary citizen cannot comply with. In the wake of making a proper law, he proposes a code as he supposes that he corresponds to all requirements. Unfortunately, new code is vulnerable to alterations occurring every day to the extent anyone cannot follow. At the end of the story, Rex introduces a well-articulated law under the requirements of legality. Yet, he needs to include the fundamental aspect of legality, not applying the provisions of the law in a manner that their application is congruent with the content of the law.<sup>118</sup> In his illustrative tale of King Rex's unsuccessful attempts to establish an effective legal system, Fuller highlights the pitfalls of ignoring the fundamental requirements of legality. Despite Rex's initial intent for reform, his failure to adhere to key principles in law-making - consistency, clarity, possibility, stability, and congruity in application - results in a flawed legal system. The subsequent sections will delve into a detailed examination of these basic principles of legality, which King Rex neglected, drawing upon Fuller's perspective.

### **1.1.1 Generality**

The generality of legal rules, in terms of general acceptance, rests on their impartiality, impersonality and applicability to everyone. Generality cannot be implied from private cases if one in charge of rule-making tries to lay out some general rules, since they cannot be impartial and impersonal as they must be. Generality is not only to create regulations with the faculties mentioned above but also to exist these rules. The reason for Fuller to make this distinction is that impersonality, impartiality, and applicability for everyone as the characteristics of generality belong to the principle of equality, which determines the content of provisions so that these features also concern the external morality of law except the internal morality of law on which Fuller contemplated. In this vein, the decisive point of generality is having a system of rules to which decision-making authorities, whether administrative or judicial, ought to adhere.

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<sup>118</sup> See Nigel E. Simmonds, *Central Issues in Jurisprudence* (4th edn, Sweet & Maxwell 2013) 241.

However, this does not mean that all governmental acts, such as the ruling directed against the defendant, must be general.<sup>119</sup>

### **1.1.2. Promulgation**

Publicizing laws can be back to ancient times. The underlying reason they should be published is to inform the people on how they must adjust their acts according to the promulgated law. At the outset, there is no controversy on this requirement. In contrast, an uncertain debate circulates if common law is known to its subjects, then why should the laws be promulgated generally? What's more, another question is more challenging than the former: why should laws be promulgated to inform a few people to learn their content? These questions are plausible for Fuller. In response to these detailed questions, he contends that even if a few people need to know the content of laws concerning them, laws should be promulgated given that being not a qualified reader of laws follows those being informed regarding the laws due to the effortlessness of this follow-up process. So that this can extend the recognition of law across a country even if most of the population does not read the content of laws oneself.

Last but not least, promulgating laws provides an opportunity to control whether the authorities adhere to the laws they enact. Having reached anonymity on the promulgation of laws, then, the last question is which laws should be regarded as to be promulgated? In this regard, the internal rules regulating the agencies' function are mostly kept from this corpse. However, in the case of a judicial proceeding, some cases need to be resolved through the internal procedures of the court's function. Accordingly, there should be pivotal consideration in such fragile situations where the promulgation of rules is foremost.<sup>120</sup>

### **1.1.3. Retroactive Laws**

Retroactive laws are not evaluated profoundly among legal philosophers. In legal practice, a well-known Latin maxim, "Nulla Poena Sine Lege (no penalty without law)" resolves the problems from the retroactive laws. Yet, this addresses only the aspect of criminal law for the debate of retroactive laws. When it comes to civil law, common

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<sup>119</sup> Fuller (n 114) 47-49.

<sup>120</sup> Ibid 50-51.

arguments everyone uses are kicked off as referring the regulatory nature of civil law, and contention is emphasized that civil law does not direct the conduct of people compared to criminal law. However, according to Fuller, the problem can not be expressed simply. A tax law incorporating the assets gained in the past into the scope of tax can initiate a discussion as to whether incorporation is an application of tax law retroactively. This question is open to debate eventually.

On the other hand, considering civil law, imagine a law imposing the obligation that all marriages must be stamped could not be enforced on all marriages due to technical defects in the press of stamps after the law had been enacted. In such situations, applying the law retroactively validates the void marriages, serves other legality principles such as promulgation, and does not demand impossibility from the subjects of law. In this regard, people should point out the guidance role of laws, including those in the scope of civil and tax laws as criminal laws. For example, contract law directs people to figure out their work with private enterprises. Tax laws regulate the conduct of people in deciding how they adjust their assets per the obligations brought about by tax laws. For that reason, if one wants to set out an effective resolution for the retroactive laws, this person should look into the functional side of this retroactive law instead of its title and evaluate whether the retroactive law is a violation of the social contract signed between the state and its subjects.<sup>121</sup>

#### **1.1.4. Clarity**

Clarifying the content of laws should be considered when considering this requirement of legality as a fundamental and usual assignment of administrative and judicial branches instead of the legislature. Yet, this is not a convenient method to figure out the problem of clarity, given that making clarity in the laws is chiefly the task of the law-giver at the first level. Since the demands of internal morality of law do not exclude the legislature, there can never be a privilege to exempt it from carrying out this requirement. Moreover, demanding clarity means that this may not deplete the concepts of due care and good faith or require rejection as the generic rules that are put into the laws. Nevertheless, these generic rules cannot be used as the epicentre of making clarity in every case due to altering of interpretations on the clarity of laws in every case, such

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<sup>121</sup> Ibid 51-63.

as the inadequateness of appealing to the good faith for every commercial case. In this vein, the general principles used for clarity should be considered in the context of case-by-case analysis as well as conditions of the tasks belonging to the legislature can be transferred to the judiciary should be discussed at the highest level.<sup>122</sup>

#### **1.1.5. Contradictions in the Laws**

In terms of the internal morality of law, contradictory laws might cause some perplexing legal consequences if the interpreters of law cannot reconcile the contradictions in the concerned law. What needs to be taken place is made up of miscellaneous proposes. For instance, if one handles the two contradictory provisions in a law to be brought before a court, there would be a legal controversy before the court. In this regard, the judge can interpret the contradictory provisions in two ways: either setting out a resolution prevailing one provision over the other or reconciling two contradictory provisions to acquire a meaningful solution. On the one hand, complexity increases when two laws contradict with each other. As is known, a well-known Latin maxim, “lex posterior derogat priori (subsequent law invalidates the previous one)” is used to overcome the contradiction between two laws. However, in some situations, this resolution cannot be adequate. Still, the reconciliation of two contradictory laws can find a more plausible answer if they are construed in the light of different contexts and conditions.

Furthermore, the word “contradictory” cannot meet the contradiction in laws at one point since the rules cannot revoke each other automatically as logic can. Instead, as in the case of Common Law, “opposite in laws” or, as an old-fashioned term, “inconvenient in laws” can be used to meet the contradictions in laws. Undoubtedly, these are formal and symbolic debates over the use of language and can be pulverized quickly. Due to these reasons, according to Fuller, the resolution of legal contradictions necessitates a comprehensive understanding of various societal contexts. The first context is legal, where factors like precedent cases, the law’s language and structure, and relevant legal norms can provide valuable insights into possible resolutions. The second context is moral, which requires the legal decision to not only be legally defensible but also in alignment with shared societal values. The third context is political, wherein the decision

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<sup>122</sup> Ibid 63-65.

may be influenced by elements such as policy objectives, power dynamics, and societal expectations concerning the legal system's role. The fourth context is economic, where considerations such as the decision's impact on economic relationships, property rights, and economic stability can be significant. Lastly, the sociological context must be taken into account, requiring a reflection on the social implications of the decision, including its effects on social order, cohesion, and the public's faith in the legal system.<sup>123</sup>

#### **1.1.6. Laws Requiring the Impossible**

In this requirement, Fuller refers to different liability types in law, which sparked questions for decision-makers. In general, one can be judged for an act if this person commits this act intentionally or neglectfully. These condemnation instruments provide a determinateness of judgements to some extent. By doing so, the people cannot be responsible for the impossible things, exceeding their wills. Nevertheless, a term "culpability" makes more sense than intention and neglect when making judgements concerning the acts of people. At this point, how can the culpability of a person be determined is a tricky question when it comes to mainly two flexible standards used for this purpose: "judgement to a reasonable person" and "judgment to case-by-case review". To be objective to a certain degree, evaluating one's act requires one to be open to a reconciliation of both standards by prevailing the "reasonable person" standard if one wants to be more objective by not diving into the sophisticated nature of the "case-by-case review" standard.

On the one hand, liability in law is not limited to liability based on culpability. Still, situations can be that rectification of inadvertencies or mistakes which one should have been careful, but couldn't have when this act was committed. This type of liability stems from unjust enrichment, quasi-contract, contract or tort. Their common feature was to rectify one of parties' acts contrary to the due diligence when the legal relationship was established between them. Fuller views these as "supplementary rules" integral to the internal morality of law, aimed at correcting people's inadvertencies. However, he considers exceptions like strict liability, often associated with hazardous services such as business liability, asserting that such liability can be inconsistent with internal morality since it demands liability for events not caused by culpable action or correctable mistakes.

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<sup>123</sup> Ibid 65-70.

However, Fuller reverses this in a way that if one attempts to take place some risky operations, the strict liability can be imposed on the shoulders of the maker on the condition that this obligation should be clearly incorporated into the law.

For this reason, the strict liability does not contradict with the internal morality of law as the claim that it demands the impossibility from the people. Instead, it saves the law-givers from making laws bringing out certain rules on the liability springing from the hazardous operations by creating a mechanism determining the cost of these operations being assigned to the public interest. For Fuller to run away from the difficulties of criminal proceedings, strict liability can never be used since a criminal act can be punished by not evaluating whether an act is taken place by the culpability of suspicious. Hence, it is a rule demanding the impossibility of making liable of people without their liable participation in acting and violates one of the legality requirements.<sup>124</sup>

#### **1.1.7. Constancy of the Law through Time**

As in the case of retroactive laws, violation of this requirement of legality ceases the determinacy of the law, so both of them are similar in respect of their impacts on the internal morality of law. Yet, frequent changes in the law can be more disruptive than retroactive laws since the latter might correct certain deficiencies that took place in the past and contribute to the internal morality of law at one point. Contrary to this, if frequent changes are taken place in the law, the constancy of the law can not be secured and retain its meaning. In this respect, if this is so, the only fact is the constancy of the disorder through time by the hands of the law-giver. The lapse of time in the law of obligations, as an example, is given by Fuller to emphasize this fact by saying that if the legislature lays out a law changing the lapse of time in the law of obligations, there should be an interim period between the ratification and effective dates of the law, considering the rights of creditor against the obligator.<sup>125</sup>

#### **1.1.8. Congruence between Official Rule and Declared Rule**

As Fuller mentioned, this requirement can be regarded as the most complicated among the basic desiderata of legality. Because if there is a problem of congruence

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<sup>124</sup> Ibid 70-79.

<sup>125</sup> Ibid 80.

between official rule and declared rule, the interpretation of rules comes to the front, and the interpreters are judges when this law is brought before the courts. The *Heydon Case*, which determines the principles of interpretation in the UK, gives the four principles to interpret the blurriness of a law. The principles offered by this case can be regarded respectively: determining the previous law enacted before the current law, the problem referred by the earlier law is what was, what is the resolution constructed by the legislature to this problem in the current law, revealing the true reason of this resolution, and the courts should apply this resolution following the determined purpose in the current law. In addition to these principles, Fuller adds one more principle that the purpose of law should be evaluated under the subjects of this law to prevent the abuse of the law in a way that only the judges in the courts can understand the reason for the law at hand. The aftermath of influential reasoning, Fuller gives various examples from the cases to make the readers clear and concludes that the congruence between the law-giver and the judges guarantees the congruence between official rule and declared rule, permitting the judges to be the creator of the construction of constant interpretation principles.<sup>126</sup>

## **2. The Concept of Law and Reciprocity**

In the theory of Fuller, the concept of law is the centre of the purposive enterprise of subjecting human conducts to the governance of rules as well as reciprocal and cooperative efforts of citizens and law-giver can construct this enterprise. Pursuing two central terms, Fuller sets out a multi-dimensional legal theory comprehending humans' ethical, social, and political aspects and their coincidence with the law.<sup>127</sup> According to multi-dimensional legal theory, there is no separability between law and morality since law confronts us with moral judgements even if we deny this inherent nature of law encompassed with morality. In this regard, undoubtedly, means to create the law are valuable, but they only have a sense if they can be merged with the aim of the law. As the purpose of making an analogy, Fuller contends that law which is encompassed with only formal rules, setting aside its purpose, can be resembled a modern science which is only encircled by the tools of measurement and test, excluding the explanation of the proper

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<sup>126</sup> To read more, and make out reasonable implications from the controversial cases over the interpretation problem, see *ibid* 80-91.

<sup>127</sup> See Brian Bix, *Jurisprudence: Theory and Context* (6th edn, Sweet & Maxwell 2012) 84-85.

aim of making science.<sup>128</sup> Under this title, Fuller's concept of law will be addressed as to its relationship with the internal and external morality of law in the context of the morality of the law-making process as well as the extent of contribution provided by the internal morality of law to the morality of law will be addressed. Lastly, to embody all of these philosophical requirements, the meaning of the reciprocity between citizens and law-giver and the morality of aspiration being grounds for this reciprocity will be clarified, as argued by Fuller.

### **2.1. Entrenchment of the External Morality of Law: Respecting the Requirements of Internal Morality of Law**

In the process of law-making, for Fuller, respecting the internal morality of law secures the rule of law as the poignant principle of which. Notwithstanding, there is an external morality of law when enacting the rules to be respected by the subjects of them. It contends that what ought to be the content of rules, apart from the procedural requirements of law-making, as named of internal morality of law, that Fuller defended. The relationship between external and internal morality of law reflects a mutual interaction. In this line, the superior outcome to be stemmed from this relationship is that respecting the internal morality of law prevents the probable injustices, which can be occurred in botchery content of the laws when interpreting them.<sup>129</sup> If a law-giver is willing to respect eight basic requirements of the legality as the internal morality of law, the laws to be enacted will be informed by the aspiration of procedural natural law, which is already existed in the law itself. In pursuing this obedience to the internal morality of law, the external morality of law will be adequately identified. The subjects of the law will obey the law for its success in creating a rational, plausible, and integrated system of rules that ought to be provided by the law as the enterprise of subjecting the people to the governance of rules. That is to say, the internal morality of law will pave the way for the external morality of law, and this process will be completed when people direct themselves to follow the rules enacted as the rational standard for their conduct.<sup>130</sup>

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<sup>128</sup> S. Viner, 'Fuller's Concept of Law and Its Cosmopolitan Aims' (2007) 26 Law and Philosophy 1, 5-7.

<sup>129</sup> Fuller (n 114) 131-132.

<sup>130</sup> Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' (2008) 83 New York University Law Review 1059, 1070.



## **2.2. The Path of Procedural Natural Law towards Substantive Natural Law: Morality of Aspiration, Minimum Content of Natural Law and Reciprocity**

The morality of aspiration, which constitutes the progressive ground for Fuller's theory, is vital to the internal morality of law. It means that humans can take their good life to the extent they want. This process takes time and demands to be forbearing from humans since it will last the spin of their life. Contrary to this, the morality of duty requires obedience to social behaviour rules, which can be described as cultural norms being adopted among people. For example, when there is a violation of a law prohibiting gambling, the morality of aspiration evaluates gambling in terms of its obstacles being created for the development of capacity and potential aspired by humans heading towards their ultimate goal. However, the morality of duty evaluates gambling as an activity adversely affecting general public interest and gambler's family life. The morality of aspiration aims to develop the potentialities of humans, and treats the law in this manner. In contrast, the morality of duty seeks to protect social life and treats the law by social responsibilities and duties among the people.<sup>131</sup>

Furthermore, for Fuller, laws should be designated through the morality of aspiration as its function is not imposing duties upon the people but developing the capacities of people as much. From this point of view, a view of implicit human can be inferred from the morality of aspiration, which occupies the centre of substantive natural law along with the procedural natural law.<sup>132</sup> This view indicates the relationship between the former and the latter. It determines the factual aims of the law.<sup>133</sup> In this view of implicit human, the law is centred on the ultimate development of human life, promoting opportunities to enhance their capacities at highest level. This view reflects the view of the modern school of natural law as their view of law tackles the law as an instrument generating rational conduct for human behaviour.<sup>134</sup> At the end of his contention on that what should be the central principle of the minimum content of substantive natural law, he proposes the communication arguing the importance of meaningful communication among humans has been a life-saving skill since the occurrence of humanity in

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<sup>131</sup> Fuller (n 114) 5-9.

<sup>132</sup> See *ibid* 162-168.

<sup>133</sup> See *ibid* 184-187.

<sup>134</sup> Jonathan Crowe, 'Between Morality and Efficacy: Reclaiming the Natural Law Theory of Lon Fuller' (2014) 5 *Jurisprudence* 109, 113.

transferring the knowledge and the developments related to it. According to Fuller, law misses its point as the purposive activity if there is no strong communication means to reflect the rules designated among people who must behave pursuant to this law.<sup>135</sup>

In Fuller's view, reciprocity among people and their expectations from the law plays a crucial role in realizing the law as a purposive activity. This involves both morality of aspiration and communication among individuals; the former represents the essence of law, and the latter serves as an anchor ensuring the law's continued existence. It's essential not to overlook the internal morality of law, along with its eight basic requirements, as these constitute the fundamental framework that defines all aspects of law.<sup>136</sup>

### **C. Constructive Interpretation with the Morality: Ronald Dworkin and Right-Answer Thesis**

As the leading intermediary legal philosopher between legal positivists and natural law scholars, Ronald Dworkin's interpretive approach, which is based on legal principles regarding the theory of adjudication, prevailing different values behind these principles when judges rule the decision, has been unique for jurisprudence since his notable published books, which are *Taken Rights Seriously* and *Law's Empire*. He constructs a legal theory that there is a mutually-designed approach encompassing both rules and principles as the hallmarks of law when raising the question of what the parts of the law are. More significantly, his adjudication theory is intertwined with his legal theory as he claims that law as a concept can be understood not only by observing the law as a conceptual matter but also by looking into this conceptual matter in the eyes of judges and legal practitioners. Thus, he tackles the adjudication as a contributor to a general law theory, whereas many theorists criticise him for this consideration.<sup>137</sup>

Dworkin mainly uses his constructive interpretation when judges adjudicate the hard cases, which is controversial as to how the judges rule in these cases. Additionally, he enhances the right answer thesis that includes an alternative answer for hard cases that indeterminacy is, in fact, an answer for a dispute in a hard case by rejecting the binary approach that there is an answer or no answer for a dispute in the hard cases before the

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<sup>135</sup> See Fuller (n 114) 187.

<sup>136</sup> See Kristan Rundle, 'Fuller's Internal Morality of Law' (2016) 11 *Philosophy Compass* 499, 503.

<sup>137</sup> See Bix (n 127) 98.

courts since indeterminacy is probable in the nature of hard cases as the intermediary standpoint between affirmative and negative responses.<sup>138</sup>

According to Dworkin, during the adjudication process, judges should search for past decisions of legal practice as a pre-interpretive data which are fit to the current legal problem before the court. In this vein, among various past decisions, judges should determine the legal principles behind all of these related decisions to adjust them for the current problem, propounding the best answer for the current case before the court. In the interpretation phase, competing principles are controversial and difficult to choose, which would direct the case adjudication. However, Dworkin offers the process of appeal to underlying values behind these legal principles and names this appeal process as the post-interpretation phase. At the end of adjudication process, the best answer for the current case is by following two stages: at first blush, the judge fits the doctrinal history of legal practice. In advance of this, the judge reveals the institutional rights of parties in the case and appeals a new political theory, which is different from other judges in the chain, relying on the arguments of principle to argue the legal rights of parties.<sup>139</sup>

Constructive interpretation and right answer thesis are highly related when the adjudication process begins. Last but not least, for the adjudication process, Dworkin gives utmost importance to the distinction of arguments of principle and policy when the judges rule the cases brought before them. It is true, for Dworkin, that the judges should adjudicate hard cases before them, applying the constructive interpretation and right answer thesis. Yet, in providing the best right answer, the vital thing is to generate the arguments of principle to justify the judgement that would be rendered regarding the current case since the arguments of principle create individual rights. In contrast, arguments of policy create collective aims.

For this reason, judges should construct a political theory that is grounded on arguments of principle aimed at balancing different competing principles in the case, mainly referring to the morality of the community, which determines the institutional rights of individuals in the community. In the aftermath of this referral, legal rights of individuals can be articulated and discussed in the current case before the judges to reach

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<sup>138</sup> Joshua R. Geller, 'Truth, Objectivity, and Dworkin's Right Answer Thesis' (1999) 1999 UCL Jurisprudence Review 83, 98.

<sup>139</sup> See Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057.

the best right answer in hard cases.<sup>140</sup> Accordingly, Dworkin's constructive interpretation, application of this interpretation to various practices, and its reflection in law as a conception of law as integrity will be handled. Dworkin's right-answer thesis and his various components will be explained, arguing how the best answer to hard cases can be provided by balancing different legal principles in the context of arguments of principle.

## **1. Constructive Interpretation as the Ground of Adjudication Theory**

Interpretation has been a controversial concept many times for legal philosophers. Before constructing an interpretation which fits for adjudication theory, Dworkin expounds on the function of different interpretation methods and their differences, such as scientific interpretation, artistic interpretation, conversational interpretation, and interpretation of the social practice. While taking up each of them separately, the interpretation of social practice is guiding for constructive interpretation that he proposed since the law is also a social practice and needs to be interpreted in the way other social practices are.<sup>141</sup> On the other hand, the interpretation of social practice can not be taken as a crude method to reveal the creator's intention as the carrier of this practice. Interpretation of social practices is to interpret things created by people, focusing on their purposes rather than their causes. Thus, this process makes sense this practice in the eyes of the interpreter. To understand the constructive interpretation, it's helpful to read the definition of it from the words of Dworkin: "Constructive interpretation is a process of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."<sup>142</sup>

Comprehending the arguments of Dworkin, first, his central themes on different methods will be touched upon under this title. After telling the pivotal points of interpretation methods, as the commencing point of Dworkin's constructive interpretation, features of artistic interpretation and interpretation of social practice as well as how they lead Dworkin to make out reasonable outcomes for his constructive interpretation, will be mentioned. What's more, the stages of constructive interpretation, and how Dworkin embodies these stages under the ambit of the conception of law as

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<sup>140</sup> See Ronald Dworkin, *Taken Rights Seriously* (Harvard University Press 1977) 82-123.

<sup>141</sup> See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 49-53.

<sup>142</sup> Ibid 52.

integrity, and its differences from other similar concepts, pragmatism and conventionalism, will be tackled. On the one hand, in the last chapter, the particular stages of law as integrity in the adjudication theory of Dworkin will be explained.

### **1.1. Different Methods of Interpretation**

There are different methods for interpretation depending on what contexts are in place to interpret. For example, scientific interpretation deals with the collected data to be analysed descriptively, whereas conversational interpretation follows a similar pattern, aiming to understand the speaker's intentions, obtaining mere conclusions about what the speaker meant by giving these statements or what caused them to speak in a certain way. On the one hand, there are two more interpretation methods: artistic interpretation and interpretation of social practice. They are known to have similarities as both can be identified as "creative interpretation" when it comes to their interpretation on their subjects. Interpretation of work of arts and social practice, in which the former is the subject of artistic interpretation. At the same time, the latter is the subject of interpretation of social practice, which is concerned with the purposes rather than causes or descriptive conclusions.

For instance, the creative interpretation of courtesy as a social practice or of a poem as a work of art can be made by understanding the purpose of citizens in courtesy and the poet's purpose in writing the poem. Yet, for Dworkin, more than this point of view is needed to define the interpretation of works of art and social practices. The distinguished feature of these methods of interpretation is not to be creative but to be constructive since the interpretation of social practices and works of art should refer to purposes claimed by the interpreter, not the purposes of the author in an artistic work or citizen in a social practice. In this sense, Dworkin paves his way from the rolling coasts of creative interpretation used for social practices and works of art towards the entrenched castle of constructive interpretation to be used for legal practices either.<sup>143</sup>

### **1.2. Constructive Interpretation: Interpretive Stages with Justifications**

When considering all interpretive attitudes, there are anchors standing them up tightly. In the same way, justifications are the anchors of constructive interpretation being

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<sup>143</sup> Ibid 49-52.

made in the interpretation of social practices and artistic works. Since social practices are much more relevant to the law, constructive interpretation of social practices prevails. First, there should be a pre-interpretive stage in which rules and standards concerning the practice are to be interpreted and identified with consensus. This is because the interpreter needs to grasp a general conviction accepted among people as regards the practice to be interpreted in further stages of constructive interpretation.<sup>144</sup>

Second, following the pre-interpretive stage, the interpretive stage comes to the scene, in which the interpreter propounds justifications for the central themes of practice being determined in the pre-interpretive stage. While the interpreter claims justifications for the practice, these justifications are based on arguments such as seeking the value behind this practice in a general context. Even if all features of justification are not fit to structure of practice in the pre-interpretive stage, a rough coherence is sufficient, preventing to invent newly practice which is entirely different from the practice to be interpreted.<sup>145</sup> Lastly, in the post-interpretive stage, the interpreter propounds their arguments on what the practice is, making efforts to structure these arguments as better justifications than the justifications accepted at the interpretive stage. The interpreter contemplates arguments to make the practice its best version by revealing the what is value or purpose of maintaining this practice for people fulfilling it.<sup>146</sup>

For example, Dworkin handles the practice of courtesy as a social practice to be interpreted under constructive interpretation. Before starting the constructive interpretation, there should be a common understanding of what courtesy means for the people participating in this practice. This common knowledge shared by most people in this practice constitutes the pre-interpretive data for the interpreter before passing into the interpretive stage. In the phase of the interpretation stage, the interpreter should justify reasons for the people's adherence to courtesy and generate fruitful arguments to produce justifications for being applied courtesy to specific groups. These justifications differ from the general acceptance of at the pre-interpretive stage for courtesy. They can be as follows: For some people, courtesy such as bowing should apply to women who do not engage in a man's job or are not lesbians. If these people think of bowing as emphasizing

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<sup>144</sup> Ibid 65-66.

<sup>145</sup> Ibid 66.

<sup>146</sup> Ibid 67-68.

the weakness of the female sex, they are prejudiced against women because of their value judgements. On the other hand, for another group of people, courtesy as bowing is to respect for high-ranking soldiers when you see them as passing from your front. The justification the interpreter engendered should fit the views that people adopted, preserving its originality. After the first two stages, at the post-interpretive stage, there should be a point of courtesy as a practice in its best light found out by the interpreter.<sup>147</sup>

### **1.3. Constructive Interpretation of Legal Practice: The Evaluation of Law in Moral Sense**

In the case of applying the constructive interpretation to legal practice, Dworkin refers to a moral evaluation of legal practices as different from than defining aspect of which. Put differently, constructive interpretation allows the interpreter of legal practices to claim the evaluative arguments. It can be defined as an alternative against the determinate standards for the rules descriptively, as in the case of legal positivism. In the interpretation of legal practices, the interpreter is the judge and should construct arguments that comply with the constructive interpretation during the adjudication process. As in the case of other social practices, there is a pre-interpretive stage for the legal practice, either. In this regard, it can be better to hear from Dworkin on what is the background of the pre-interpretive stage in the interpretation of the legal practice:

“Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.”<sup>148</sup>

In this regard, there is a general understanding of the law for judges interpreting the legal practice before them. Though Dworkin’s definition of the law can vary among judges, enforcement of coercion is the common denominator of law to comprise different conceptions of law as the pre-interpretive structure. These conceptions are in place when defining the deeper aspects of law because the law is an interpretive concept, such as other social practices. More significantly, at the interpretive stage, these conceptions are based on moral-based justifications. The judges seizing the legal practice look into these

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<sup>147</sup> See Stephen Guest, *Ronald Dworkin* (3rd edn, Stanford University Press 2013) 70.

<sup>148</sup> Ibid 73.

justifications, which are based on moral arguments, in an evaluative context. At the post-interpretive stage, the judges should be interpreters determining the best interpretation of the legal practice before them, relying on past decisions ruled by other fellow judges. While handling past decisions, they engender the best justification of the practice by detecting the principles and underlying values justifying the practice before them in the context of a political theory constructed by the judges and apply the best answer to be implicated from various justifications to make sense of particular legal practice in its best light, not violating the integrity of the law, which is the part of the constructive interpretation of the legal practice.<sup>149</sup>

#### **1.4. Law as Integrity: A Rival Conception Against Conventionalism and Pragmatism**

As Dworkin mentioned, constructive interpretation is composed of different steps to be taken to reach the best understanding of particular legal practice before the judges. In this respect, he proposes a set of questions to be answered under different conceptions, conventionalism, pragmatism and law as integrity, as follows: is the assumed connection between law and coercion genuinely justified ? Is there any reason to use the coercion of public force stemming from the rights and responsibilities based on past political decisions given by judges or legislators? If so, what is the reason behind this? What type of consistency with past political decisions serves this best? <sup>150</sup>

Indeed, conventionalism, pragmatism, and law as integrity are classifications of Dworkin and conceptions about the concept of law. Conventionalism represents the “interpretation method of legal positivism”, which sees the law as a doctrinal history with its texts, statutes or decisions. A legal professional reveals the real meaning of these texts when interpreting them, giving utmost importance to the words. On the one hand, pragmatism refers to “legal realism”, which centres judges’ remarks over the texts, statutes, and legal practice, so to speak, in a case to be ruled by them. The former defends

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<sup>149</sup> See Ronald Dworkin, ‘Law as Interpretation’ (1982) 60 Texas Law Review 527, 540-545.

<sup>150</sup> Dworkin (n 141) 94.



objectivity in law, whereas the latter claims the subjectivity of law is an interpretive concept. Accordingly, these conceptions are variants of two different polar.<sup>151</sup>

Law as integrity is an enterprise to reconcile these conceptions claiming that law works on both subjective and objective rationales, setting aside strict points of conventionalism and legal pragmatism, on the other hand, and paving a new path for legal interpretation, on the other. Dworkin defines the conception of law as integrity. It represents the institutional history of innumerable decisions, structures, conventions, and practices as a chain when a judge or legal practitioner interprets these pre-interpretive materials flowing from past decisions. This structure is also closely associated with the constructive interpretation of social practices, and the articulation of constructive interpretation in legal practice can be seen. All in all, the legal practice is neither purely objective nor subjective, as defended by the first two conceptions in legal interpretation when the conception of law considers this practice as integrity.<sup>152</sup>

### **1.5. Components of Law as Integrity: Fit, Justification and Integrity**

As a Dworkinian legal interpretation method, the law as integrity reflects constructive interpretation. It encompasses different components to consider when the judges or lawyers select this conception to interpret the practice. In this vein, let's review the stages of adjudication, which is the centre of Dworkin's approach in law as integrity. First, the judge must determine the concept of law before seeking out a response to the problem brought before the court. To determine the concept of law, the judge must select an interpretation theory for the relevant purposes; suppose that they choose the theory of law as integrity. Subsequently, complying with the law as integrity, the judge proceeds to interpret as highlighting the principles behind this law.

These underlying principles behind the law must adequately fit existing legal practices composed of statutes, precedents, and cases. Even if these principles, as well as values intertwined with these principles, are fit to present an adequate account of existing legal practice, there must have a justification to make a moral evaluation which flows

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<sup>151</sup> Stanley Fish, 'Working on the Chain Gang: Interpretation in the Law and in Literary Criticism' (1982) 9 The University of Chicago Press 201, 201.

<sup>152</sup> Ibid 202.

from these principles as the best argumentative defence.<sup>153</sup> Dworkin expounds on how this justification can be achieved by constructing such principles as follows: “...a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents, and so far as these are to justified on principle, constitutional, and statutory provisions as well.”<sup>154</sup>

Additionally, the most striking component of law as integrity is the ideal of integrity. The ideal of integrity, for Dworkin, is considered a political virtue belonging to legal and political systems.<sup>155</sup> It provides a polyphonic forum to secure fairness and justice in a community of principle under genuine equality of every member of this community since this community concerns whether the legal system as a whole that has a value of integrity.<sup>156</sup> By doing so, it protects the coherence of legal practice as a whole before concluding an interpretation of this practice. To make clarify this point, an example used by Dworkin can be given. Suppose that there is a checkerboard abortion law to be passed in the parliament. The law provides the right to abortion to women born in odd-numbered years, whereas it does not provide such a right to women born in even-numbered years. At first blush, the law is appropriate for justice and fairness since it guarantees a fair procedure to give women the right to abortion without suspicion.

Furthermore, the checkerboard statute also provides justice favouring both parties, which are pro-life and pro-choice, instead of enacting a pro-choice or pro-life law that has a one-way projection. If so, what is wrong with this law? The problem is the ignorance of equality before the law as a principle. At the outset, the law is convenient to the values of justice and fairness, while they are pointless in the value of integrity. Since women that have the odd-numbered year of birth can get an abortion if the right to abortion of women that have the even-numbered year of birth is denied by justifying a denial of the right to abortion in general.<sup>157</sup>

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<sup>153</sup> Jon Mahoney, ‘Objectivity, Interpretation, and Rights: A Critique of Dworkin’ (2004) 23 Law and Philosophy 187, 192-193.

<sup>154</sup> Dworkin (n 140) 116-117.

<sup>155</sup> Steven Ross, ‘Law, Integrity, and Interpretation: Ronald Dworkin’s Law’s Empire’ (1991) 22 Metaphilosophy 265, 268.

<sup>156</sup> See Dworkin (n 141) 216, 243.

<sup>157</sup> See Simmonds (n 118) 233-234.

As is seen checkerboard law, while appearing fair and just on the surface, creates a fundamental paradox. By affording the right to abortion only to women born in odd-numbered years, the law inadvertently establishes an inequality. It disrupts the principle of equality before the law, a core tenet of a just legal system, by distinguishing between individuals based on their birth year, an arbitrary and unrelated factor. The seeming fairness stems from the law's attempt to balance pro-life and pro-choice perspectives, but this balancing act falls apart when the underlying equality principle is breached. It presents an interesting dilemma: how can a law be both fair (in trying to represent differing views) and unjust (in violating the equality principle) at the same time? This is where the concept of legal integrity comes into play. Integrity, in this context, refers to the consistency and coherence of the legal system and its ability to uphold its fundamental principles. When the checkerboard law breaches the equality principle, it compromises its own integrity. Therefore, the pursuit of legal integrity necessitates the adherence to the principle of everyone's equality before the law. In other words, any seeming points of justice and fairness in the law become meaningless if they compromise the overall integrity of the system.

In conclusion, the integrity of a legal system, built on fundamental principles like equality, is essential and must be upheld even when a law may seem fair on other grounds. The case of the checkerboard law underscores this necessity, illustrating that true justice cannot be achieved by piecemeal and arbitrary allocations of rights but requires consistent adherence to core legal principles.

### **1.6. Law as Integrity in Dworkin's Adjudication Theory: A Pioneer Guide of Judge Hercules**

The adjudication theory of Dworkin has shaped the centre of superior judge Hercules' judgements over the problems he confronted. Law as integrity in adjudication theory is an interpretation of past decisions ruled by other fellow judges to find the best answer based on fairness and justice as regards the problem brought before Hercules.<sup>158</sup> Keeping up with this understanding, a particular case to be interpreted as complying with the law as integrity can be touched upon, as Dworkin argued. This case is about deciding whether a person, who is not at the scene of the accident, has the right to compensation

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<sup>158</sup> Dworkin (n 141) 239-240.

for emotional injury caused by an accident that harmed her family. In the case, Ms McLoughlin, the plaintiff, suffered an emotional injury after hearing that her family got into an accident. When she went to the hospital, she encountered a situation in which her daughter died, and her husband and other children were seriously injured. As a result of this terrible scene, she suffered severe shock and sued Mr O'Brian, who is the defendant.<sup>159</sup> Assume that Judge Hercules must decide this case, the common-law case named *McLoughlin v O'Brian*, under the conception of law as integrity. In the first place, Hercules must search for cases ruled by other judges in the past to create pre-interpretive data for him to fit them into the current case. When he approaches the threshold of relevant cases to be examined at one point, if there is no requirement to expand the research, he must uncover the justifications for these cases. After that, he must draw his interpretation of the current case from these justifications by preserving the integrity of the chain of cases.<sup>160</sup>

Suppose the law as integrity is carried out step-by-step after completing the search of precedent cases. In that case, Hercules must determine the coherent theory of legal rights for emotional injuries caused by accident being convenient to the chain of cases he referred. He must adhere to the previous case law when he constructs the best interpretation of practice relating to emotional injuries and sets out his substantive political conviction on the issue. In this regard, as Dworkin suggests, Hercules can offer different interpretations and chooses one of them as the best interpretation of the relevant case at the end of the legal interpretation process based on the method of law as integrity.

In this regard, Hercules offers a shortlist indicating his prospective interpretations before reading the precedent cases regarding emotional injuries and probable legal right to compensation. Hercules presents the shortlist as follows:

- 1) No moral right to compensation except for physical injury.
- 2) The moral right to compensation for emotional injury if the claimant is at the scene.
- 3) The moral right to compensation when there is an economic interest in favour of all community or an opportunity to prevent high costs of like accidents.

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<sup>159</sup> *McLoughlin v O'Brian* [1983] 1 AC 410.

<sup>160</sup> Dworkin (n 141) 239.

- 4) The moral right to compensation for all injuries, regardless of whether they are foreseeable or not.
- 5) The moral right to compensation for all injuries if they are reasonably foreseeable.
- 6) The moral right to compensation for all injuries, if reasonably foreseeable, on the condition that it is not an unbearable financial burden for the defendant.<sup>161</sup>

Considering all features of interpretations, Hercules must unveil the relevant principles behind these interpretations to justify cited cases ruled before the case of *McLoughlin*. First, he decides that (1) and (2) can not be justified under the fitness and the principle of justice because (1) is not fit the past cases favouring the right to compensation for emotional damages. Though (2) is fit to past decisions that favour the right to compensation for emotional damages, it is not convenient to the principle of justice as it entitles a right to compensation for emotional damages only if the claimant is at the scene of the accident. When it comes to (3) aiming at the reduction of the economic cost of accidents, there can be found a coherent right to compensation for emotional damages if searching for the judgements that give importance to the economic interests of the community or macro-view of reducing the adverse effects of similar accidents, not focusing on an individual case. However, (3) cannot offer an interpretation based on justice and fairness, as well as prospect principles being embedded into their substance, being the grounds of law as integrity, because this interpretation is founded upon the arguments of policy that are contrary to the theory of Dworkin. The basis of theory mentions that Hercules must construct a set of principles based on justice and fairness, not flexible day-to-day policies.<sup>162</sup>

Furthermore, if returning to other interpretations, Hercules proposed interpretations (4), (5), and (6) are candidates for further investigation under law as integrity since they are fit to past decisions that entitle them to the right to compensation for injuries, whether physical or emotional. They are more well-structured than others to be considered under the virtues of justice and fairness. At this point, Hercules must expand his research to the past decisions relating to the right to compensation for all injuries. Suppose he finds a one-time decision granting the right to compensation for a physical injury only if the harm is reasonably foreseeable. With this past decision, arguments of (4) are invalid since it

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<sup>161</sup> Ibid 240-241.

<sup>162</sup> Ibid 243.

does not take into account foreseeability, and now they're required to extend the research for testing the rest of the interpretations, which are (5) and (6). What about this testing? The answer is clear: looking into the decisions related to imposing high economic costs and heavy financial burdens on the shoulders of defendants, in other words, the problem of liability. That is to say, the focal point to test (5) and (6) must be shifted from plaintiff to defendant to evaluate these interpretations properly. Afterwards, along with the end of the search of past decisions based on liability costs of accidents, suppose that Hercules finds a series of past decisions that fit (5) liability in more professions based on foreseeability. In contrast, the past decisions that fit (6) are about the liability in only lawyers with limited liability, even if they are more than past decisions that fit (5). In this sense, (5) works the integrity of law better than (6), given that (5) provides a wide-range liability for the foreseeable result of an accident with no limitation on liability. With this examination, Hercules refers to the importance of quality of decisions rather than quantity.<sup>163</sup>

Moreover, there are further questions in (5) and (6). Hercules will tackle the point of liability problem in such an accident and interrogate how the principle of community interprets this problem before examining the case based on political morality in the context of justice and fairness. Depending on the community's view, Hercules will review the case based on justice and fairness. If the community demands unlimited liability as long as it is foreseeable, this requires the value of fairness to be superior to justice in the eyes of the community; a procedural value comes to the front instead of substantive value.

On the one hand, if the community demands a limited liability based on foreseeability, the value of justice prevails the fairness since a substantive value exists according to the community. Here, Hercules must balance these two values against each other by contending arguments of principle. In such a private law case, Hercules might prefer political fairness to abstract justice, considering that this case is much more related to public rights than individual rights. On the other hand, if he had reversed the line from private law to constitutional law, Hercules' decision would have been affected by the nature of the constitutional law case that protects individual rights.<sup>164</sup>

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<sup>163</sup> Ibid 244-249.

<sup>164</sup> Ibid 249-250.

Whichever interpretation is preferred, he evaluates the morality of his arguments based on political morality, and will find the best right answer to the relevant case. In this regard, it can be articulated that Hercules interprets a hard case under two stages: First, he defines a group of interpretations that fit past decisions, which are justified in their context, in like cases, as the fitness stage. Then, he prefers one of them by contemplating political morality based on arguments of principle as the stage of integrity in the terrain of the community of principle.

## **2. Right Answer Thesis and Hard Cases: Discovering Best Right Answer in the Light of Arguments of Principle**

In the history of adjudication, answers have yet to be clear in the written rules to decide a hard case that requires more advanced arguments to be employed. A hard case is controversial and cannot be resolved by the current rules applied in the present case. According to Dworkin, this complexity would be resolved through the principles embedded in regulations. With this claim, Dworkin defends that judges have weak discretion on hard cases rather than strong ones defended by legal positivism.<sup>165</sup> In this regard, primarily, Dworkin argues a case, which is *Riggs v. Palmer*, as his famous example for the revelation of principles behind rules, whereas he points out the arguments of principle and genuine conflict of these principles in finding out the single right answer for a hard case as well as refers to many cases. The reason why the arguments of principle are employed is that the arguments of principle create individual rights. For this reason, judges must act in arguments of principle when ruling a judgement, not arguments of policy that create collective aims for the community as a whole, because the legislators use arguments of policy, and the judges are not legislators.<sup>166</sup>

Dworkin propounds that there is a one-right answer for hard cases in the sense of evaluative standards and emphasizes that ruling a judgement is not descriptive and analytical engagement by choosing given alternatives to the current problem in a hard case. Accordingly, one-right-answer can be discovered by only the moral arguments

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<sup>165</sup> Gordon Woodman, 'Dworkin's "Right Answer" Thesis and the Frustration of Legislative Intent: A Case Study on the Leasehold Reform Act' (1982) 45 *The Modern Law Review* 121, 122.

<sup>166</sup> See Raymond Wacks, *Hukuk Kuramını Anlamak: Hukuk Felsefesi ve Hukuk Kuramına Giriş* (Fatma Süzgün Şahin Ünver & Serdar Ünver tr., Astana Publishing 2017) 206-207.

based on principles if there is no accurate rule to be employed in the current hard case.<sup>167</sup> Then, this evaluation presents the best and one-right answer for this case. The stages regarding the creation of arguments of principle are multi-dimensional and arrive after completing the constructive interpretation in the current case. From this perspective, to make sense of the right-answer thesis, arguments of principle and its difference from the arguments of policy, and type of rights at the centre of right-answer thesis will be handled in this title.

### **2.1. Arguments of Principle: The Founding Corpus of Right-Answer Thesis**

In the theory of Dworkin, rights are created by principles in hard cases if there is no clear rule in the law to be applied to the case. The first case used by Dworkin to demonstrate the existence of principles, that is *Riggs v. Palmer*, can be reviewed. In this case, the main question is whether a person murdering his grandfather has the right of succession depending on his grandfather's will. In the law regulating this affair, there was no certain rule to be employed in the case, and formally the murderer could inherit. However, the court points out a principle that "No one shall be permitted to profit by his own wrong" and does not recognize the defendant's right to succession.<sup>168</sup>

The realization of abstract moral rights heading towards concrete legal rights is founded based on political morality, and entitling rights for individuals demands justice, fairness or another aspect of morality, not for developing any economic, social, or political aim.<sup>169</sup> For instance, a law providing a subsidy to aircraft manufacturers to improve national defence mechanisms is an argument of policy. At the same time, statutes passed in favour of anti-discrimination are an argument of principle. The former justifies a non-individuated political aim which is a collective goal. On the one hand, the latter explains an individuated political aim: a group right. At this point, another significant point needs to be emphasized: even if a law is formulated based on the argument of policy, its image in substance might be justified by an argument of principle.

For example, the law of subsidy can provide equal treatment for all manufacturers, and aircraft manufacturers can have the right not to be excluded from the business of

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<sup>167</sup> Ibid 208.

<sup>168</sup> Dworkin (n 140) 23.

<sup>169</sup> Guest (n 147) 90.



manufacture in the sense of this argument of principle. Similarly, the anti-discrimination law, which grants the right to non-discrimination of a group in the community, can be qualified by an argument of policy claiming that rules of employment that comply with anti-discrimination law undermine the justification of the current law, disrupting the public affairs in some work fields.<sup>170</sup> Thus, in the process of law-making, the legislative lays down the rules based on arguments of policy that aim at developing some collective goals for the community as a whole. In contrast, the judges decide the hard cases at hand by relying on the arguments of principle, which generate the rights, and grant the right to claim a person for these rights in the current situation. However, as mentioned above, a law based on the arguments of principle can be qualified by the arguments of policy, and another law based on the arguments of policy can be turned out a law generating the arguments of principle.

## **2.2. Classification of Rights in the Right Answer Thesis: From Background Rights to Legal Rights**

As mentioned, rights are individuated political aims. They develop a political decision that protects the state of affairs in which a person has the right to utilize some opportunity or resource. Furthermore, claiming a right requires the construction of genuine political theory when resolving a legal problem stemming from hard cases. In this regard, a well-structured political theory must distinguish different types of rights. First, this theory must distinguish the background or moral rights from institutional ones. The former serves a political aim that is not included in the current legal order. It is formulated based on general moral demand instead of constitutional demand to be recognized before the legal institutions. For example, as a moral right, suppose that a political theory provides a right to property to have others' properties. This is not legal under the constitution. In this case, this moral right is background right as unlawful. This moral right cannot be realized unless the constitution is amended to demolish the right to property or people rebel against the current regime to overthrow the established constitutional order. If this amendment is taken place, the right to property to have others' property would be recognized as an institutional right <sup>171</sup>.

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<sup>170</sup> Dworkin (n 140) 82-83.

<sup>171</sup> Ibid 93.

Accordingly, institutional rights are the character of established constitutional order. They provide a legal background for demanding a right, and the rights based on institutional rights are legal under the constitution. In other words, institutional rights are about how the legislative regulates the rules, what competencies it carries out, and what the functions of the general structure operate. Institutional rights are the question of what the character of the institutional system that generates legal rights deals with institutional rights.<sup>172</sup>

Second, this political theory must classify the rights as abstract and concrete. Abstract right is a general political aim not weighed against other political aims, which are other rights or policies. For example, speaking out about a right to free speech is an abstract right because it does not define a particular situation that the right to free speech is applied or not applied to resolve the conflict between the right to free speech and other rights. On the other hand, concrete right is a political aim that is weighed against different political aims, which are other rights and policies. Proceeding with the example given, the right to free speech becomes a concrete right if it is argued in a way that a newspaper has the right to publish some information on the national defence of the state because their publication does not violate the right to security of soldiers to be affected by this publication. In this respect, the right to free speech is weighed against other political aims, in this case, the rights of soldiers. Thus, it is turned out from an abstract right to a concrete right by balancing the right to publish a person against other competing rights of soldiers in a particular context.<sup>173</sup>

Consequently, this political theory must construct legal rights, which are concrete and institutional. The construction of political theory to contend competing rights or principles in a hard case stems from institutional rights. In this regard, if returning to Dworkin's superior judge Hercules to make sense of the connection between constructive interpretation and right answer thesis, it can be rendered for hard cases that first, Hercules must argue plausible interpretations that fit like cases in the past. Second, he must generate justifications for the cases he searched as pre-interpretive data. After all, Dworkin must construct a political theory to justify a newly argumentative proposal to prefer the best right answer from his pre-prepared interpretations at the beginning. At this

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<sup>172</sup> Ibid 101.

<sup>173</sup> Ibid 93.

point, his political theory must reveal the character of the institutional framework to indicate institutional rights and discover the institutional morality of the community as opposed to popular judgment in the community. The former reflects the historical and integral points of the community, while the latter merely shows off the prejudiced thoughts of ordinary men. To comprehend the morality of society in the sense of his political theory-based political morality, Hercules must base on some concepts from this institutional framework. For example, to decide whether a woman has a legal right to abortion, he can address the concept of dignity and justify the right to abortion in this sense after being compatible with the institutional morality of the community as well as taking into account fairness and justice in creating legal rights of parties in a hard case. As he balances the competing claims of parties under arguments of principle based on the concepts from the institutional history and morality of the community, he would reach the best interpretation of the current legal problem so that he would find the best and one right answer as far as he could with his best effort.<sup>174</sup>

From this point, in the last chapter, in terms of right to marry under Art. 12 of ECHR, the two ECtHR judgements on same-sex marriage will be examined under constructive interpretation and right answer thesis of Ronald Dworkin in a way that what extent these judgements are compatible with the theory of Dworkin? And how the best application of this theory can be applied to these judgements? On the one hand, if jumping out to the theory of Fuller, the ECtHR judgements on same-sex marriage will be examined in a way that what extent the ECtHR addresses the internal morality of law, morality of aspiration, and reciprocity between applicants and state, and how the best application of this theory can be applied to these judgements? All in all, the point of the last chapter is to describe the degree of the moral point of judgements and to generate solid moral arguments that need to be argued in these judgements in the context of the theories of Dworkin and Fuller.

### **III. MODERN NATURAL LAW INTERPRETATION OF THE EUROPEAN COURT OF HUMAN RIGHTS JUDGEMENTS ON SAME-SEX MARRIAGE BASED ON THE RIGHT TO MARRY UNDER ARTICLE 12 OF THE ECHR**

#### **A. Right to Marry Under ECHR and ECtHR**

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<sup>174</sup> See *ibid* 105-130.

The ECHR, under Art. 12, guarantees the right to marry and to found a family, stating: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” This implies the existence of two aspects: a right to marry and a right to establish a family. However, the scope of this right, its limitations, and the interpretation thereof have been a subject of extensive debate and interpretation before the (ECtHR).

The ECtHR has offered more clarity on the interpretation of Art. 12. It affirms that national laws should not restrict or reduce the right in such a way that it is effectively impaired. In the landmark case of *Rees v. the United Kingdom*, the court held that the ability to marry under Art. 12 refers to the traditional marriage between opposite sex couples. However, later in *Hämäläinen v. Finland*, it extended this scope, stating that Art. 12 also secures the fundamental right of transgender individuals to marry, although the court did not determine that there is a right to same-sex marriage under Art. 12.<sup>175</sup>

Despite such progressive decisions, the Court has often deferred to the principle of “margin of appreciation,” allowing member states to maintain their legal traditions and values. It is also evident from *Schalk and Kopf v. Austria*, where the Court ruled that the non-recognition of same-sex marriages does not violate Art. 12, respecting the Austrian law. Moreover, the Court acknowledged that Art. 12 must be evaluated in the light of present-day conditions and that same-sex couples can enjoy family life, protecting them under Art. 8.<sup>176</sup>

The Court’s jurisprudence on this issue exhibits a gradual but cautious evolution towards inclusivity and flexibility. However, concerns have been raised regarding the level of deference to national jurisdictions, such as in *Oliari and Others v. Italy*, where the Court emphasized states’ obligation to provide legal recognition to same-sex couples.<sup>177</sup> This highlights the need for a more consistent approach and a more progressive

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<sup>175</sup> *Rees v. UK* App no 9532/81 (ECHR, 17 October 1986), *Hämäläinen v Finland* App no 37359/09 (ECHR, 16 July 2014).

<sup>176</sup> *Schalk and Kopf v. Austria* App no 30141/04 (ECHR, 24 June 2010).

<sup>177</sup> *Oliari and Others v Italy* Apps nos 18766/11 and 36030/11 (ECHR, 21 July 2015).

interpretation of the right to marry, considering societal changes and the importance of respecting individual autonomy.<sup>178</sup>

In summary, the right to marry under the ECHR and the jurisprudence of the ECtHR represents a complex interplay between respect for national sovereignty and the Court's commitment to fundamental human rights. This tension continues to shape the contours of this right, highlighting the need for ongoing analysis and debate among legal scholars, policymakers, and human rights advocates.<sup>179</sup>

In light of this perspective, the historical evolution of the ECtHR's judgments concerning same-sex marriage will first be scrutinized. This examination will provide a foundation for understanding the facets of current judgments that are to be analyzed within the framework of modern natural law theories, specifically those proposed by Lon Fuller and Ronald Dworkin. Subsequently, the cases of *Schalk and Kopf v. Austria* and *Chapin and Charpentier v. France* will be evaluated against the theoretical concepts postulated by Fuller and Dworkin. The objective of this evaluation is to discern whether these cases align with these leading modern natural law theories and their associated principles.

## **B. The Historical Development of the ECtHR's Judgements on Same-Sex Marriage and the Cases of *Schalk and Kopf v. Austria* and *Chapin and Charpentier v. France***

The legal discourse around same-sex marriage before the ECtHR has been robust, with claims of violations under Art. 12 of the ECHR presented by same-sex couples. It's noteworthy that the trajectory of this discourse, as evidenced in cases like *Schalk and Kopf v. Austria* and *Chapin and Charpentier v. France*, has evolved in step with societal conditions and attitudes. The Court has progressively shifted from protecting the private lives of same-sex couples to advocating for their equal marriage rights.

The seminal case that first spotlighted the rights of same-sex couples was *Dudgeon v. United Kingdom*. The court scrutinized the intrusion of Northern Ireland's laws into a same-sex relationship under the purview of Art. 8 of the ECHR - the right to

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<sup>178</sup> See Jens M. Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights' (2013) 10 Equal Rights Review 83, 92.

<sup>179</sup> To understand debates regarding struggle for human rights, including right to marry, under ECHR see Loveday Hodson, *NGOs and the Struggle for Human Rights in Europe* (Hart Publishing, 2011).

respect for private life. Ruling in favor of the plaintiff, the court established a precedent for the protection of the private lives of same-sex couples. This precedent was subsequently invoked in the cases of *X, Y, and Z v. United Kingdom* and *W.J. and D.P. v. United Kingdom*, wherein the court examined same-sex relationships in light of Art. 8. Notably, these protections were seen through the lens of privacy, not family life.<sup>180</sup>

As societal conditions evolved over time, the need to expand the rights of same-sex couples became more evident. Consequently, the ECtHR revised its perspective, moving from the sphere of private life to encompass family life. This shift became apparent in cases like *Karner v. Austria* and *Kozak v. Poland*, where the Court, recognizing the notion of home and family life, extended tenancy rights to the surviving partners in same-sex relationships, thereby broadening the concept of family life as protected under Art. 8.<sup>181</sup>

Furthermore, the ECtHR has evaluated the concept of same-sex relationships in the context of the right to marry under Art. 12 of the ECHR. A landmark case in this line of jurisprudence was *Rees v. United Kingdom*, concerning a transsexual person's right to marry. The Court's ruling underscored the traditional understanding of marriage as a partnership between biologically opposite sex couples.<sup>182</sup> This traditional view was upheld in similar subsequent cases until the landmark decision of *Goodwin v. United Kingdom* led to a breakthrough reinterpretation of the concept of marriage. In this case, the court developed a new approach that recognized the post-operative sex of transsexuals when granting the right to marry, citing social changes in the institution of marriage since its first ruling on the issue, which was the *Rees* case. Consequently, the Court ruled that the applicant's right to marry had been violated, as she had transitioned from male to female and was prevented from marrying a man due to the law prohibiting such a marriage.<sup>183</sup>

On the one hand, in the case of *Schalk and Kopf v. Austria*, the ECtHR first addressed the issue of same-sex marriage, separate from the right of transsexuals to marry.

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<sup>180</sup> See Masuma Shahidi, 'Equal Marriage and European Courts' (2023) 23 ERA Forum 398, 399.

<sup>181</sup> Ibid 400.

<sup>182</sup> *Rees v. UK* (n 175) para 14.

<sup>183</sup> *Goodwin v. UK* App no 28957/95 (ECHR, 11 July 2002), paras 99-104.

An Austrian same-sex couple claimed that their right to marry under Art. 12 had been violated, as well as their right to respect for private and family life under Art. 8 in conjunction with Art. 14, arguing that they were discriminated based on their sexual orientation. The court made a decision that there was no violation of the right to marry under Art. 12, reiterating that the decision to grant same-sex marriage rights to same-sex couples falls within the margin of appreciation of member states, and afforded Austria a wide margin of appreciation, and pointed out that there is no European consensus among member states on granting same-sex marriage. Nonetheless, the case of *Schalk and Kopf v. Austria* is considered a landmark because it was the first instance in which the Court addressed the right to marry under Art. 12.<sup>184</sup>

Aftermath of this case, in the case of *Oliari and Others v. Italy*, the Court ruled that the Italian government must provide legal recognition for the applicants' same-sex relationships, consisting of three same-sex couples, in the form of civil partnerships, emphasizing the emerging consensus across Europe and the world on this issue. Although this decision marked further progress, the court did not grant same-sex marriage for the applicants under Art. 12 of the ECHR, reiterating the wide margin of appreciation granted to member states as repeated in the recent case on same-sex marriage, *Chapin and Charpentier v. France*.<sup>185</sup> In this case, a French same-sex couple claimed a violation of their right to marry under Art. 12, as well as their right to respect for private and family life under Art. 8 in conjunction with Art. 14. They lodged an application before the ECtHR against France. In its judgment, the Court reaffirmed its decision in *Schalk and Kopf v. Austria*, stating that neither Art. 12 nor the combination of Articles 8 and 14 required member states to allow same-sex couples the right to marry, and adopted same conclusion in its previous decision in *Oliari and Others v. Italy*, handed down on July 21, 2015. Considering the brief time that has passed since this ruling, the Court found no justification for deviating from the settled conclusion in the case of *Chapin and Charpentier v. France*.<sup>186</sup>

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<sup>184</sup> See Shahidi (n 180) 402.

<sup>185</sup> See Frances Hamilton, 'The Case for Same-Sex Marriage Before the European Court of Human Rights' (2018) 65 Journal of Homosexuality 1582, 1584-1591.

<sup>186</sup> *Chapin and Charpentier v. France* App no 40183/07 (ECHR Press Release, 9 June 2016), pp. 1-2.

From this perspective, the first section will summarize the facts of *Schalk and Kopf v. Austria* and *Chapin and Charpentier v. France*, as these two cases are crucial in highlighting the ECtHR's approach to same-sex marriage. Following this, in the second section, these judgments will be evaluated within the context of Lon Fuller's and Ronald Dworkin's theories. Particularly, the extent to which these judgments align with Fuller's concepts of "Morality of Aspiration, Internal Morality of Law, and Reciprocity" as well as Dworkin's concepts of "Law as Integrity and Right-Answer Thesis" will be explored. The former concepts pertain to Fuller's theory of law, while the latter concepts are associated with Dworkin's adjudication theory.

## **1. The Summary of Facts and ECtHR's Rulings in the cases of *Schalk and Kopf v. Austria* and *Chapin and Charpentier v. France***

### **1.1. *Schalk and Kopf v. Austria***

*Schalk and Kopf v. Austria* was a landmark case decided by the ECtHR on June 24, 2010. The case involved two Austrian nationals, Horst Michael Schalk and Johann Franz Kopf, who were in a same-sex relationship and sought to be legally recognized as a couple through marriage. Schalk and Kopf applied for marriage in Vienna, Austria, but their application was rejected by the Vienna Municipal Office, citing that Austrian law did not permit same-sex marriages.

The couple brought this decision before Austrian courts, claiming that the refusal to grant them the right to marry violated their rights under the right to marry under Art. 12 and the prohibition of discrimination under Art. 14 of the ECHR. The Austrian courts dismissed their case, leading Schalk and Kopf to take their case to the Austrian Constitutional Court, which dismissed their application as the lower courts did. Having exhausted domestic remedies, the applicants lodged an application before the ECtHR.<sup>187</sup> The ECtHR found that Art. 12 as well as Art. 8 in conjunction with Art. 14 did not insist an obligation on states to grant same-sex couples access to marriage, as this provision was framed with the traditional understanding of marriage as being between opposite sex couples, and ruled that there is no violation of the right to marry under Art. 12. The Court also decided that there was no violation of the right to respect for private and family life under Art. 8 in conjunction with the prohibition of discrimination under Art. 14,

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<sup>187</sup> *Schalk and Kopf v. Austria* (n 176) paras. 7-14.



considering that the Austrian government had taken positive steps to recognize same-sex couples through the Registered Partnership Act, which came into force in January 2010.

The Court noted that there was an emerging European trend towards legal recognition of same-sex couples, but it was not a common ground to require states to provide same-sex couples with the same access to marriage as opposite-sex couples. Although the court did not find a violation of the ECHR in this case, the ruling was significant as it recognized same-sex relationships as a form of “family life” under Art. 8 by highlighting its previous case law in support of the applicants, paving the way for future progress in equal marriage rights for same-sex couples in Europe.<sup>188</sup>

## **1.2. *Chapin and Charpentier v. France***

*The Chapin and Charpentier v. France* was the recent case on same-sex marriage decided by the ECtHR on 9 June 2016. French nationals Stephane Chapin and Bertrand Charpentier applied for marriage in Bègles, but the public prosecutor objected. Despite the objection, the mayor performed the ceremony. The prosecutor then sought annulment, which was granted by the Bordeaux tribunal de grande instance and upheld by the Bordeaux Court of Appeal. They appealed to the Court of Cassation, but the court dismissed the couple’s appeal. As a result, the couple applied to the ECtHR to settle for the case.<sup>189</sup>

The ECtHR, in *the Schalk and Kopf v. Austria*, acknowledged that the right to marry under Art. 12 applied to the applicants’ complaint but did not impose countries to grant same-sex couples the right to marry. This stance was reiterated in subsequent cases, such as *Oliari and Others v. Italy*. The Court found no justification to change its conclusion in the present case. Since 2013 law came into force in France allowed same-sex marriage, the applicants had right to marry, and therefore, there was no violation of Art. 12 in conjunction with Art. 14. The Court reaffirmed that under Articles 14 and 8, states have the freedom to limit marriage to opposite-sex couples and have some flexibility in determining the legal status of alternative forms of recognition. At the time, the applicants could have entered a civil partnership (PACS) under Article 515-1 of the Civil Code, which granted certain rights and obligations related to taxes, property, and

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<sup>188</sup> Ibid paras. 94-108.

<sup>189</sup> *Chapin and Charpentier v. France* (n 186) 1.

social protection. The court emphasized that it was not obligated to provide an in-depth analysis of the differences between marriage and PACS. It observed that the situation was consistent with trends in other member states and found no proof that the respondent state had overstepped its discretion. The court also highlighted that same-sex couples could marry in France since the 17 May 2013 law. Consequently, there was no violation of Art. 8 in conjunction with Art. 14.<sup>190</sup>

### **C. The Evaluation of the Cases of *Schalk and Kopf v. Austria* and *Chapin and Charpentier v. France* Under Art. 12 of the ECHR Considering the Central Concepts of Lon Fuller's and Ronald Dworkin's Theories**

In this section, the cases of *Schalk and Kopf v. Austria* and *Chapin and Charpentier v. France* will be examined through the lens of the central concepts embedded in the theories of Fuller and Dworkin. In Fuller's legal theory, these concepts include the "Internal Morality of Law," "Morality of Aspiration," and "Reciprocity." For Fuller's concepts associated with his legal theory, "Internal Morality of Law" involves examining whether the judges in the current cases have structured their decisions to be compatible with the eight basic requirements of legality: generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time, and congruency. "The Morality of Aspiration" entails evaluating whether same-sex marriage, as presented in these cases, serves as a foundation for advancing human potentialities in their best form. "Reciprocity" involves examining the extent to which the current cases align with a conversational interaction between citizens and lawmakers in fulfilling their reciprocal duties.

As for Dworkin's concepts stemming from his adjudication theory, "Law as Integrity" evaluates whether the current cases fit the doctrinal history of previous cases, whether justifications are inferred by the judges from similar cases, and whether the creation of genuine justifications is an integral part of the Court's institutional morality. Lastly, "Right-Answer Thesis" examines the extent to which the current cases create legal rights in a hard case, assessing whether they conform to the line of moral, institutional, and legal rights while considering arguments of principle.

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<sup>190</sup> Ibid 2-3.

## **1. Evaluating *Schalk and Kopf v. Austria*: An Analysis Based on Fuller's Theoretical Concepts of Internal Morality of Law, Morality of Aspiration, and Reciprocity**

### **1.1. Evaluation Based on Eight Basic Requirements of Legality**

In the theory of Fuller, as indicated in the second chapter, the law is subjecting human conducts to the governance of law. To make realize this aim, Fuller offers eight basic requirements of legality to assess the procedural moral value of existing laws, whatever they are cases, statutes or regulations.<sup>191</sup> Considering Fuller's eight basic principles for legality in *Schalk and Kopf v. Austria*, the Austrian legal system and the ruling of the ECtHR can be analyzed as follows:

- a. Generality: Austrian law applied the same rules to all citizens regarding marriage, and it did not single out specific individuals or groups for different treatment. However, the law did not recognize same-sex couples, which could be seen as a failure to treat all individuals equally.
- b. Promulgation: Austrian law and the ECHR were publicly available, and the proceedings in the case were transparent, fulfilling the principle of publicity.
- c. Non-retroactivity: Austrian law and the ECHR are prospective in nature, meaning they apply to future conduct rather than past actions. This principle was upheld in the case.
- d. Clarity: The legal provisions governing marriage in Austria were clear, and the ECtHR's decision was based on a clear interpretation of Art. 12. However, one could argue that the interpretation of Art. 12 could evolve over time, and it might not have been clear to the applicants that their claim would be denied.
- e. Non-contradiction: The ECtHR's decision was consistent with its prior rulings, which had not recognized a right to same-sex marriage under Art. 12. However, one could argue that the decision was inconsistent with the broader trend toward recognizing same-sex marriage rights in other jurisdictions.

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<sup>191</sup>To gain a comprehensive understanding of these requirements and explore specific case examples that demonstrate an effective legal system under the principle of legality, see Lon L. Fuller, *the Morality of Law* (revised edn, Yale University Press 1969) 33-81.

f. Possibility of compliance: The legal provisions governing marriage in Austria were practicable, as they could be effectively applied and enforced. The ECtHR's decision did not introduce new impracticable requirements.

g. Constancy through time: The legal system remained stable throughout the case, with the courts following established procedures and adhering to the rule of law.

h. Congruence between declared rule and official action: The decision in *Schalk and Kopf v. Austria* aligned with the written laws of Austria and the interpretation of the ECHR made by the ECtHR. However, some may argue that the decision did not align with the broader social values and evolving understanding of marriage in society.

In conclusion, *Schalk and Kopf v. Austria* through Fuller's lens of legal principles, the case largely fulfills the eight foundational requirements of a robust legal system. Nevertheless, the case raises pointed questions about the differential treatment of same-sex couples under Austrian law and the interpretation of Art. 12 by the ECtHR. In particular, the principle of generality, while upholding the uniform application of marriage laws, fails to recognize same-sex couples, revealing a disconnect between formal equality and substantive fairness. Furthermore, while the principle of clarity is preserved in the specific legal provisions governing marriage, the evolving interpretations of Art. 12 cast a shadow of ambiguity on potential future claims.

Additionally, the tension between non-contradiction and congruence principles is striking when considering broader societal values and changing perspectives on same-sex marriage. Although the ECtHR's ruling was consistent with its prior rulings, it may not align with broader societal values and the growing acceptance of same-sex relationships. Considering the global trend towards recognizing same-sex relationships, one could argue for an evolved interpretation of Art. 12 to include the right to same-sex marriage. This stance aligns with Helfer and Voeten's analysis of the ECtHR's evolving stance, emphasizing the significance of societal norms in shaping court interpretations and decisions.<sup>192</sup>

## **1.2. Evaluation Based on Morality of Aspiration and Reciprocity**

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<sup>192</sup> Laurence R. Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 International Organization 77, 85-87.

To evaluate this case under Fuller's theory of law, it is essential whether the ruling aligns with the "morality of aspiration" and "reciprocity between citizens and state."<sup>193</sup>

Fuller believed that the law should aim to be moral and just. In *Schalk and Kopf v. Austria*, the couple argued that their inability to marry constituted discrimination based on their sexual orientation. To assess whether the ECtHR's ruling aligns with the morality of aspiration, one must consider if the Court's interpretation of Art. 12 is just and fair. The Court recognized that social attitudes towards same-sex couples have evolved over time but maintained that the language of Art. 12 does not explicitly grant the right to marry to same-sex couples. However, the Court also noted that states have the freedom to decide whether to extend marriage rights to same-sex couples, and encouraged the Austrian government to continue its legislative efforts in providing legal recognition to same-sex partnerships. While the ruling did not recognize a right to same-sex marriage under Art. 12, it can be argued that it struck a balance between preserving the language of the Convention and encouraging progress towards equal rights. Consequently, it can be argued that the Court's ruling aligns with the morality of aspiration in promoting the legal recognition of same-sex partnerships. However, it falls short of fully embracing this concept by not granting same-sex couples the right to marry and form a family, which would support their personal growth within society, just as it does for opposite-sex couples.

According to Fuller, the relationship between citizens and the state should be based on reciprocity, with the state respecting citizens' rights and citizens, in turn, respecting the law. In *Schalk and Kopf v. Austria*, the ECtHR ruling, by not finding a violation of Art.12, effectively upheld the Austrian government's decision not to extend the right to marry to same-sex couples at the time. This may be seen as a limitation on the reciprocity between citizens and the state, as it can be argued that the state was not fully recognizing and respecting the rights of its LGBTQ+ citizens. However, it is significant to highlight that the ECtHR also emphasized the evolving nature of social attitudes and

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<sup>193</sup> To grasp the moral dimensions of law that guide individuals towards their fullest potential, as well as the reciprocal relationship between lawmakers and citizens, which is a necessary precondition for the law's moral function in directing human behavior according to established rules, see Fuller (n 114) Chapter I and Chapter IV.

the potential for legal recognition of same-sex partnerships, which could ultimately lead to a more reciprocal relationship between citizens and the state.

As a conclusion, under Fuller's legal philosophy, the case of *Schalk and Kopf v. Austria* illustrates a nuanced application of the "morality of aspiration" and the concept of "reciprocity between citizens and state." While the ECtHR's decision acknowledges societal shifts towards greater acceptance of same-sex relationships, it hesitates to extend marriage rights to same-sex couples explicitly, somewhat curbing the pursuit of "aspiration" to full equality under the law. This reluctance, however, is somewhat balanced by the court's emphasis on member states' freedom to enhance legal recognition for same-sex partnerships, signaling a nod towards progress within the confines of the Convention's literal language.<sup>194</sup>

Furthermore, the principle of reciprocity between the state and its citizens seems compromised, as the Court's decision essentially upheld Austria's refusal to extend marriage rights to same-sex couples. Despite this, the ECtHR underscored the evolving societal attitudes towards same-sex partnerships and the increasing potential for their broader legal recognition. This perspective suggests a trajectory towards an enhanced reciprocal relationship between states and their LGBTQ+ citizens. Although not wholly satisfying Fuller's "morality of aspiration" and "reciprocity" principles, the case reflects the law's potential to evolve alongside societal norms, embodying the dynamic nature of Fuller's "internal morality of law."

## **2. Evaluating *Schalk and Kopf v. Austria*: An Analysis Based on Dworkin's Theoretical Concepts of Law as Integrity and Right Answer Thesis**

### **2.1. Evaluation Based on Law as Integrity**

In *Schalk and Kopf v. Austria*, the ECtHR had to consider whether Art. 12, which guarantees the right to marry and found a family, applies to same-sex couples. The ECtHR, in this case, concluded that Austria's refusal to grant same-sex couples the right to marry did not violate Art. 12, as the Court did not explicitly recognize same-sex marriage. The ECtHR's decision can be seen as fitting within the existing legal framework

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<sup>194</sup> Fuller (n 114) 33-38.

of the ECHR, as it was based on the text and interpretation of Art. 12 and aligns with the institutional history of the Court, respecting the outcomes of previous case law as well.

Moreover, Dworkin's principles of justification and integrity within "law as integrity" require judges to provide an interpretation of the law that is both coherent with existing legal practices and morally justifiable when ruling on a case. At the time of the case, the Court observed that a European consensus on same-sex marriage had not yet been established, and therefore, the Court could not impose a new interpretation of Art. 12 that would include same-sex marriage. From the perspective of the principle of justification, the Court's decision can be seen as consistent with existing legal principles and community values, as it revealed the justifications of previous case law concerning same-sex marriage. In this regard, the Court respected the margin of appreciation afforded to states in interpreting the right to marry and recognized that states were in the process of evolving their understanding of the issue. However, as mentioned in the second chapter, "law as integrity" as a constructive interpretation method in law involves a newly articulated justification for a hard case brought before judges that is different from previous justifications to contribute to the current chain of decisions made by other fellow judges in the institutional history without breaking down the integrity of the system. From this perspective, the decision may be more contentious and likely unsatisfying. It could be argued that the Court missed an opportunity to promote greater equality and recognize the rights of same-sex couples by not creating a political theory as the basis for the right to marry for same-sex couples. For instance, the court could have developed an original justification for the right of same-sex couples to marry based on the recognition of the right to marry for transsexual persons who transitioned from male to female in the case of *Goodwin v. United Kingdom*.<sup>195</sup>

Consequently, under Dworkin's "law as integrity" as part of his adjudication theory, the ECtHR's decision in *Schalk and Kopf v. Austria* can be seen as adhering to the principle of fit as the part of "law as integrity," by respecting the margin of appreciation and European consensus doctrines adopted in previous judgments on the issue. Thus, it is consistent with existing legal principles and institutional history of the Court. In terms of justification, the court reveals the reasons behind previous judgments that denied the right to marry for same-sex couples. However, by not granting marriage

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<sup>195</sup> See *Goodwin v. United Kingdom* (n 183).

rights to same-sex couples, the court missed an opportunity to offer a valid and authentic justification, as well as contribute to the evolving body of judicial decisions on same-sex marriage, and it is incompatible with the ideal of integrity, as it fails to advocate for equality and recognition of their right to marry under Art. 12 of the ECHR.

## **2.2. Evaluation Based on Right Answer Thesis**

Following the concept of law as integrity, Dworkin's right-answer thesis focuses on finding the right answer through legal principles, including moral principles. In this case, the ECtHR relied on the historical understanding of marriage and the lack of consensus among member states to justify its decision. However, under Dworkin's thesis, the ECtHR should have gone beyond the historical understanding and engaged in a deeper analysis of the moral principles at stake. These principles may include dignity, autonomy, and equality, which could potentially lead to a different outcome.

The principle of equality could be employed to argue that denying the right to marriage for same-sex couples is discriminatory. This is because it treats them differently from opposite-sex couples without a valid reason, which goes against Dworkin's "right to treatment as an equal."<sup>196</sup> From the argument of principle, several sub-principles can be derived. For instance, the principle of dignity could support the right to treatment as an equal by acknowledging the inherent worth of all individuals, including same-sex couples and their right to form legally recognized partnerships.

Furthermore, the principle of autonomy could argue that individuals should have the right to decide whom they wish to marry, regardless of their partner's gender, and support the right to treatment as an equal under Art. 14 of the ECHR. More importantly, in *Schalk and Kopf v. Austria*, the Court could consider balancing various competing principles. This balance could be achieved between the right to treatment as an equal of same-sex couples under Art. 14 of the ECHR in conjunction with Art. 12 and potential restriction grounds under the court's doctrines used to deny same-sex couples the right to marry within the context of member states' acceptance of the traditional definition of

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<sup>196</sup> Dworkin distinguishes between "the right to equal treatment" and "the right to treatment as an equal" under the concept of equal concern and respect. The former pertains to the distribution of goods and opportunities at an equal level for everyone, while the latter addresses the provision of the same treatment for everyone without discrimination. See Ronald Dworkin, *Taken Rights Seriously* (Harvard University Press 1978) 273.



marriage. These doctrines are the margin of appreciation and European consensus. The former principles could represent arguments of principle, while the latter doctrines could represent arguments of policy.

By doing so, the right answer to whether the right to marry should be recognized for same-sex couples can be determined by adhering to the three prongs of Dworkin's right answer thesis: moral right, institutional right, and legal right, provided the case passes all tests. In discussing the moral right of same-sex couples, the Court could argue for the liberty as independence, dignity, and autonomy of same-sex couples to realize their potential in their best form, addressing these concepts as moral rights. By pursuing this approach, the Court could contend for the right to treatment as an equal under the non-discrimination right of Art.14 of the ECHR, relying on the aforementioned concepts to establish the institutional right of same-sex couples. Lastly, the court could recognize their legal right to marry under Art.12 of the ECHR..<sup>197</sup>

In conclusion, under Dworkin's right-answer thesis, the moral rights would encompass dignity and autonomy, asserting that individuals possess inherent worth and should have freedom to make personal decisions, like choosing a marriage partner, without interference.<sup>198</sup> Institutional rights hinge on the non-discrimination principle under Art. 14 of the ECHR, demanding equal treatment of same-sex couples. The ECtHR's decision in *Schalk and Kopf v. Austria* may be seen as not treating same-sex couples as equals, potentially leading to a violation of institutional rights. Legal rights extend to the right to marry under Art. 12 of the ECHR. In this context, the ECtHR's decision could be viewed as not fully recognizing the emerging legal rights of same-sex couples. Dworkin's theory suggests laws should be consistent, with legal interpretation being just and fair. A deeper analysis of the legal rights of same-sex couples, reflecting evolving social norms, might have provided the right answer according to Dworkin's right-answer thesis.<sup>199</sup>

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<sup>197</sup> In terms of the concept of liberty, Dworkin distinguishes between "liberty as license" and "liberty as independence." The former implies a liberty without any restrictions, while the latter advocates for a liberty that may be limited in favor of others' competing interests or rights under certain circumstances. See *ibid* 262-263.

<sup>198</sup> Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 72-103.

<sup>199</sup> Dworkin (n 141) 410-420.

Thus, the ECHR's decision in *Schalk and Kopf v. Austria* could be seen as falling short in engaging with the relevant moral, institutional, and legal rights of same-sex couples, leading to an unjust result that fails to fully recognize their evolving rights and social status.

### **3. Evaluating *Chapin and Charpentier v. France*: An Analysis Based on Fuller's Theoretical Concepts of Internal Morality of Law, Morality of Aspiration, and Reciprocity**

#### **3.1. Evaluation Based on Eight Basic Requirements of Legality**

Applying Fuller's eight basic principles for legality to *Chapin and Charpentier v. France*, the French legal system and the ruling of the ECtHR can be analyzed as follows:

- a. Generality: The French law and the ECHR applied generally to all individuals in France, regardless of their sexual orientation. However, the laws at the time did not explicitly include same-sex marriage.
- b. Promulgation: Both the French law and the ECHR were published and available to the public, satisfying the principle of promulgation.
- c. Non-retroactivity: The laws were not applied retroactively in this case. The couple filed their application after they were denied the right to marry.
- d. Clarity: The French law and the ECHR were clear in stating the right to marry but did not explicitly include same-sex marriage. This lack of clarity may have contributed to the couple's confusion about their rights.
- e. Non-contradiction: There was no apparent contradiction between the French law and the ECHR regarding the right to marry.
- f. Possibility of compliance: The couple's inability to marry under French law at the time was not due to their inability to comply with the law, but rather due to the law not including same-sex couples in its provisions.
- g. Constancy through time: The French law and the ECHR remained constant throughout the proceedings, and the couple's rights were not arbitrarily changed during the process.

h. Congruence between declared rule and official action: In this case, the French officials acted in accordance with the law as it was at the time, even though it did not explicitly include same-sex marriage.

Based on this evaluation, the French law on marriage, as applied in the case of *Chapin and Charpentier v. France*, complied with the principles of Lon Fuller's concept of internal morality of law. However, one could argue that the ECtHR's interpretation of Art.12 in this case did not fully consider the evolving understanding of human rights and the principle of equality. At the time of the decision, several countries had already recognized same-sex marriage, and the Court could have interpreted Art. 12 more progressively to include the right to marry a person of the same sex.<sup>200</sup> This could have led to a more inclusive and morally just outcome for the applicants and other same-sex couples.

### **3.2. Evaluation Based on Morality of Aspiration and Reciprocity**

To evaluate *Chapin and Charpentier v. France* under these concepts, it can be examined that how the ECtHR ruling and the French law on marriage affected the applicants' aspirations and the reciprocity between them and the lawmakers. By denying the applicants the right to marry, the French law and the ECtHR's ruling arguably hindered the applicants' ability to achieve their full potential and self-realization. Marriage is an important institution that allows individuals to express their love, commitment, and support for one another. By excluding same-sex couples from this institution, the law limited the applicants' ability to fully participate in society and achieve a sense of dignity and respect.

The principle of reciprocity requires lawmakers to create fair and just laws that respect citizens' rights and dignity. In *Chapin and Charpentier v. France*, French lawmakers had created a law that prohibited same-sex marriage, which the ECtHR upheld. The applicants, as citizens, were expected to comply with this law. However, the law may be seen as failing to respect the applicants' rights to equal treatment in the society and recognition, as it excluded them from the institution of marriage solely based on their sexual orientation.

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<sup>200</sup> ILGA, 'State Sponsored Homophobia Report' (2020) < <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview> > accessed 22 May 2023.

In conclusion the ECtHR's decision in *Chapin and Charpentier v. France* upheld the French law on marriage, which did not acknowledge same-sex marriage at that time. As a result, the Court might not have effectively promoted Fuller's principles of morality of aspiration and reciprocity between citizens and lawmakers. The ruling restricted the applicants' opportunities for personal growth and self-realization and did not fully recognize their rights to equal treatment under the law. Therefore, the ECtHR's ruling in this case did not adequately adhere to Fuller's concepts of morality of aspiration and reciprocity. It is crucial to acknowledge, however, that the ECtHR's interpretation of Art. 12 in this case could have been influenced by the legal context at that time and the conservative approach of earlier case law, such as *Schalk and Kopf v. Austria*.

#### **4. Evaluating *Chapin and Charpentier v. France*: An Analysis Based on Dworkin's Theoretical Concepts of Law as Integrity and Right Answer Thesis**

##### **4.1. Evaluation Based on Law as Integrity**

In this case, the Court maintained that Art. 12 of the Convention enshrines the traditional concept of marriage as being between opposite sex couples, reiterating its conservative approach to the institution of marriage. The court emphasized that the scope of Art. 12 does not impose an obligation on contracting states to grant the right to marry to same-sex couples. This decision is coherent with the Court's previous decisions regarding the right to marry, and fit to the institutional history of the Court.

However, Dworkin's concept of law as integrity under his adjudication theory stresses the justification and integrity as other stages of law as integrity. When considering the court's convenient to the indication of justification in its previous case law may be sufficient as reiterating the outcomes of *Schalk and Kopf v. Austria* and *Oliari and Others v. Italy*. Yet, the Court should have gone beyond this justification, which includes the similar words that the margin of appreciation is wide in moral matters or there is no European consensus among member states. Justification phase of law as integrity entails a genuine and newly constructed justification to contribute to the chain of other judges justifications on the same problem. Even if the previous case law justifications did not recognize the right to marry of same-sex couples, the Court could

have shifted from its conservative approach considering the evolving social changes regarding the same-sex marriage in member states as well as world.<sup>201</sup>

In this regard, as a genuine justification, dynamic interpretation could be replaced with European consensus by not taking the consensus as pure majoritarian, but taking an emerging trend.<sup>202</sup> Compared to *Schalk and Kopf v. Austria* as the first case discussing the same-sex marriage, the Court should have advanced its arguments under the principle of equality and fairness leading to the recognition of the right to marry of same-sex couples. On the other hand, the court's decision not to find a violation of Art. 12 may not align with promoting fairness and equality for same-sex couples under the ideal of integrity entailing the protection of these principles to secure the integrity of law. For this reason, this decision could be seen as inconsistent in promoting fairness and equality in marriage rights for same-sex couples. Furthermore, Dworkin's adjudication theory emphasizes the importance of finding the best-fitting and morally sound interpretation of existing legal principles. Given that *Chapin and Charpentier v. France* is the last case regarding the right to marry under Art.12 of the ECHR, the Court's interpretation of Art 12 should have represented the most morally sound position, considering the evolving understanding of marriage in modern societies. Many countries have recognized same-sex marriage as a fundamental right, and public opinion has shifted significantly in recent years. By maintaining a narrow interpretation of Art.12, the Court might not be adopting the most morally sound position in light of these developments.

Consequently, the ECtHR's ruling on *Chapin and Charpentier v. France* can be seen as coherent with existing legal principles but may not align with the values of fairness, equality, and morally sound interpretation as emphasized in Dworkin's conception of law as integrity under his adjudication theory. The former represents the fitness, while the latter represents the justification and integrity.

#### 4.2. Evaluation Based on Right-Answer Thesis

Dworkin emphasizes the importance of legal principles in guiding judicial decision-making. In the case of *Chapin and Charpentier v. France*, there are several

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<sup>201</sup> See Masuma Shahid, 'The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments concerning Equal Marriage Rights (2017) 10 Erasmus Law Review 184, 194.

<sup>202</sup> Ibid.

principles and values at play, including the right to marry, non-discrimination, human dignity, autonomy and the evolving understanding of family and marriage.

The Court's decision not to find a violation of Art. 12 was based on its interpretation of the scope of the right to marry, which emphasizes the traditional concept of marriage as being between the opposite sex couples. In doing so, the Court gave more weight to the principle of adhering to the traditional concept of marriage over the principles of non-discrimination and evolving moral values.

Moreover, Dworkin's approach would require judges to balance competing principles in determining the right answer. In this case, the Court could have placed greater emphasis on the principles of non-discrimination and evolving moral values as integral components of the principle of equality. Pursuing this approach, the three-prong test of moral right, institutional right, and legal right could be satisfied. As highlighted in the evaluation of *Schalk and Kopf v. Austria*, the Court might have invoked Dworkin's concepts of "right to treatment as an equal," "liberty as independence," and "human dignity and autonomy" to establish a moral right to marry for same-sex couples. Subsequently, the Court could have employed the right to non-discrimination and the principle of equality under Art. 14 of the ECHR to demonstrate the institutional right of same-sex couples. Ultimately, the Court could have established a legal right by weighing various competing principles and prioritizing the principles of equality and non-discrimination.

It is worth mentioning that many countries have recognized same-sex marriage as a fundamental right, and public opinion has undergone significant changes in recent years. By giving more importance to these principles, the Court might have reached a different conclusion, identifying a violation of Art. 12 or examining the complaint under Art. 14 of the ECHR. This alternative outcome would demonstrate a more cohesive and consistent application of principles, taking into account broader moral values and the significance of the principle of equality and non-discrimination.

In summary, according to Dworkin's right-answer thesis, the ECtHR's decision in *Chapin and Charpentier v. France* may not exemplify the one correct answer thesis in this case when considering the weighting and balancing of relevant principles. Dworkin posits that principles should be weighted and balanced to derive a morally just outcome. Here, the Court's traditional interpretation of marriage potentially overlooked the

principles of non-discrimination and equality, resulting in an outcome that might be seen as insufficient in Dworkin's perspective. The failure to account for the evolving societal norms and interpretations of marriage further amplifies this discrepancy.

A closer alignment with Dworkin's thesis could have been achieved by considering the global trend towards recognizing same-sex marriage and the shift in public opinion<sup>203</sup>. This approach urges judges to integrate these societal changes and moral principles into their decisions, ensuring that law reflects evolving moral values and principles of equality and non-discrimination. Consequently, the decision in *Chapin and Charpentier v. France* appears to fall short of Dworkin's "one right answer", suggesting a scope for further jurisprudential evolution.

## CONCLUSION

### A. Concluding Remarks

This thesis principally analyzes modern natural law and its reflection on the case law of the ECtHR in the context of same-sex marriage under Art. 12 of the ECHR. To evaluate this accurately, it was essential to understand the roots of modern natural law. Thus, a brief overview of the evolution of natural law, from the Greco-Roman period through after the Second World War, was presented, highlighting its gradual development under three distinct categories: traditional natural law, natural rights (social contract theories), and modern natural law. In this regard, the epistemological sources of natural law, namely god, human nature, and self-evident principles, are crucial for classification and for distinguishing the development of natural law across different historical periods were explained.

Having understood the historical progression of natural law, we delved into modern natural law theories, focusing on the central arguments of two leading philosophers in this area, Lon Fuller and Ronald Dworkin. Subsequently, the thesis aimed to answer its primary research question: What are the reflections of modern natural law in the judgments of the ECtHR regarding same-sex marriage? In pursuit of this answer, the theories of Fuller and Dworkin were employed, utilizing the central concepts embedded within their frameworks. Addressing the central research question, covered in

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<sup>203</sup> ILGA, 'State Sponsored Homophobia Report' (2020) < <https://ilga.org/state-sponsored-homophobia-report-2020-global-legislation-overview> > accessed 22 May 2023.

the final chapter, it was found that the reflections of modern natural law concepts in these judgments are varied. Generally, the judgments comply with Fuller's legal theory and Dworkin's theory of adjudication. However, they fall short in terms of their ethical reasoning, which is a fundamental aspect of both theories, thus compromising their legal quality in the context of modern natural law. These shortcomings primarily stem from the failure to recognize the equal marriage rights of same-sex couples to marry under Art. 12 of the ECHR, and the lack of exploration of the moral implications of these theories, as exemplified by Fuller's morality of aspiration and Dworkin's right answer thesis. On the other hand, the research results highlight that even if the judgments of the ECtHR were to fully reflect modern natural law in terms of same-sex marriage, this would not be sufficient to evaluate the concept of same-sex marriage under Art. 12 of the ECHR.

While the theories of Fuller and Dworkin offer significant insights, they have certain shortcomings in guiding the ethical aspects of same-sex marriage. Modern natural law, as incorporated into Fuller and Dworkin's theories, aims to establish independent and self-evident ethical principles. However, these theories seem to overlook a critical stage in the generation of these principles: the epistemological value they possess. For instance, in his constructive interpretation and right-answer thesis, Dworkin confines legal principles within a chain of pre-existing laws that address the current legal problem before a particular judge. This constraint, while providing a specific sphere for the judge to create arguments based on principles and to balance competing principles, overlooks the creation of these principles and their balancing necessitates a consideration of their epistemological values in relation to human values. This horizontal view may necessitate unconventional decisions that could disrupt the integrity of the legal chain. This is especially pertinent when considering that the arguments of principles and rights, which are created based on these principles, may not always be deduced from the existing framework.

In the same manner, Fuller's legal theory is also not adequately structured to evaluate the morality of ECtHR judgements concerning same-sex marriage. This is because, Fuller's eight basic requirements of legality are designed to ensure an effective legal system, outlining certain procedural rules that need to be considered before laws are made. Although these requirements contribute to the moral aspects of laws, excessively oppressive regimes can manipulate all of these requirements to create a malevolent legal system, as was the case with the Nazi Regime. The concept of the morality of aspiration



plays a significant role when evaluating the moral dimensions of ECtHR judgments. The Court's decision to not grant the right to marry under Art. 12 of the ECHR to same-sex couples is morally unjustifiable. It prevents these couples from enhancing their potentialities in society, not affording them the same status as opposite-sex couples. However, the epistemological value of these justifications tends to be overlooked, as is often the case with Dworkin's theoretical concepts.

At this point, we should understand what the term "epistemological value" signifies in the context of modern natural law theory. To do this, let's consider Ioanna Kucuradi's approach to evaluating the value of legal norms. Kucuradi suggests that the epistemological value of these norms lies in their relation to humanity and its values, notably human dignity and human rights. She emphasizes that these values are anchored in historical information. According to Kucuradi, legal rules should not be applied mechanically; instead, they require an explanation to expose their underlying epistemological values. Additionally, the concepts pertaining to these legal rules should be correctly employed when explaining the value of the rules.<sup>204</sup> This approach is particularly relevant when examining the nature of modern natural law, which is founded on independent and self-evident concepts. Theories based on these concepts should provide rational grounds for their arguments. In this context, the understanding of human rights becomes an essential epistemological value that justifies the principles used to evaluate the law, such as those proposed by Fuller and Dworkin, and in general for all modern natural law theories or approaches when formulating these theories and their foundations.

However, in my opinion, when legal philosophers investigate their research subject - in this case, judgements of ECtHR on same-sex marriage - they should draw upon other disciplines to understand the epistemological value of their research subject and the conceptual foundations used to evaluate the law and its principles. If the first epistemological value is the knowledge of human rights, the second should be the data from other disciplines, provided that these data are pertinent to the object of research. This approach can be labeled as "informative interpretation". A modern natural law theory should recognize the epistemological value of its subject of research, drawing upon both

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<sup>204</sup> Ioanna Kucuradi, *İnsan Hakları: Kavramları ve Sorunları* (5th edn, Philosophical Society of Turkey 2022) 63-64.

natural and social sciences as well as human rights knowledge. For instance, let's consider the evaluation of same-sex marriage and its representation in the ECtHR judgments from the perspective of a modern natural law theorist. If a researcher assesses these judgments solely based on the knowledge of human rights, questioning whether these judgments have epistemological value, this approach will not be sufficient to meet current conditions, given that same-sex relationships are also a subject of research in natural and social sciences.

Therefore, "informative interpretation" can bridge this gap, enabling a more expansive and flexible approach to legal research (both conceptual and empirical), and broadening the reach of modern natural law in two significant ways: Firstly, a legal philosopher should assess the epistemological value of a law (in its broad sense), rather than merely establishing general principles without delving into their epistemological characteristics. Secondly, to clarify the epistemological value of the law, the legal philosopher should engage with human rights knowledge, examining whether the law aligns with this understanding. In other words, it involves considering the intrinsic value of humans and their moral values, such as equality, freedom, and human dignity. After assessing the law in this manner, the legal philosopher should also incorporate data from other scientific fields if the subject of research is relevant to natural and social sciences.

In this context, when evaluating the judgments of ECtHR regarding same-sex marriage, a legal philosopher should first assess these judgments in light of human rights knowledge. This is a crucial initial step in elucidating their epistemological value, referring to human values, and interpreting their true worth before establishing related principles. This lays the groundwork for moral-legal compound arguments.

For this purpose, it can be rendered that same-sex couples, like opposite-sex couples, possess inherent dignity, freedom, and equality. If the right to marry is not granted to same-sex couples, their human dignity is infringed upon by the states, and their freedom as humans is constrained. More importantly, they are not treated as equals to opposite-sex couples in the eyes of the law. Recognizing their right to marry ensures that their activities as human beings are enabled by the structural opportunities granted to them solely by virtue of their human existence. Human rights within ECHR are grounded in these inherent values. As a significant point of reference, Art. 1 of the UDHR states: "All human beings are born free and equal in dignity and rights. They are endowed with

reason and conscience and should act towards one another in a spirit of brotherhood.” This provision’s epistemological value lies in the understanding of human structural opportunities.

Furthermore, the preamble of the Declaration emphasizes that “the neglect of human rights has resulted in shocking atrocities, yet the ideal of a world where people can freely express themselves and live without fear or need is humanity’s ultimate goal.” This statement reveals another facet of human rights knowledge, namely, historical conditions and inferences drawn from events that have transpired under these conditions. Therefore, a modern natural law philosopher, while evaluating the judgments on same-sex marriage, should consider these deductions that shape our understanding of human rights. This philosopher may argue that the ECtHR judges should have contemplated the right to marry for same-sex couples in light of this epistemological value. They might identify that the current judgments lack this epistemological value, which is rooted in our understanding of human rights.

Having analyzed these judgments in light of this epistemological value, a modern natural law philosopher should consider the data provided by natural and social sciences regarding same-sex relationships. This includes the biological and historical origins of these relationships, as evidenced by various research studies.<sup>205</sup> These data, combined with human rights knowledge, should be utilized to augment the core understanding of human rights. The fact that same-sex relationships are a subject of scientific inquiry provides a foundation for the theories of modern natural law, as these theories should be built on principles derived from human reason. In essence, an ideal modern natural law theory should be founded on principles arising from the knowledge of human rights and the data pertaining to its research subjects: humans, human values, and the law as a mechanism regulating human behavior.

## **B. Prospective Modern Natural Law Theory: A New Approach Surrounding Knowledge of Human Rights and Science**

In this era, as we face increasingly complex global issues, it’s crucial that modern natural law theory evolves, expanding the scope of legal philosophy research. This evolution should involve an interdisciplinary approach, drawing insights from various

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<sup>205</sup> See ‘Sexual Orientation & Homosexuality’ (American Psychological Association) <<https://www.apa.org/topics/lgbtq/orientation>> accessed 23 May 2023.

fields of research, thus enriching the process and outcomes. The evolution of modern natural law in this context could effectively address criticisms directed at legal theories. These criticisms suggest that normative legal theories, including modern natural law and second-generation legal positivism, have overlooked the social and empirical dimensions of law research subjects, relying heavily on concrete legal reasoning.<sup>206</sup> By evolving and considering these aspects, these theories can become more comprehensive and responsive.

To reach this holistic theoretical viewpoint for modern natural law, it's important to delve deeper into the previously mentioned method of interpretation that is the informative interpretation. As previously noted, the first step involves acquiring knowledge about human rights to evaluate the research subjects of legal philosophy. This knowledge can be gained by understanding humanity's historical experiences and grasping the structural opportunities available to humans.

The second stage of the informative interpretation calls for an in-depth understanding of relevant research data from social and natural sciences. More specifically, I will demonstrate how this scientific knowledge can be harnessed to bolster arguments for same-sex marriage. Primarily, the use of scientific data should be based on a rights-based approach, setting the groundwork for recognizing the right to marry for same-sex couples. Otherwise, these findings could be employed detrimentally, stalling the advancement of rights for same-sex couples and compromising the understanding of human rights, the initial stage of the informative interpretation.

Secondly, considering the deeply social nature of same-sex marriage, the data should be used to positively influence public opinion. This could help sway those in society who hold regressive views, making them understand that recognition of same-sex marriage can coexist with traditional marriage. The role of law is pivotal in driving this paradigm shift, particularly in its use of relevant data, due to its ability to guide and regulate societal norms. It can create arguments that either support or undermine human rights. For instance, laws that discriminate can lead to tragic outcomes like suicides among same-sex couples, whereas anti-discriminatory laws can improve their mental and

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<sup>206</sup> See Roger Cotterrell, *Hukukbilimin Politikası: Hukuk Felsefesine Eleştirel Bir Giriş* (Saim Üye tr, Pinhan Press 2019) 389-394.

physical wellbeing.<sup>207</sup> The ECtHR, for example, can play a transformative role in recognizing same-sex marriage under Art. 12 of the ECHR, just as it did for the recognition of private and family life under Art. 8 of the ECHR, reinforcing its arguments with pertinent research data guided by a rights-based approach. In summary, the informative interpretation method could be a promising approach to address the existing gaps in legal research carried out by legal philosophers operating within normative legal theories.



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<sup>207</sup> Nancy J. Knauer, 'Legal Consciousness and LGBT Research: The Role of the Law in the Everyday Lives of LGBT Individuals' (2012) 59 *Journal of Homosexuality* 748, 748-756.

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