

On Having your Legalism and Eating It Too

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I. Introduction: 'The Divide and Rule of Law'

In *Law's Meaning of Life*¹ [LML], Ngaire Naffine refers to a position variously defined as that of the 'legalist,' of the 'sceptically-minded lawyer' or of the 'doubting jurist' [DJ] and the following remarks should be seen as a contribution to the definition and the defence of that general position. Some aspects of Naffine's characterisation of the position are endorsed here, some are modified or rejected; the main objective being to establish the role played by the DJ argument in Naffine's book. Stimulation of this response is it is hoped a modest indication of the value to the discipline of Naffine's book. For *LML* seems to accept the 'legalist' or DJ argument at some points, but at other points to reject it or to assimilate it into a much larger explanatory scheme. It may be that there is some persuasive kernel of the DJ position which even its critics find it impossible to consistently reject. (Even if so, that kernel may of course be very 'thin').

Naffine focuses her book on the question 'who is law for?' Although addressed in various ways throughout the book, especially early on, it is still perhaps left incompletely analysed by book's end. The rhetorical force of the question is undeniable and in the context of discrimination (unfair treatment of some person) of one kind or another by the legal system, this force seems appropriate. Certainly law has a lot to do with exclusion² and while such injustice persists there can be no complaints against the scrutiny of what one might call *the divide and rule of law*.

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¹ Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009).

² John R. Morss, "'Desperately Mortal": Exclusion in Shakespeare's legal plays' (2007) 12 *Deakin Law Review* 181.

But Naffine's 'who is law for' question itself requires scrutiny. Is 'is there a who in law?' a question at all? Much of what appears to be indicated by the question – the 'mischief' addressed by the posing of the question – is more precisely captured by the question 'who/what is the law *about*?' Not that that question is lacking in interest, and much of the book is in fact concerned with it. But as a general (or theoretical) question, 'who is law for?' seems worryingly imprecise. It may be moving too far in the direction of *The Castle* with that popular Australian movie's authentic-nostalgic spin on law and justice. Indeed Naffine might seem to be risking a populism or even anti-intellectualism, in presenting the more formalistic approach as 'hot-house flower.'³ Again, the book is written for students as well as for more seasoned academics (sceptical or otherwise) so that an engaging and provocative style is a significant virtue in areas that tend to the dry.

II. Law's Constitutive Role

According to Naffine, DJ treats the 'who is law for' question as 'misconceiv[ing] the very character of the legal endeavour' on the grounds that (for DJ) 'law constitutes legal persons through its endowment of rights and duties.'⁴ This DJ view, and Naffine's expression of it, seem to me correct. I am not suggesting that it is straightforward to unpack the latter process (law's constitution of the legal subject) still less straightforward to locate that process within the larger social (historical, political, ideological) processes. But the direction of the explanation seems to be correct. Legal subjects (entities with relationships of rights, duties or both with other legal subjects) are not what law finds itself required to deal *with* as a given, but what law deals *in* – its currency.⁵

It seems to me that Naffine recognises the strength of the DJ argument for law's constitutive role with respect to legal persons. For example it is stated that the plan for the book is 'to reinvigorate the idea that law *is always responsible for its subject*, and not just in a narrow technical manner, and that *in the making of legal persons* it continues to set the very contours of the moral and political community.'⁶ This is a strong affirmation of DJ's position. Similarly, Naffine observes that rights and duties 'will fluctuate over a human lifetime as a host of legal relations are

³ *LML* 3; similarly for the 'Hey Presto' passage, 42.

⁴ *LML* 2.

⁵ Or in the 'naturalist' terms loosely derived from Darwin, legal subjects do not correspond to law's *genotype* (its DNA) but to its *phenotype* (the characteristics of the embodied species).

⁶ *LML* 13; emphasis added. It is unclear what is meant to be indicated here (what is cancelled out or redefined) by the parenthetical 'and not just in a narrow technical manner.'

entered and left' ('as the Legalists insist'). She further observes that legalists 'are right. The legal concept of the person can be metaphysically neutral.'⁷ This 'proactive' or autonomous position for law is inconsistent with the view that law must reactively respond to pre-identified legal persons (pre-identified by natural processes for example). One can thus find in *LML* grounds for the DJ position and therefore arguments against what Naffine generally defines as 'metaphysical.'

But elsewhere Naffine rejects 'legalism.' Naffine suggests that legal rights and duties are not arbitrarily or randomly dispensed or distributed, so that what DJ fails to notice, or perhaps deliberately conceals, is the reliable patterns lying behind the constituting process. '[I]t is these patterns which the Legalists have been unwilling to acknowledge as fundamental to personality.'⁸ This general line of argument is fairly familiar as a critical legal studies [CLS] argument claiming to uncover the true (or at least the less false) picture of law's role in society – identifying the functions of law which supposedly drive its processes, processes falsely understood as autonomous. Law, or lawyers of the DJ (or cognate) persuasion, supposedly suffer from false consciousness in relation to law's process. According to this CLS point of view, law does in a sense constitute legal persons but only as part of a larger set of processes, as proxy or (so to speak) as part of the superstructure erected on the socioeconomic base – just another brick in the wall.

This functionalist or contextualist argument seeks to resolve the difficulties of naturalism and of other unsuccessful alternatives to 'legalism' – according to which, persons come before legal persons – by setting the legal process within a larger context. If the legal-person-constituting processes of law are themselves driven by prior forces then they are not meaningfully autonomous and the rug onto which DJ was tentatively stepping is whisked away.

It would have been helpful if this contextualist approach had been explored and articulated in more detail in *LML*. Critical work in legal studies has not come up with convincingly articulated versions of this view. Many of the central chapters of the book are in that ballpark, but the outcome in my view is that the DJ position is not so much displaced as nudged aside. The DJ position – the position that legal persons are constituted by law – is (it seems to me) left in limbo by *LML* – both recognised and rejected.

III. Is The Person a 'Basic Conceptual Unit'?

⁷ *LML* 165, 166.

⁸ *LML* 166.

Naffine suggests that for the orthodox (formalist/DJ) view, the ‘person’ is ‘the basic conceptual unit of legal analysis ... the formal subject of rights and duties.’ Given the primary claim of the formal/legalist/DJ position, namely that legal personhood is constructed or constituted by law, for the *person* to be its unit would seem odd. The person is perhaps the basic conceptual unit of *moral* analysis (at least in some of the variants of the latter). But what seems most basic in the DJ analysis is the scheme of legal relations. In other words it is reciprocal right-duty (etc) relationships between pairs of entities that seems basic, the equivalent of the fecund but astonishingly simple code of affinities between bases in the DNA molecule.⁹

It is important to stress the *extensive* sense of the reciprocity, as in Hohfeld’s famed account. Rights and duties are relationships *between* entities. For if our unit is a (‘natural’) person with integrated rights and duties then our approach is surely a morality rather than a legal perspective. If the relationship between those rights and duties is thought of as reciprocal it is in a very different, *intensive* sense – as when it is argued that right X for agent A will always bring with it duty Y also in agent A. It might be argued that a *moral* person or agent must combine both, i.e. an agent with rights must also be an agent with responsibilities (as perhaps implied in the name of Victoria’s ‘Charter of Rights and Responsibilities’).¹⁰ Surprisingly, this approach may be related to the *contractual* sense of rights and duties, to the extent that some shared attitude such as goodwill is presupposed to underlie contract – a presupposition found in international law as well as in the contractual law of municipalities.

Of course whether one thinks of these positions (extensive and intensive reciprocity) as distinct or as integrally related may be the whole point.¹¹ And it may well be possible to rewrite the intensive version of (right-duty etc) reciprocity in a quasi-Hohfeldian framework. However I think it may be of interest to maintain the distinction. So one might define the *legal* attitude as a focus on relationships among different actors (the ties that bind so to say), so that it is these relationships that are the building blocks. Indeed Naffine seems to recognise this – the Legalist view is that legal personality is ‘inherently relational’; the legal person is ‘defined by

⁹ John R. Morss, ‘The Legal Relations of Collectives: Belated Insights from Hohfeld’ (2009) 22/2 *Leiden Journal of International Law* 289, 295.

¹⁰ A moral philosophical viewpoint (Kantian for example) may indeed subsume the (intensive) reciprocity into a general moral unification – treating the reciprocity as a consequence or an implementation of the moral nature.

¹¹ See John R. Morss, ‘Part of the Problem or Part of the Solution? Legal positivism and legal education’ (2008) 18 *Legal Education Review* 55.

their legal relations.’¹² However this relational-legal account is transformed into the suggestion that ‘[t]he nature and form of legal relations ... mirror or picture ... the nature and form of real human relations.’¹³ This, perhaps, is where the patterns (of law’s constitutive relationships) are supposed to come from – the larger or underlying social processes. In this context, appeal is made to Levinas and more generally to phenomenological and to other social views of the self, emphasising fluidity and multiplicity.¹⁴ Rather large steps are taken somewhat rapidly here and although these issues are important and certainly deserve to be followed up in more detail, the sense persists of having one’s cake and eating it too.

IV. Who Cares Best for the Real People?

As Naffine indicates, DJ would be sceptical of the suggestion that ‘the real natural person should fully and accurately sound in law’¹⁵ and that law should respond to ‘prior natural subjects of rights.’ The argument can be made that legal process (such as criminal justice) is not helpfully thought of as the revelation of the true person¹⁶ (of the accused) as if anything short of this constitutes injustice. But to the extent Naffine commits herself to the authenticity position (the position rejected by DJ), this seems inconsistent with the remarks on fluidity of personality noted above – or at least, to call for unpacking. For if this fluidity or mutability is ‘not allowed’ (and it is not at all clear what ‘not allowed’ means), then ‘I am denied access to the multiple characters which might otherwise form and enrich my public personae.’¹⁷ It is the antinomy of the cake once more.

Relatedly, an aspect of style might be mentioned. There is said to be a loss of moral dimension in Legalism, an ‘absence of real people whom we care about.’ Various criticisms of the DJ/Legalism view are made in the book. Occasionally, the rhetoric seems unhelpful. Thus legalists are accused of ‘amputat[ing] the human being from law’ and thus ‘depopulating’ law.¹⁸ This is aligned with a supposed quietism in the face of evil regimes. By contrast, a natural-law approach is said to enable the challenging of and

¹² LML 168.

¹³ LML 169.

¹⁴ John R. Morss (1995) *Growing Critical: Alternatives to developmental psychology*, London: Routledge.

¹⁵ LML 2.

¹⁶ John R. Morss, ‘Rosencrantz and Guildenstern are Nevertheless Dead: The hypothetical adolescence of Prince Hamlet and the contested remorselessness of young offenders’ (2004) 1 *University of New England Law Journal* 187.

¹⁷ LML 170.

¹⁸ LML 180.

resistance to such abusive systems. Similarly while it is said that the legal device of the constituted person ‘has great creative and humanitarian potential,’ the ‘creative’ part is glossed as ‘manipulable’¹⁹ as in Nazi Germany or in the 1984 scenario. The question of the connections if any between formalism or legalism in law, and evil regimes, is of course an important and troubling one but is not helpfully addressed by mere association.²⁰ It is addressed I suppose by robust and probably never-ending debate.

Since Monty Python, if not before, ‘The Meaning of Life’ is a phrase difficult to employ without an element of self-consciousness if not irony, and Naffine’s title is surely used with the former if not with the latter. The same may surely be said of the sub-title with its encyclopaedic inclusiveness of discipline areas. This hint of self-deprecation does not detract from the seriousness of the content or of the contribution. The stylistic antinomy is somehow appropriate and even necessary. The trope of wanting to have one’s cake and eat it too has been somewhat ‘dissed’ in the above comments; yet this absurd, all-too-human urge might be said to be what drives law in the first place. Legality is absurd yet communities and individuals persist in striving for it, at building and re-building it, sometimes at great cost – perhaps, then, not another brick in the wall so much as the same old boulder rolled up the same old slope.

¹⁹ *LML* 165.

²⁰ *LML* 180.