

## The Morality of Law and Economic Management

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### Abstract

*This paper explores in brief the economic basis of Lon L. Fuller's morality of law thesis, and its relevance to discussions on the complex relations between law and economics. Almost all the flaws of national and international institutions of economics are the result of a failure to set the right balance between the aspiration for 'an optimum allocation of resources' and the duty to provide 'legal rules conducive to security and predictability'. Both the aspiration and duty constitute the two kinds of moralities that Fuller recognized to show that 'law is inherently moral', and used to illuminate the role of an institutional setting responsible for adjudicating rules for the allocation of economic resources.*

**Keywords:** Lon L. Fuller, Law and Morality, Interactional Legal Theory, Law and Economics, Legal Obligation, World Trade Law.

### Introduction

Since the publication of the revised edition of Fuller's book, *The Morality of Law*, in 1969 the application of the interactional legal theory has significantly multiplied, widely ranging from its relation to ethics, constitutional law, and international law.<sup>1</sup> Despite being admired by many, but strongly undermined by some for his book 'sloppiness' and 'flimsy' arguments, but Fuller had no doubt rejuvenated the study of legal theory in the twentieth century.<sup>2</sup> The recent major works that were built on the

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<sup>1</sup> Lon L. Fuller, *The Morality of Law* (revised edn, Yale University Press 1969); David Luban, 'Natural Law as Professional Ethics: A Reading of Fuller' (2001) *Social Philosophy & Policy* 176; Roderick Macdonald, 'Legislation and Governance' in W. Witteveen and Van Der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press 1999) 279-311; Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010)

<sup>2</sup> This was partly because of Oxford legal positivism scholar, H.L.A. Hart, challenged him in the famous 1958 Harvard Law Review debate. Without Hart who had played a pivotal role in this rejuvenation mission, we would not have Fuller's subsequent elaborations on his theory to make it more comprehensible and useful for our world today. See Witteveen and Burg, *Rediscovering Fuller* (n 1); Robert Summers, *Lon L. Fuller* (Stanford University Press 1984); Nicola Lacey, 'Out of the 'Witches' Cauldron'?' in Peter Cane (ed), *The Hart Fuller Debate in the Twenty-First Century* (Hart Publishing 2010) 1-42. For a critique of Fuller theory and its defenders see Matthew Kramer, 'Scrupulousness Without Scruples: A Critique of Lon Fuller and His Defenders' (1998) *Oxford Journal of Legal Studies* 235. For the Hart-Fuller debate see H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) *Harvard Law Review* 593; Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) *Harvard Law Review* 630

morality of law thesis include Simmonds', *Law as a Moral Idea*, and Rundle's book that refocuses the attention on 'human agency' as implicit in Fuller's concept of 'legal morality'.<sup>3</sup> But a fundamental pillar in Fuller's theory that has not received much attention in jurisprudence, and its study is relevant for illuminating the notion of national as well as international obligation is the economic basis of the morality of law. The main message of this paper is that minimum knowledge of the relations between law and economics is very useful for understanding Fuller's morality of law thesis. Because throughout this famous thesis, the use of economic science, especially in explicating the institutional design of law is very prevalent. This is not a surprising inclination, given that Fuller's first degree was in economics, which also explains his strong support for the socio-legal studies that include economics and other social science fields.<sup>4</sup> Fuller's theory is acutely relevant to national and international institutions of economics because it sheds light on the challenge of setting the right balance between the aspiration and duty in economic regulations, and more importantly how 'fidelity to law' can be socially constructed.<sup>5</sup> He had also been aware of the limitations of an institutional setting adjudicating rules that apply to the allocation of economic resources. This makes his theory useful for discussing the challenges facing an institution responsible for adjudicating rules for the management of economic resources.

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### **Economics in The Morality of Law: Summary and Reflections**

Before summarising the morality of law thesis it is helpful to start with Fuller notion of law and general overview of his interactional legal theory. Fuller notion of law is the purposive 'enterprise of subjecting the human *conduct* to the governance of rules'.<sup>6</sup> The 'human element' has always been prevalent in Fuller's theory; for instance, he said that the task of legal philosophy is not only to provide a statement about "valid" law but also 'to give a profitable and satisfying direction to the application of human energies in the law'.<sup>7</sup> The notion of an interactional law comes from a sentence that he wrote when opposing legal positivism and its inclination to 'the command theory of law' of law as 'a command of the sovereign, backed up by sanctions'. Fuller contended, 'if we could come to accept what may be called broadly *an interactional view of law*, many things would become clear that are now obscured

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<sup>3</sup> Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press 2008); Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Hart Publishing 2012)

<sup>4</sup> Fuller was against the fragmentation of educational system with too much specialisation and lack of interdisciplinary outreaches and engagements. For example, he wanted legal education to include social sciences, chiefly economics. See Summers, *Lon L. Fuller* (n 2) 3, 106, 148

<sup>5</sup> See Philip Selznick, 'Review of The Morality of Law' (1965) *American Sociological Review* 947

<sup>6</sup> Fuller, *The Morality of Law* (n 1) 122

<sup>7</sup> Lon L. Fuller, *The Law in Quest of Itself* (reprinted in, *The Lawbook Exchange* 2012) 2. See Lon L. Fuller, *Anatomy of Law* (Penguin Books 1971) 59

by the prevailing conception of law as one-way projection of authority'.<sup>8</sup> It was the contention of Fuller and natural law theorists before him that the contemplation of the forms of law 'i.e. the characters of legal declaration' will show the moral content of law and its normative implications on human interactions.<sup>9</sup>

According to Fuller, the relation between law and economics is not determined by merely the role of law in mitigating or removing inequality, but that law has to be translated into corrective and distributive justice that refocuses the attention on role of the institutional setting responsible for economic management.<sup>10</sup> Viewing law within the remit of social justice will facilitate the kinds of actions that are taken to remedy economic inequalities that 'arise within a framework of legal compulsions'.<sup>11</sup> For example, Fuller's view on reciprocity is informed by his proposed though incomplete project of '*Eunomics*', or the study of good social order, and his differentiation, when he wrote about the concept of 'freedom', between the organization by common ends and reciprocity.<sup>12</sup> The former refers to the parties joining forces for the accomplishment of common aims that they cannot accomplish individually, while the latter refers to the principles of reciprocity in the literal sense of the parties' exchanges of rights or privileges for reciprocal gain.<sup>13</sup> An organization can be founded on the model of reciprocity and aspires to achieve a common ends, a principal example of this with all of its flaws is the World Trade Organization (WTO). The WTO to a large extent represents 'the organization of market economy' that Fuller elaborated on it to advance his thesis.<sup>14</sup> However, Fuller considered the organization by reciprocity to highlight the challenge of providing a mechanism for an optimal realization of the gains of reciprocity.<sup>15</sup> For Fuller, the 'economic freedom' cannot be clearly discussed 'in isolation from the specific mechanisms or procedures by which that freedom is determined, or, as I should prefer to say, by which freedom to choose is allocated and conflicting choices are reciprocally adjusted'.<sup>16</sup>

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<sup>8</sup> Fuller, *The Morality of Law* (n 1) 221

<sup>9</sup> Fowler Harper, 'Forms of Law and Moral Content' (1929) *Illinois Law Review* 256; Rundle (n 3) 101

<sup>10</sup> Aristotle's distinction between corrective and distributive justice, that Fuller's adopted, means that corrective justice is concerned with the restoration of 'a previous relationship that has been upset in some improper manner' whilst distributive justice refers to the nature of socially just allocation of resources among members of a society. See Lon Fuller 'Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale's "Freedom through Law"' (1954) *Columbia Law Review* 70

<sup>11</sup> *ibid*

<sup>12</sup> Lon Fuller 'Freedom- A Suggested Analysis' (1955) *Harvard Law Review* 1305.

<sup>13</sup> *ibid*

<sup>14</sup> Fuller even went further to say 'this analysis [of the role of legal duty in the society of economic traders] suggests the somewhat startling conclusion that it is only under capitalism that the notion of the moral and legal duty can reach its full development'. Fuller, *The Morality of Law* (n 1) 24, for more on this statement see this blog entry: Fuller Reads Pashukanis/Marx Meets the Liberals <<http://pashukanis.blogspot.co.uk/2006/06/fuller-reads-pashukanismarx-meets.html>> accessed 22 June 2015

<sup>15</sup> Fuller, 'Freedom –A Suggested Analysis' (n 12)

<sup>16</sup> Fuller 'Some Reflections on Legal and Economic Freedoms' (n 10)

With regard to the morality of law thesis, Fuller saw three problems that led him to regard 'law as inherently moral', and see the close affinity between 'the two moralities, aspiration and duty, and the modes of judgment characteristic of economic science'.<sup>17</sup> He noted the *first* problem as his, 'dissatisfaction with the existing literature concerning the relation between law and morality' because of 'the failure to clarify the meaning of morality itself'.<sup>18</sup> Such failure is derived from the presumption that when law is compared with morality it is readily assumed that by virtue of the comparison everyone knows what morality embraces.<sup>19</sup> Fuller saw the implication of this problem in the common misunderstanding of what law actually implies, and how it can be distinguished from non-law.<sup>20</sup> In addressing this problem, Fuller proposed two kinds of morality that shows the moral content of law, the morality of aspiration, and the morality of duty. The former refers to the morality of good life or 'the expression directed toward the achievement of human excellence', while the latter refers to 'the conditions essential for orderly social living or existence'.<sup>21</sup>

The morality of aspiration resembles that of aesthetics -the artistic expression of excellence-, whereas the morality of duty resembles law. The two moralities are intertwined in that the morality of aspiration has 'overtones of a notion approaching that of duty' through its consideration of the kinds of activities that are worthy of human capacities, and that would fulfil the criteria of good life.<sup>22</sup> For instance, by recalling that in the law of contract mutual misapprehension of relevant facts means that the agreement is void, Fuller said 'what the morality of aspiration loses in direct relevance for the law, it gains in the pervasiveness of its implications'.<sup>23</sup> However, after he determined the relationship between law and morality, he noted a *second* problem concerning a neglect in existing literature to address the morality that makes law possible, or, what he called, the demands of 'the inner morality of law'.<sup>24</sup> To address this problem, Fuller focused on the problems of legal pathology resulting from the neglect of those demands or the eight desiderata for law-making.<sup>25</sup> Fuller's eight moral tests of legality are '*generality, promulgation, non-retroactivity, clarity, non-contradictory, not asking the impossible, constancy, and congruence between rules and official action*'.<sup>26</sup> Simmonds argues that Fuller's systems, 'count as law in virtue of their approximation to the ideal of compliance with the eight

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<sup>17</sup> Fuller, *The Morality of Law* (n 1) 15

<sup>18</sup> *ibid* 3

<sup>19</sup> *ibid* 4

<sup>20</sup> *ibid*

<sup>21</sup> *ibid* 5

<sup>22</sup> *ibid* 8

<sup>23</sup> *ibid* 9

<sup>24</sup> *ibid* 4

<sup>25</sup> *ibid* 33-94

<sup>26</sup> *ibid* 39

desiderata'.<sup>27</sup> And this approximation provides for a minimum respect for human agency 'i.e. activism' within the law for upholding the ideals of peace and justice.<sup>28</sup>

By associating 'the inner morality of law' with the morality of aspiration, Fuller attempted to convey the message that a respect for those eight desiderata will limit, 'the kinds of substantive aims that may be achieved through legal rules'.<sup>29</sup> Fuller used 'the external morality of law' and 'external aims of law' interchangeably to refer to the law substantive aims such as the principle of fairness.<sup>30</sup> This means that the societal concerns for justice 'i.e. substantive ends pursued through law', that Fuller identified as the 'the external morality of law', can be limited by the eight principles of legality that he associated with 'the inner morality of law' and constitute the enterprise of law-making.<sup>31</sup> For example, writing about the neutrality of judges when interpreting statutes, Fuller said 'the very same considerations that require an attitude of neutrality with regard to the external aims of the law demand a commitment by the judge to the law's internal morality'.<sup>32</sup> This is because 'the interpretation of statute is... a process of adjusting the statute to the implicit demands and values of the society to which it is to be applied'.<sup>33</sup>

The *third* problem that Fuller initially faced when he laid down the above premises of his thesis, and the one that he returned to at the end of his book, when he wrote about the substantive aims of law and institutional design was 'the proper location of the moral scale's pointer'.<sup>34</sup> He explained this problem by using the analogy of 'a scale or yardstick that begins at the bottom with the most obvious demands of social living, and extends upward to the highest reaches of human aspirations'.<sup>35</sup> He said that the difficulty with this moral scale is in locating the pointer that 'marks the dividing line where the pressure of duty leaves off, and the challenge of excellence begins'.<sup>36</sup> Fuller explained this by saying:

If the pointer is set too low, the notion of duty itself may disintegrate under the influence of modes of thought appropriate only to the higher levels of a morality of aspiration. If it is set too high, the rigidities of duty may reach up to smother the urge toward excellence and substitute for truly effective action a routine of obligatory acts.<sup>37</sup>

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<sup>27</sup> Nigel Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (4<sup>th</sup> edn, Sweet & Maxwell 2013) 258

<sup>28</sup> See Rundle (n 3)

<sup>29</sup> Fuller, *The Morality of Law* (n 1) 4

<sup>30</sup> *ibid* 47

<sup>31</sup> *ibid* 4

<sup>32</sup> *ibid* 132

<sup>33</sup> Fuller, *Anatomy of Law* (n 7) 59

<sup>34</sup> Fuller, *The Morality of Law* (n 1) 170 (emphasis added)

<sup>35</sup> *ibid* 9-10

<sup>36</sup> *ibid* 170

<sup>37</sup> *ibid*

In order to express this problem clearly, and throughout his thesis Fuller used economic management modes to show the difficulty of locating this pointer, and the interconnection and limitations of the two moralities. Firstly, he selected two concepts relating to economics: the first is concerned with ‘the relationships of exchange’, and the second with what he regarded as something at the heart of economics namely ‘the principle of marginal utility, by which we make the most effective allocation of the resources at our command’.<sup>38</sup> Fuller saw a close correlation between these concepts and the two moralities. He regarded the marginal utility as the economic counterpart of ‘the morality of aspiration’, and the economics of exchange as having a close affinity with the morality of duty.<sup>39</sup> Fuller explained that when an economist is trying to create a stable and productive economy by advising consumers on the most efficient ways of equalising the return for the money they spend; he usually resorts to the ‘utility’ criterion, which is an undefined criterion for the optimum allocation of resources.<sup>40</sup> The ‘aspiration moralist’ who is concerned with our efforts to make the best use of our lives is unable to define what is the best for human.<sup>41</sup> Therefore, it is within this undefined criterion, relating to ideas about the highest moral or economic good, that the marginal utility economist and aspiration moralist share, which would ultimately lead to a consideration of the notion of balance.<sup>42</sup> The primary concern of both the morality of aspiration and marginal utility is maintaining the right balance in every life-fulfilling human endeavour, and this means that the prudent management of resources is of paramount importance.<sup>43</sup>

The morality of duty, however, finds its closest kinship with the economics of exchange and out of duties that arise by the exchange of promises. Fuller maintains that ‘to establish the affinity between duty and exchange’ there needs to be ‘a mediating principle that can only be found in the relationship of reciprocity’.<sup>44</sup> When trying to answer the question, ‘under what circumstances does a duty, legal or moral, become most understandable and most acceptable to those affected by it?’ Fuller identified three conditions to achieve ‘the optimum efficacy of the notion of duty’.<sup>45</sup> Firstly, the reciprocal exchanges of promises must be voluntary, and secondly, the parties’ reciprocal performances ‘must be equal in value’.<sup>46</sup> Thirdly, the relationship of duty must be in theory and practice ‘reversible’.<sup>47</sup> Fuller explained these conditions as follows:

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<sup>38</sup> ibid 16

<sup>39</sup> ibid

<sup>40</sup> ibid 17

<sup>41</sup> ibid

<sup>42</sup> ibid 18, 44-46

<sup>43</sup> ibid 18

<sup>44</sup> ibid 19

<sup>45</sup> ibid 22

<sup>46</sup> ibid 22

<sup>47</sup> ibid

When we ask, “in what kind of society are these conditions most apt to be met?” the answer is a surprising one: *in a society of economic traders*. By definition the members of such a society enter direct voluntary relationships of exchange. As for equality it is only with the aid of something like a free market that it is possible to develop anything like an exact measure for the value of disparate goods. Without such a measure the notion of equality loses substance and descends to the level of a kind of a metaphor. Finally, economic traders frequently change roles, now selling, now buying. The duties that arise out of their exchanges are therefore reversible, not only in theory but in practice.<sup>48</sup>

Therefore, the relationship between the principle of reciprocity and the formation of obligation is a very intimate and productive one. Fuller’s thesis is helpful when addressing the discussions that either separately focuses on the fulfilment of aspiration or duty, without realising the close interactive relationship between the two moralities, and their connection to the concept of law. However, for a better understanding of Fuller’s theory it is helpful to regard the concept of law as ‘an essentially ambiguous concept’.<sup>49</sup> According to Burg, ‘an essentially ambiguous concept is a concept which refers to a dynamic phenomenon that can only be described and modelled in at least two different ways that are each essentially incomplete and that are partly incompatible with each other’.<sup>50</sup>

Thus, an ambiguous concept like law can only be explained by ‘legal interactionism’ that goes beyond viewing law as either a product (doctrine), or practice (process) in order to reach a ‘pluralistic’ account that treats law as a dynamic phenomenon made up of different characteristics.<sup>51</sup> For example, law should be seen as a gradual concept, comprising a plurality of sources that include interactional law, in the Fullerian sense, and enacted law.<sup>52</sup> For the purpose of this article, only Burg’s definition of law as ‘an essentially ambiguous concept’ is relevant for the purpose of explaining law as a product and as a process in accordance with Fuller’s theory.<sup>53</sup> In fact, Burg was right in saying ‘The idea of essential ambiguity does not exclude the possibility that law as a product and law as practice have at least some characteristics in common that *determine the distinctively legal*’.<sup>54</sup>

Fuller suggested that the contemplation of interactional theory proves productive for realising the limits of adjudicating legal rules that were primarily made for prudent management of economic resources. However, when he discussed ‘legal morality and

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<sup>48</sup>ibid 23 (emphasis added) citing Giorgio Vecchio, *Justice: An Historical and Philosophical Essay* (Philosophical Library 1953) 96

<sup>49</sup>Wibren Van Ber Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Ashgate Publishing Limited 2014) 40

<sup>50</sup> ibid

<sup>51</sup> ibid 15

<sup>52</sup> ibid

<sup>53</sup> ibid 65-75

<sup>54</sup> ibid 79

the allocation of economic resources' Fuller raised an issue about the challenge of locating the pointer on the moral scale but this time to advance this thought:

The task of economic allocation cannot be effectively performed within the limits set by the internal morality of law. The attempt to accomplish such tasks through adjudicative forms is certain to result in inefficiency, hypocrisy, moral confusion, and frustration (...) As lawyers we have a natural inclination to "judicialize" every function of government. Adjudication is a process with which we are familiar and that enables us to show to advantage our special talents. Yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources.<sup>55</sup>

Those who are becoming more sceptical about the judicialization of world trade advocating noncompliance for welfaristic objectives, might be relieved to read the above paragraph.<sup>56</sup> From a historical perspective, however, the ideas of those advocates who can be labelled 'anti-legalists', and those of the 'legalists' who remain entrenched in their belief that judicialization is the only way forward, are very distinct. This is true especially when one considers their take on the ideas about duty or obligation that arise out of the reciprocal exchanges of promises and the proper function of institutional setting that organises such activity. Both the legalists and anti-legalists seem to agree about the benefits of trade conducts guided by the principles of reciprocity and non-discrimination, but they do not agree on the status of the obligations arising out of these conducts or how they should be properly adjudicated.

This is why Fuller is relevant to highlight the notion of obligation in the institutional setting for a society of economic traders who ought to use adjudication as an appropriate method of settling disputes. It is true that not every legal problem can be aptly solved by a legal verdict, because there are other factors that influence the functioning of the society of economic traders, factors that transcend the subject of law, be they social or purely managerial. However, law always asserts its relevance in social interactions modes that are working toward the achievement of a normative order. Once this order has been established, the question of whether it can be best served by prudent managerial decisions or legal rulings is a different matter altogether. For Fuller, legal texts matter, but 'the source of normativity is social interaction' that is guided by the principles of legality.<sup>57</sup> The interactional theory with

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<sup>55</sup> Fuller, *The Morality of Law* (n 1) 173, 176. See Lon L. Fuller, 'Freedom as a Problem of Allocating Choice' (1968) Proceedings of the American Philosophical Society 101

<sup>56</sup> See Judith Goldstein and Lisa Martin, 'Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note' in Judith Goldstein and others, *Legalization and World Politics* (MIT Press 2001) 219. See Abdulmalik M Altamimi, 'Can the WTO Rules be Efficiently Breached for Welfarist Objectives?' (2014) 11 Manchester Journal of International Economic Law 79-95

<sup>57</sup> Robert Wolfe, 'Kaleidoscopic Multilateralism: Lon Fuller, Rod Macdonald and the WTO' in Richard Janda and others (eds), *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (McGill-Queen's University Press 2015) 90; Lon Fuller, 'Human Interaction and the Law'



its morality of law thesis is acutely relevant for explaining the purpose and practice of the world trade law with its competing needs for ‘an optimum allocation of resources’ and ‘legal rules conducive to security and predictability’.<sup>58</sup>The theory is also helpful for addressing the distortions of the ‘law and economics’ jurisprudential school with its ultimate goal of ‘wealth maximization’ at the expense of all human constructed values, moral or legal.<sup>59</sup>

Finally, it is worth considering the applicability of the Fuller’s informed ‘interactional theory of international law’ to the WTO, as some scholars claim that this organization suffers from the lack of ‘normative consciousness’, public reason, and undetermined legality status.<sup>60</sup>This interactional approach can contribute to better understanding those causes of failures that emanate from either a lack of shared understandings, rules that contradict Fuller’s criteria of legality, or the lack of a practice of legality.<sup>61</sup>With regard to the lack of public reason, the above explications on the appropriate role and form of law, as conceived by Fuller, are very relevant for the fulfilment of the project of ‘cosmopolitan justice’.<sup>62</sup> From reading Fuller it is clear that his ‘purposive interpretation’ conforms with ‘internationalist model’ that give effect to only those intentions of the lawmakers that serves the ideals of justice.<sup>63</sup>

Furthermore, the content of world trade law cannot be explained by the reliance on Dworkin’s legal interpretivism, and certainly since the law here is an international law, or the reliance on classical legal positivism. Unlike Fuller, Dworkin did not identify constraints on lawgiver’s power to respect the ‘inner morality of law’, and the essential role of human agency in law-making and application. Fuller’s theory is helpful because it contains this highly needed cosmopolitan aim ‘respect for all those who are affected by the laws’.<sup>64</sup> However, as Petersmann rightly observed, the WTO

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in Kenneth Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (revised edn, Hart Publishing 2001) 231-266

<sup>58</sup>Jagdish Bhagwati, *Free Trade Today* (Princeton University Press 2003) 4; John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2<sup>nd</sup> edn, MIT Press 1997) 10

<sup>59</sup> See Richard Posner, *The Economics of Justice* (Harvard University Press 1981); Alan Sykes and Eric Posner, *Economic Foundations of International Law* (Harvard University Press, 2013); Eric Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014)

<sup>60</sup> See Steve Charnovitz, *The Path of World Trade Law in the 21<sup>st</sup> Century* (World Scientific Publishing 2014); Sungjoon Cho, *The Social Foundations of World Trade: Norms, Community, and Constitution* (Cambridge University Press 2014); Ernst-Ulrich Petersmann, ‘The Establishment of a GATT Office of Legal Affairs and the Limits of ‘Public reason’ in the GATT/WTO Dispute Settlement System’ in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015) 31

<sup>61</sup> See Brunnée and Toope (n 1)

<sup>62</sup>Petersmann (n 60). See Frank Garcia, *Global Justice and International Economic Law* (Cambridge University Press 2015) 205-272

<sup>63</sup> Nicholas McBride and Sandy Steel, *Great Debates in Jurisprudence* (Palgrave 2014) 125. See the Vienna Convention on the Law of Treaties (VCLT) Articles that emphasize the ‘purposive interpretation’ of treaties: Arts. (18) (31-33).

<sup>64</sup> S. Viner, ‘Fuller’s Concept of Law and Its Cosmopolitan Aims’ (2007) *Law and Philosophy* 1

law lacks ‘public reason’, and this can have a detrimental effect on its enforcement. Therefore, it emanates from this conclusion that it is right to say that the WTO law lacks a ‘legal morality’, and it is only by applying Fuller’s eight tests of legality that the ‘deficiencies’ of this law can be identified and readily remedied.

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### Conclusion

Fuller’s preference for using economics to explain the right content and purpose of law is very clear. The re-reading of the morality of law, in light of the contemporary relevance of its economic basis, can provide an original elaborate account of the complex relations between law and economics. Various biographical accounts of Fuller’s life reveal his strong enthusiasm for bridging the divide between economism and legalism, with special focus on the institutional role of law in adjudicating rules for economic disputes. Communications between him and the constitutional political economy scholar, James M. Buchanan, is a testament to Fuller’s enduring passion for a law and economics field of study that does not rid *law* of its essential obligatory effect or *economics* of its marginal utility ideal.<sup>65</sup> One might ask if Fuller were alive, what would he have said about Buchanan’s last book, *The Reason of Rules* (1985), which brought Buchanan’s work even closer to Fuller’s elaborations on legal rules.<sup>66</sup> But both scholars who stood up to the strong opposition by experts in their respective fields (Fuller for his morality of law, and Buchanan for his reasoning of economic rules) left us with an enlightening legacy of an economic reading of legal rules.

As to Fuller’s argument for the moral content of law, this argument will only become relevant once the social role of law, especially to the economic conducts is critically considered. The clear analogy between harm-based and duty-based moral restraints, and Fuller’s moralities of aspiration and duty propositions show the relevance of Fuller’s thesis to ‘the moral foundation of economic behaviour’ that can only be found in high trust society.<sup>67</sup> Finally, apart from the morality of law thesis strong basis in economics, this does not negate the fact that this thesis originally relates to the laws of lawmaking, and the respect those laws afford to human agency. By considering the inherently unjust laws in totalitarian regimes, and the newly made laws in countries-in-transition that are striving to live up to the criteria of legality that Fuller identified, then and only then the moral content of law can be fully comprehended.<sup>68</sup>

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<sup>65</sup> Letters exchanged between Fuller and Buchanan, 8-13 January 1964, The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 2 cited in Lacey, ‘Out of the Witches’ Cauldron’ (n 2) 30-31

<sup>66</sup> James M. Buchanan and Geoffrey Brennan, *The Reason of Rules: Constitutional Political Economy* (reprint edn, Liberty Fund 2000)

<sup>67</sup> David Rose, *The Moral Foundation of Economic Behavior* (Oxford University Press 2014)

<sup>68</sup> Countries-in-transition refers to a group of countries that are neither stable democracy nor autocracy but going through a transition toward *nomocracy*, rule by law. See Beth Simmonds, *Mobilizing for*

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*Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009). A useful connection in this regard can be made between Fuller's thesis and the work of the political theorist, Hannah Arendt, who saw law not as an expression of command or the legitimate will of the sovereign, but rather as a horizontal interactive mechanism for arranging the relations between people within a society. How the lawgiver's power can be constrained in favour of the agency 'i.e. activism' of law subjects?, was the central question that equally concerned Fuller and Arendt, and scholars who studied their works. See Kristen Rundle, 'Legal Subjects and Juridical Persons: Developing Public Legal Theory through Fuller and Arendt', (2014) *Netherlands Journal of Legal Philosophy* 212; Keith Breen, 'Law beyond Command? An Evolution of Arendt's Understanding of Law' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the Law* (Hart Publishing 2013) 15