Unbearable Lightness of Natural Law

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Abstract

Natural law theory and legal positivism are the prevalent legal theories. The write-up discusses the historical development of natural law theory along with its impact on various legal systems, legal thinking, legal doctrine, and principles. Though positivism theory challenges natural law theory by suggesting that law emanates from the consent of people and states, natural law theory maintains that there are objective moral norms that act as the foundation for law and the legal system. This write-up thoroughly discusses the historical development of natural law theory, from Greek philosophers to contemporary thinkers such as Lon Fuller and John Finnis. Despite the dominance of legal positivism theory, the core ingredients of natural law, such as morality, reasonableness, and the common good, continue to shape legal systems and influence legal philosophy around the world.

1. Introduction

Natural law and legal positivism are two dominant legal theories that have greatly impacted legal systems, ways of legal thinking, legal doctrine, and legal principles around the world. Positivism is often articulated and viewed in opposition to the principle of natural law. Natural law has an origin of great antiquity. However, the emergence of positivism in the 18th century posed a challenge to natural law. Legal positivism suggests that law is based on the consent of the people. Positive law is defined as any source of legal authority posited by human beings. Legislation and international treaties are considered true manifestation of legal positivism as these are mainly based on the consent of the people and states. While legislation is the principal modality of the law-making process at the national level, international treaties are now the main sources of international law- leading to an idea that the influence of natural law is declining and positivism is supplanting natural law. But natural law doctrine is still one of the most powerful legal theories that profoundly influence the development of legal systems and is continuously shaping the contours of law and legal philosophy.

2. Classical Natural Law Theory

Natural law had been derived from ethical theories. It typically entails an assertion that there are some objective moral norms, standards, or laws governing human conduct that are in some way

related to the nature of persons.[1] Natural law is a "guide to individual conduct" and "serves as a standard for the laws enacted by the State."[2] Natural law theorists maintain that moral norms and other basic practical principles are rational principles whose directiveness and prescriptivity are independent of people's feelings or desires.[3] Natural law inheres in human nature. It is discernible by reason. It furnishes a guide or foundation for the law and legal system. The essence of the natural law principle is that the understanding of law entails a broader understanding of morality. Natural law finds its normative source in morality, and it maintains that there is an overarching relationship between law and morality. Natural law springs from human reason, and natural law theory maintains that there is an essential connection between law and morality.[4]

According to the natural law theory, it is part of the very meaning of 'law' that it passes a moral test. This does not necessarily mean that there is an equivalence between law and morality because there are many moral obligations that have no place as legal requirements (e.g., private obligations of courtesy and gratitude) and that many legal requirements do not, in content, represent moral obligations (e.g., a legal requirement that certain documents be submitted in triplicate for administrative convenience). But what is required is that no rule can count as a law unless what it requires is at least morally permissible. As such, moral validity is a necessary condition for legal validity.[5] Thus, classical natural law theory asserts that moral validity is a logically necessary condition for legal validity-an unjust or immoral law being no law at all; and the moral order is a part of the natural order. Natural law is a higher moral law, and when rules conflict with natural law, they are devoid of genuine legal validity. Law's very nature, it is claimed, impresses on it a minimum moral content.

If the legal order is viewed as essentially connected with the moral order, then there will be moral reasons justifying allegiance to the law. On the other hand, there will be moral reasons justifying disobeying laws that are not based on moral order. In this sense, the moral order is viewed as a part of the order of nature. According to one author, "The essence of natural law may be said to lie in the constant assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason."[6] Natural law is considered as 'immanent truths concerning human nature' and is believed to be a 'rational foundation for moral judgment.'[7] Natural law has three main characteristics: firstly, it is universal and immutable, which implies that it is available at all times and in all places. It exists everywhere through instinct, not because of any enactment. Secondly, it is a 'higher law' because any political authority does not promulgate

[1] Kenneth Einar Himma, 'Natural Law' in Internet Encyclopedia of Philosophy, available at http://www.iep.utm.edu/natlaw/
[2] Charles E. Rice, 'Fifty Questions on the Natural Law: What It is and Why we need it' 30 (1993).
[3] See, Robert P. George, *In Defense of Natural Law*, Clarendon Press, Oxford, 1999.
[4]Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence*, Westview Press, London, 1990, p. 11.
[5]Ibid
[6] Lloyd's *Introduction to Jurisprudence,* sixth ed., Sweet and Maxwell Ltd. 1994, London, 79.
[7] Ibid

it. Thirdly, it is discoverable by reason.[8] The historical origins of natural law tradition are very ancient. Classical natural law theory was originally developed by such ancient writers as Plato, Aristotle, and Cicero and attained its most systematic statement in the medieval Christian philosophy of St. Thomas Aquinas. Natural law has continuous historical development from Greece to the modern period.

In the Greek period, natural law was treated as divine law expressed in the rational unity of the universe. However, Stoic philosophers insulated natural law from divinity. According to them, natural law emanates from human reason. According to them, the pursuit of a good life was not separated from the pursuit of truth. The stoic way of life is to live as nearly as possible "according to nature."

Other philosophers further developed it. Cicero gave natural law as a distinct philosophical doctrine. He was influenced by Greek philosophy, Plato, and Aristotle. He established a link between nature and human reason. Cicero believed that law is an attribute of human reason and applies to all humankind. According to Cicero, "True law is reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions."[9] The medieval philosopher Thomas Aquinas, another proponent of natural law, defined law as " a certain ordinance of reason for the common good, made by him who has care of the community, and promulgated."[10] Thomas Aquinas said, "Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community…Human law has the nature of law in so far as it partakes of right reason…So far as it deviates from reason, it is called an unjust law and has the nature, not of law, but of violence…"[11] Aquinas, thus, expressed the view that every law is ordained for the common good. Aquinas extended natural law to the idea of international relations, war and peace, and international law. According to Lock, reason is the voice of God in man. Locke tells us that natural law "does not depend on an unstable and changeable will but on the eternal order of things. For…certain essential features of things are immutable, and certain duties arise out of necessity and can not be other than they are".[12] Most classical natural law theorists believed in a religious version of the ultimate overarching-value thesis.

3. Neo-classical Natural Law Theory

Classical natural law theory has been redefined and further developed by some philosophers in the twentieth century. A contemporary writer who has defended a reasonably modest conception of

[8] J. W. Harris, *Legal Philosophies*, 2nd ed., Butterworths, London, 1997, p. 7.
[9] De Re Publica, 3.22.33, trans. ClintonWalker Keys, Loeb Classical Library, Cambridge, Mass., 1928, p. 211
[10] T. Aquinas, "Summa Theologiae", in R J Regan et al eds., *Saint Thomas Aquinas: On Law, Morality and Politics* (Indianapolis:Hackett, 1988) at I-II, q. 90 a.4.
[11] The Essence of Law, 615, 633, 649)
[12] Essay VIII, in Leyden, John Locke, Essay 1999.

natural law is Lon Fuller. In his book Morality of Law, Lon Fuller made a distinct argument that law, by its nature, has a core of morality. Lon Fuller argued that the connection between law and morality is necessary only at the level of an entire system-that legal system may, of course, contain particular laws that are unjust or immoral in some other way, but the system as a whole must satisfy certain moral demands in order to count as legal. Laws that are incomprehensible, incoherent, constantly changed, kept secret, or openly ignored by those who enforce them will not be effective as laws. These are "internal morality" of law. Fuller believed in the force of reason, and his faith in reason was the most recurrent theme in his writing. According to Fuller, "If the virtue of the natural law theory has been to keep alive faith in the capacity of human reason, its vice has often been to overstate the role that rationality can play in human affairs. Reason can shape the fundamental structure of a legal system; it can not prepare the law to deal with every twist and turn that human affairs can take".[13] Fuller contended that objectivity in reason is the dictate of natural law.

John Finnis is the main propounder of the new classical natural law theory. In his book Natural Law and Natural Rights,John Finnis has developed the most substantial and contemporary theory of natural law, which is labeled as the new classical theory of natural law. He defines the task of natural law as exclusively normative. "A theory of natural law," he says, natural law is the set of principles of practical reasonableness in ordering human life and human community" and "claims to be able to identify conditions and principles of practical right-mindedness of good and proper order among men and in individual conduct."[14] The use of human reason alone, Finnis says, leads us to an awareness of the "basic values of human existence" or "basic forms of human good."[15] According to him, "Practical reasonableness" as a basic good is closely related to moral freedom.[16] Through his new natural law theory, John Finnis argues that humans are naturally inclined towards certain ends, which they refer to as 'basic goods' or 'values.'[17] These goods are described as 'basic' since they constitute intrinsic reasons for human action: humans pursue them for their own sake and not for the sake of some further objective.[18] According to Finnis, "All the inclinations of any parts whatsoever of human nature, …..insofar as they are ruled by reason, belong to natural law. If reason ordains that the act ought to be done under the aspect of the good, it is there operating within the context of the first precept of the natural law: good is to be done, and evil avoided."[19] He concludes that laws that violate general standards of justice do not have the obligatory character of law, although they may be enforced and legally obligatory.[20] Finnis argues that the moral obligation to obey legal rules is contingent upon the consistency of such rules to promote the common good; laws that are unjust and thus incompatible to further the common good do not

[13] Anatomy of Law, p. 163-164).
[14] Ibid, p.21
[15] Ibid 23
[16] Ibid 24
[17] John Finnis, *Natural Law and Natural Rights,* 2nd ed., Oxford UP 2011 at 59.
[18] Ibid 62.
[19] John Finnis, Natural Law and Natural Rights, p. 351
[20]Ibid, p. 360-61.

generate a moral obligation to obey them. New natural law theory posits that natural law principles are self-evident principles of practical reason identifying the objects of human inclination as goods to be pursued.[21] Finnis describes the common good as signifying a set of conditions that enables community members to realize their basic values for themselves and that accordingly explains the collaboration of community members.[22] The new natural law theory is grounded on the existence of basic goods as objects of natural human inclination and identifying natural law principles as directives of practical reason.

4. Significance of Natural Law Theory

The theory of natural law pervades many areas of law. For example, international law has historical roots in natural law theory. Hugo Grotius, often described as the founder of modern international law, mentioned natural law as a source of the *jus gentium* or law of nations alongside positive laws created through state consent. In the 19th century, the influence of natural law theory declined significantly due to the emergence of legal positivism.[23] The positivist claim that international law consisted exclusively of laws originating in acts of state consent through treaties marked a departure from the notion of jus gentium. Proponents of positivist thought rejected belief in the existence of objective norms discoverable through reason and characterized law as resulting exclusively from the exercise of the sovereign will by a state.[24] The influence of natural law on the development of modern international law cannot be denied altogether. While most customary international law has been codified in multilateral treaties and new multilateral treaties are adopted through state consent, it is generally acknowledged that modern international law cannot be entirely explained in positivist terms. For example, Article 38 of the Statute of the ICJ identifies "the general principles of law recognized by civilized nations" as a source of international law alongside treaties and international custom, affirming the source of international legal norms that are not grounded in state consent. The origins of modern international law principles, such as the peaceful settlement of disputes, the right of self-defense, and the right of humanitarian intervention, have all been commonly attributed to classical natural law scholars such as Francisco Suarez, Alberico Gentill, and Hugo Grotius.[25]

Similarly, the natural law theory has significantly shaped the contour of international human rights law. The natural law was viewed as establishing certain moral entitlements that all human beings supposedly have simply by virtue of being human. In this sense, natural law was also interpreted and viewed as natural rights. In the 18th and 19th centuries, the English, French, and American

[21] Ibid at 23.
[22] Ibid at 155
[23] Wilhelm G. Grewe, *The Epochs of International Law*, trans. And rev. Michael Byers Berlin 2000 at 503.
[24] John Austin, *The Province of Jurisprudence Determined*, London, John Murray 1832; see also Roberto Ago, 'Positive Law and International Law' 1957 51 AJIL 691 at 697-98.
[25] Mark Searl, 'Natural Law, International Law and Nuclear Disarmanent', *Ottawa Law Review*, Vol. 33:2,, (2001-2002) 273.

Revolutions, the idea of natural rights, forebear to the contemporary notion of human rights, played a key role in struggles against monarchies. Natural Rights gave the individual certain claim and entitlements to challenge injustice and make claims against the state. The preamble of the Universal Declaration of Human Rights 1948 begins with recognizing the inherent dignity and the equal and inalienable rights of all members of the human family as the true foundation of freedom, justice, and peace in the world. The notion of human dignity originates from human nature. Respect for the nature and dignity of the human person thus makes it possible to establish human rights - their finality, content, authority, and universality. Subsequent treaties adopted on human rights are the continuation of such an idea.[26] The Convention against Genocide 1948 makes genocide one of the most heinous crimes against nature, punishable under international law.

5. Conclusion

Natural law is assumed to entail an ideal conception of the ultimate end or good for mankind. Despite the positivist legal theory's dominance in the realm of national law and international law, natural law's two main themes- reason and the common good- are still highly relevant and continuously influence many branches of international law, national law, and human rights law.

[26] Grégor Puppinck, Natural Law and Human Rights, European Center for Law and Justice, 2018.