Page 5232 - 5241 **DOI:** *https://doij.org/10.10000/IJLMH.111130*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

Analysis of Natural Law and Social Contract Theory in Jurisprudence

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ABSTRACT

The paper aims to discuss the development and evolution of two often contradicting theories, natural law theory and social contract theory. It aims to analyse and explain the positive sides of these theories and further differentiate them. It first discusses the influence of natural law in the Ancient Greece, Ancient Rome and Ancient India for the development of law and order. It further discusses the development and implementation of natural law in modern times. It also highlights the perspectives of various philosophers like Aristotle, Socrates, John Locke, Rousseau, Hobbes and etc in the regard of these theories. It especially explores the principles and theories of Rousseau about social contract theory to understand the basic principles and ideas of this theory. It also aims to explore influence of these theories in the present world and the upcoming future.

I. INTRODUCTION

Natural Law Theory is considered as divine law and the law of nature. It has existed throughout the history. The central idea of the theory is morality. It considers morality as the higher law under which the validity of manmade laws can be measured. In ancient times, natural law was contemplated as religious or supernatural.[3] In modern times, natural law is responsible for the modern social, political, and legal ideology. It is simply based on reason and a good conscience which measures what should be done or not to done. It also distinguishes between good and bad. Its relevance can be seen throughout the time. Thus, it becomes important to study the development of natural law theory in the Ancient, Medieval, and Modern periods.

Another descriptive theory in Jurisprudence is the Social Contract Theory. It discusses about relationship between society and laws. It goes back to the seventeenth and eighteenth centuries. It belongs to the political philosophers but did not originate with them. This theory has its roots in the consciousness of medieval society. The idea had already been anticipated in Greek tradition but the full exposition of the theory in modern political theory is being associated with

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[3]CroweJonathan, *Natural Law and the Nature of Law*, Cambridge & New York, Cambridge University Press. (2019).

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the writings of Hobbes, Locke, and Rousseau.

II. NATURAL LAW THEORY IN JURISPRUDENCE

Natural Law is a philosophical theory that states that humans possess certain rights, responsibilities, and moral values that are immanent in an individual's nature. It is based on the idea that natural laws have universal application and are not based on any specific culture or customs. The theory provides a way in which society acts naturally and inherently as human beings. The best way to describe natural law is that "it provides a name for the point of intersection between law and morals."[4]

Natural Law theories of the Greek period

Greeks' philosophers were one of the first Ancients who discovered and explored the theories of natural law and developed its essentials. During that time, Greece was suffering from political instability which forced the jurists to think and develop new principles (natural law principles) to tackle and control tyranny and arbitrariness. The principles developed by the Greek philosophers were that "if there is anything universally valid, that is valid by Nature for all men irrespective of time and country. And nature is something which is outside the control of men."[5]

Various philosophers gave their theories based on their understanding of the concept of natural law. A few of the most relevant philosophers were:

1. Aristotle

Aristotle was a great Greek philosopher who is often considered to be the founding father of natural law. He believed that the whole world is the product of nature. He divided the life of a man into two parts, first, that "the man is the creature which is created by God" and second "he endowed with active reason by which he is capable of forming his will." He also stated that the principles of natural justice can be discovered for these reasons.[6]

2. Plato

Plato's work was abundantly inspired by subsequent speculation of natural law themes. He had an opinion that God gave all humans an equal sense of justice and ethical reverence so that they can survive in the struggle of life. Plato believed that natural justice is a harmony of human's inner life and it can be achieved by reason and wisdom of man. He also believed that in an

[4]A PasserinD'Entrèves, Natural Law (London: Hutchinson, 1970), 116.
[5]Dr V.D MAHAJAN, *Jurisprudence and Legal Theory*. (5thedn, 2006).
[6]Ibid.

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ideal state each man is given a particular role according to his or her capacity.

3. Socrates

Socrates was a rational and logical thinker and an enlightened master who believed in human 'insight'.[7] He believed that morality is the higher law.

According to Socrates, man has the insight that facilitates him to know what's sensibly well or what is bad, therefore an individual should act in accordance with his insight. He believed that a man can inculcate moral values in him through his insight.

Natural law in Ancient Rome

Natural law exercised an undeniable constructive influence on Roman law. Romans applied natural law theories to rework their rigid and narrow system into cosmopolitan. Roman had divided their laws into three divisions' i.e. 'jus civile' or civil law that was applicable on citizens of Rome only, 'Jus Gentium, the law that was applicable on foreigners. And 'jus naturale' was the law fastened by nature, changeless, and above all manmade laws discovered by right reasons. Based on natural law, roman jurists and magistrates applied those rules which were common with foreign citizens and to foreign laws. The body of rules that were developed during this process was called jus gentium. These laws were thought of as the laws with universal legal principles and described a good sense of justice. Later on, jus gentium and jus civile became one once Roman citizenship extended all over Europe. There was unanimity among Roman magistrates and jurists that whenever any contradiction arose between Natural law theories and Positive law theories, the former would prevail.[8]

Roman Philosophers like Greek Philosophers contributed a lot to the development of Natural Law. The most relevant philosophers were Cicero, Stoics, etc.

- Cicero- He believed that the law is the highest reason that derives its authority from Nature. He had an opinion that there is divine reason inherent within the universe that sometimes can be typically more or less identified with the physical ordering of the universe. He believed that human being is the highest creation by virtue of his school of reasoning and his welfare is the ultimate purpose of his creation, therefore this reason commands what ought to be done and what ought not to be done. It is the reason of the men by which the sense of 'justice' and 'injustice' can be measured.

[7]Dr N.V. PARANJAPE, *Studies in Jurisprudence & Legal Theory*. (9thedn, 2019)
[8]WacksRaymond. *Understanding Jurisprudence: An Introduction to Legal Theory*. Oxford: Oxford University Press.(2005)

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- Stoics- They were galvanized by the principles of Plato's theory about natural law and developed his theory. He said that the whole universe is governed by reason. And man is a part of the universe which is also governed by reason. He also stated that it is the reason of man that leads him to live according to the natural law of nature. Stoics' theory of natural law had a great impact at the time of the republic period.

Natural Law in Ancient India

Hinduism is one of the oldest religions in the world and existed even before the Greeks and Romans. The early thinkers of Hinduism (who wrote Rig Vedas) were exceptionally impressed by the power and forces of nature. These thinkers began to think about the natural forces such as storms, lightning, the wind, the sun, the moon, the rains, etc. And they also began to question (reason) themselves that "Where do the stars go by day? why does the sun not fall? What is the purpose behind the lightning in the sky? etc. The most reasonable perception was that the powers of nature were all represented by divine powers of nature. In Ancient India, the moral law or natural law was always seen above the positive law with universal validity like dharma 'righteousness', Artha 'wealth', Kama 'desires, and moksha 'salvation'. It was dharma in which the ethos of the Indian way of life was characterized."[9]

In the various Vedas different natural gods had been mentioned who were believed to be responsible for different natural phenomena. For example, it was the God Varuna who was very important in the Vedic period. Varuna was considered as the 'apostle of justice', virtue, and righteousness in the universe. He was also given the status of sky guardian of 'Rita' in Vedas. "Rita is the cosmic command, the well-ordered course of things in the universe which is based on the laws of uniformity of nature and universal causation."[10]

Dharma

Another concept which represented natural law was Dharma which means 'righteousness' and prescribes social, religious code of conducts in the society. It is also known as the customs, moral laws, duties and law in general, absolute truth, conventional code of customs, divine justice, and traditions, what is right and what is wrong, etc. It was believed that individuals should pursue what is universally right instead of what is wrong. Its principles are changeless, eternal, based on reason, truth, and morality with the purpose to maintain social order.

Thus, according to these philosophers, Natural Law Theory incorporates the idea that men

[9]Ibid.
[10]Dr V.D MAHAJAN, *Jurisprudence and Legal Theory.* (5thedn, 2006)

understand the difference between wrong and right inherently.[11] Therefore, natural law theory can exist even if humans do not understand it or no political order or legislature exists. That means that humans are not taught natural law but they initiate it by making the right decisions. Hence it is discoverable through the exercise of reasoning and logic.

III. NATURAL LAW THEORY IN MODERN WORLD

Decline of Natural law theory in the 18th Century

In the 18th century, the natural law theory saw its decline. Its primary reason was political (revolutions, democracy) and economic (industrial revolution) changes in Europe. These changes and developments required strong and reasonable political solutions. The rapid growth of natural science and the creation of new political theories gave strength to 'empirical methods' and rejected deductive methods. Some many philosophers and historians rejected natural law theory by saying that it was just a myth.

For example, Hume described that the reason understood in the system of natural law was based on confusion. And he stated that "neither values nor justice is inherent in nature". Bentham believed that natural law theory is nothing but a phrase.

He criticized natural law theory and called it "simple and rhetorical nonsense". Austin was also against natural law. According to him, "Natural Law Theory was ambiguous and misleading". He contends that all the natural rights of the individuals were created and regulated by the state and the state did not originate in a social contract.[12]

Thus, Natural Law Theory saw a decline in its popularity and many philosophers also rejected the theory.

Revival of Natural Law in the 19th century

In the 19th Century, the Western world was completely shattered after the First World War. Every state was unstable both politically and economically. Thus, a need for an ideal of justice (moral or natural law) arose. Theories like positive law completely failed to solve these new problems which led to the revival of natural law theory. The emergence of theories and ideologies like Fascism and Marxism was another reason for the revival of natural law theories.

Now, these revived natural law theories are relatively less abstract and unchangeable and are concerned with practical modern world problems, not abstract ideas. These new theories of

[11]Raz Joseph, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, Oxford: Clarendon Press. (2nd edn, 1980)
[12]Finnis John, *Natural Law and Natural Rights*. Oxford: Clarendon Press. (1980).

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natural law deal with various human ideals. Thus, it is called "natural law with variable content".

IV. SOCIAL CONTRACT THEORY IN JURISPRUDENCE

The Social Contract theory states that State is not a divine institution, rather it is an artificial institution made by men and it is the outcome of a social contract. The main supporters of this theory are Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. The idea of a contract can be constructed amongst the Sophists, school of Greek philosophers before Plato. The Sophist made a distinction between convention and nature. According to them, the fundamental principle of human life is self- assertion. Man's nature is such that if he is not regulated by a social institution he will seek his interest. Therefore, social institution though a barrier to self-realization and opposed to nature comes into play out of a voluntary agreement between individuals. Plato and Aristotle believed the State to be a natural institution.[13]

The basic concept of Social Contract theory is based on the assumption that in the beginning man lived in the state of nature. There was neither any government nor any law to regulate them. To overcome these hardships they entered into two agreements which are, 'Pactum Unionis' and 'Pactum Subjectionis'.[14] In the first agreement, people sought the protection of their lives and property and formed a civil society, where they undertook to respect each other's rights and lived in peace and harmony. By the second agreement, people united together and pledged to enforce the social arrangements thus creating an authority and surrendered the whole part of their freedom and rights to an authority, which guaranteed everyone protection of life, property, and to certain extent liberty.

The social contract theory of **Hobbes** can be best understood by dividing his theories into two broad categories: his theory of human motivation, Psychological Egoism, and his theory of the social contract, founded on the hypothetical State of Nature.

His first theory gives rise to a particular view of morality and politics, as appeared in his philosophical masterpiece, Leviathan, published in 1651.[15]

According to Hobbes, humans are individualists and egoist, seldom interested, and will pursue only those goals which they considers best in their interest. Human beings are governed by the fundamental principles in which they are governed by three passions: desire for gain, desire for glory, and desire for safety. In his second theory, Hobbes identifies the conditions of the state

[13]Mukherjee, Subrata &Suhsila Ramaswamy, *A History of Political Thought: Plato to Marx*. (2004)
[14]Boucher, David, & Paul Kelly, (eds), *Political Thinkers: From Socrates to the Present*, Oxford University Press, Oxford. (2009)
[15]HobbesThomas,*Leviathan*(first published 1651), C.B Macpherson (Eds). London: Penguin Books (1985)

of nature, based on natural law and the absence of any social or moral rules.

He describes the state of nature as solitary, poor, nasty, brutish, and short. It is a state of constant war as there is no distinction between right and wrong. The state of nature is marked by uncertainty, but at the same time, humans are motivated by the instinct of self-preservation and also a rational desire to escape the war. Hobbes's Social Contract creates a body that receives power from the contract and thus he is above it. The sovereign cannot be unjust and he cannot be held guilty of violating the law. Hobbes, states that even if the sovereign is tyrannical, the individual cannot revoke the contract. Justice lies in adherence to the contract and it is the only way through which action can be directed for the common benefits.[16]

Locke proposed a different theory of social contracts in his most important and influential political writings, *Two Treaties on Government*.[17] However, unlike Hobbes who painted a gloomy picture of the state of nature and human nature, Locke's state of nature is peaceful and individuals co-exist as they are governed by rationality and morality. Individuals were governed by natural law. It was a body of rules determined by reasons. Thus, all being equal and independent, obliges each one to respect the life, health, liberty, or possession of the other and no one ought to harm another in the enjoyment of these natural rights. Locke believed that individuals enjoy these rights for the fact that they are human beings and possess reason. Locke's state was minimal. According to him, the State was created to protect the rights of the people and the people did not surrender their rights to the State. Hence, the State could only intervene in the affairs of the individual to preserve his rights.

In fact, Locke only provided the means or justification to resist the authority if it fails to protect the trust while also justifying the right of the people to revolt or alter the authority if it finds that it is acting contrary to the purpose for which it was created. Another feature of the State was the idea of separation of powers, he assumed the State to be composed of three powers; viz., Legislative, Executive, and Federative. Locke put forward the idea of parliamentary government paving the way for a republican or democratic form of government. He was one of the greatest propounders of the individual liberty and natural rights of men. The State thus created ensured the protection of some inalienable rights that is the right to life, liberty, and property. His philosophy exerted much influence and contributed to the ideological foundation of both the French and American revolutions.

To understand **Rousseau's** idea of the social contract one needs to delve, though briefly, into

[16]Kavka Gregory S. *Hobbesian Moral and Political Theory*. Princeton: Princeton University Press. (1986)
[17]LockeJohn, *Two Treatises of Government* and A Letter Concerning Toleration. Yale University Press (2003).

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understanding the two discourses. He throws light to the conception of virtue, moral and moral psychology, and critics modernity concerning enlightenment. Rousseau made a psychological analysis of the human being by bringing in the idea of the basic instinct that governs humans.[18] Humans are governed by two instincts viz Self-love and Sympathy. Every individual has to attend to one's own preservation and cares for things which he owes himself.

In the social contract, the individuals are made to surrender everything to the society but receive back what he surrenders. According to Rousseau, each individual is a part of the whole, while the whole is a representation of the Will and Consent of each individual. The purpose of the General Will is to ensure the good of the community as a whole. Its aim is not to work for the interest of the majority or few but the common interest. The General Will is sovereign, indivisible, and is a single unit representing the Will of all individuals. It is just and supreme to any other will. Thus, the government was only an agent of the people delivering its power and authority from the Will and consent of the people.[19] While asserting the importance of the individual, Rousseau aimed at promoting the moral life and liberty of the individual. The Will of the people stood above all, in other words, *Vox Populi* was *Vox Dei*. Rousseau's social contract theories together constitute a harmonious view of our moral and political situation. We are bestowed with freedom and equality by nature, but our nature has been abused by our contingent social history. This claim is reflected in the famous quote, "***Men was born free, and is everywhere in chains***". However, we can overcome this abuse by invoking our free will to reconstitute ourselves politically, along strongly democratic principles, which is good for us, both individually and collectively.

V. CONTEMPORARY APPROACHES TO THE SOCIAL CONTRACT

In 1971, the publication of an American philosopher **John Rawls'** extremely influential *A Theory of Justice* attempted to develop a non-utilitarian justification of a democratic political order characterized by fairness, equality, and individual rights.[20]Utilitarianism asserts that the role of the State is to serve the greatest number. However, Rawls felt that the resulting good might neglect or even sacrifice the interest of the individual. According to Rawls, Justice is the first virtue of all social institutions and every person possesses inviolability i.e., secure from destruction found on justice.[21]

A just society is the one wherein the liberties of equal citizens are taken as settled, the rights

[18]Rousseau Jean-Jacques. *The Basic Political Writings*. Hackett Publishing Company (1987).
[19]Baier Annette. *Moral Prejudices: Essays on Ethics*. Cambridge: Harvard University Press. (1994)
[20]Rawls John,*A Theory of Justice*. Harvard University Press (1971)
[21]RawlsJohn, *Political Liberalism*. Columbia University Press. (1993)

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are secured, and not subject to political bargaining. This proposition is based on a form of the social contract and is drawn from Locke in the sense that the state is a voluntary society constituted for mutual protection.[22]Individuals are rational agents with interests and rights. Rawls' aim is to develop a notion of justice- **justice as fairness.** Major institutions for such purposes are the Constitution, law, the legal process and system, competitive market, family, etc. These institutions defined and determined the rights and duties and have a profound influence on the prospect of one's life.

Reviving the notion of a social contract, Rawls argues that justice consists of the basic principles of government that free and rational individuals would agree to in a hypothetical situation of perfect equality. The idea of the hypothetical social contractapplied not to the nature of the state's authority over the people but the nature of justice. The idea of the contract emphasizes two things:

(a) the social order must be made acceptable to all individuals based on consensus; and

(b) the imaginary or the hypothetical situation in which the individuals have chosen the society to live in is reconstructed.

Thus according to Rawls, we are to imagine ourselves in a contract situation in which we must agree with all those people who will live with us in the society on the principle of justice that will govern it. As they are rational individuals they realize what is good for them and also what is just. They can therefore choose the social arrangement in which they feel they would not have to suffer disadvantage. Therefore, they choose the social arrangement which would suit their own interests. But need a way out to construct a situation in which they would not have much interest and therefore they would not have the bias which follows it.

VI. CONCLUSION

The natural law theory in jurisprudence is currently undergoing a period of reformulation. The prominent contemporary natural law jurist such as John Finnis has tried to construct a new version of natural law. "New natural law" as it is sometimes called, originated with Grisez, focuses on basic human goods such as human life, knowledge, and experience, all of which are self-evident and intrinsic as they reveal themselves as being incommensurable with one another.

On the other hand, the Social Contract theory is as old as philosophy, as it holds a view that persons' moral and political commitments are dependent upon an agreement or contract among

[22]SandelMichael, *Liberalism and the Limits of Justice*. Cambridge: Cambridge University Press. (1982)

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them to form a society in which they live. It is associated with the liberal tradition of political theory for it assumes the fundamental freedom and equality of all those who enter into a political organization. Thus, it would be difficult to amplify the effect that social contract theory has had, both within philosophy and on the wider culture. Social contract theory is with us for the foreseeable future. Despite that, so are the critiques of such theory, which will continue to influence us to think and rethink the nature of both ourselves and our relations with one another.

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 [ISSN 2581-5369]