

CONCEPTUALISING AND CONTEXTUALISING NATURAL LAW

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ABSTRACT

The idea of natural law has a long history. It has had different meanings for different people and continues to occupy intellectual engagements as to the connotations of the expression 'natural law' in diverse and differing contexts. This requires delving deep into the hoary past and analysing the gradual development of the idea of natural law through the ages. Understanding natural law necessitates exploring its relation with positive law, its application, and, notably, the import of the word 'natural' in the expression 'natural law'. Be that as it may, there is no denying the fact that there is an element of exclusivity about natural law that has kept it alive and going across generations. Even some of the jurists that adhered to the principles and tenets of legal positivism have shown an inclination towards the principles of natural law, especially as regards the relation between law and morality. It has survived the tests of time. The present paper seeks to explicate the various dimensions of natural law and explores its growth and application.

Keywords: Natural Law, Positive Law, Good Conduct, Jus Cogens, Human Rights

INTRODUCTION

To Paton, natural law has always meant different things to different people. "*Its true meaning is still a matter of controversy today*".¹ To Boucher, "*the idea of natural law has a long and intricate history*."² It has been used as a weapon against oppressors, combining reason, emotion, knowledge, and passion. Despite many meanings and interpretations, natural law has considerably influenced the development and evolution of law. Its philosophical explorations and practical applications in law (domestic and international) have been particularly notable.

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¹ G W Paton, *A Textbook of Jurisprudence* (Oxford University Press 1964) 94.

² David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (OUP 2009) 19.

To date, the progression of natural law into the working of legal and other institutions fascinates and drives the legal imagination of many.³

This paper sheds light on a few philosophical takes on the subject. Also included is a discussion on the application of natural law across three specific areas of law, namely (1) universal/human rights theory, (2) *jus cogens* norms in international law, and (3) constitution law and interpretations. Each of the three areas of law involves serious engagement with the idea of natural law. A combined reading of its philosophical meanings and practical enunciations is likely to enable an enriched understanding of one of the most curious areas of law and philosophy.

THE IDEA OF NATURAL LAW

Bearing in mind the richness of natural law in terms of its philosophical meanings, an informed discussion on it can be centered around five major themes, including (1) natural law as good conduct, (2) natural law as morality, (3) natural law and positive law, (4) reading natural law, and (5) natural law representing the dignity of life.

NATURAL LAW AS GOOD CONDUCTOR

Jus natural or natural law was originally the stoic philosophical conception of a universal ideal of good conduct. Few asserted that all laws should be founded on this ideal and that they ought not to be overridden by any other laws however made. The most significant contributions from many jurists include, first, the linking of *jus naturale* as law based on natural reason, i.e., it is discoverable by reason and immutable (unchangeable).⁴ In other words, natural law exists in nature before it exists in human judgment. Second, natural law is superior to the law created by the state and its existence is independent of men. According to Davies, it is something that may be said to exist whether or not any person, judge, or legislature has ordained what the law is.⁵ Third, natural law is universal in nature applying to everyone irrespective of geographical limitations. In the words of Judaeus,⁶

³ Julia Klaus, "The Evolution of the Prohibition of Genocide: From Natural Law Enthusiasm to Lackadaisical Judicial Perfunctoriness - And Back Again?" (2021) 11(1) Goettingen Journal of International Law <www.gojil.eu/issues/111/Klaus_Final.pdf> accessed 2 July 2022.

⁴ H H Marshal, *Natural Justice* (Universal Law Publishing Co Pvt Ltd 1998) 6.

⁵ Margaret Davies, *Asking the Law Question* (Law Book Company 2008) 73.

⁶ M J Sethna, *Jurisprudence* (Bombay: Lakhani Book Depot 1959) 71.

The natural law is...not an ordinance made by this or that mortal, corruptible and perishable law, a lifeless law written or lifeless parchment, or engraved on lifeless column; but one imperishable and impressed by immortal Nature on the immoral land.

Another feature of natural law has been its role in creating intersections between law and morality.⁷ The main claim of natural law theorists is “*what naturally is, ought to be*”.⁸ According to Murphy, the central claim of natural law jurisprudence is that there is a positive internal connection between law and decisive reason for action, and a strong motivation backs law for action. Based on this understanding, social, personal, and political matters concerning abortions, homosexuality, same-sex ‘marriages’, and marital infidelity have on different occasions been tested on the principles of natural law.⁹ In this regard, Cotterrell writes;¹⁰

Throughout its long history, natural law theory has postulated the existence of moral principles having validity and authority independent of human enactment and which can be thought of as a “*higher*” or more fundamental law against which the worth or authority of human law can be judged. This fundamental ‘natural law’ is variously seen as derived from human nature, the natural conditions of existence of humanity, the natural order of the universe, or the eternal law of God. The method of discovering it is usually claimed to be human reason. Natural law thus requires no human legislator. Yet it stands in judgment on the law created by human legislators.

A part of its understanding is that natural law includes both the laws of the physical world and the laws which govern human thought and behaviour.¹¹ Years ago, Cicero observed;

True law is right reason in agreement with Nature. It is of universal application, unchanging and everlasting...it is a sin to alter this law, nor is it allowable to repeal a part of it, and it is impossible to abolish it entirely...there will not be

⁷ Alexander Passerin D'Entreves, *Natural Law* (First Published 1994, Routledge 2017) 116.

⁸ Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (OUP 2006) 1.

⁹ Michael D A Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 2014) 83-90.

¹⁰ Roger Cotterrell, *Politics of Jurisprudence* (OUP 2003) 115.

¹¹ K K Mathew, *Three Lectures* (Eastern Book Company 1983) 36.

different laws in Rome and at Athens or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times.

To Bix, Cicero introduces four core premises of traditional natural law including (1) Natural law is unchanging over time; (2) It does not differ in different societies; (3) Every person has access to the standards of this higher law; and (4) Every person has access to it by use of reason.¹²

NATURAL LAW AND POSITIVE LAW

Natural law is the sum total of all those norms which are valid independent of, and superior to any positive law. In other words, these norms of natural law owe their dignity not to arbitrary enactment. On the contrary, they provide the very legitimation for the binding force of positive law.¹³ According to Hart, there are certain principles of human conduct awaiting discovery by human reason, with which man-made law must conform if it is to be valid.¹⁴ According to Crowe, there are two elements subsumed in Hart's description of natural law. First, specific objective ethical principles are "*accessible to all humans by their rational capacities.*" Second, it is impossible to fully determine a law's validity without having reference to these fundamental ethical ideas. In this context, Friedmann states that the most important and lasting natural law theories have undoubtedly been inspired by the two ideas of a universal order governing all men and the individual's inalienable rights.¹⁵

All in all, a belief in the existence of objective moral principles is a necessary prerequisite for a tenable natural law theory. And this very aspect of the natural law tradition has been explored time and again. According to Gardner,¹⁶

Natural law, in the tradition of that name, is not the same thing as human law. Natural law is the same thing as morality. It is the higher thing to which human law answers. We may regret that members of the tradition seem to feel a need

¹² Brian Bix, *Jurisprudence: Theory and Context* (Carolina Academic Pr 2006) 66-67.

¹³ Max Weber, *Law in Economy, and Society* (Harvard University Press 1959) 287-288.

¹⁴ HLA Hart, *The Concept of Law* (Clarendon Press 2007) 186.

¹⁵ W Friedmann, *Legal Theory* (Sweet & Maxwell 2016) 96.

¹⁶ Brian Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism' (2000) 75 Notre Dame LawReview

<https://academia.edu/27186091/On_the_Dividing_Line_Between_Natural_Law_Theory_and_Legal_Positivism> accessed 2 July 2022.

to present morality as a kind of law, which it is not. For a start, morality is not a system (and is not made up of systems) and nor does it make claims, pursue aims, or have institutions or officials, all of which features are essential to the nature of law. Nevertheless, even as we resist the idea that morality is a kind of law, we should endorse the idea that morality is entirely natural. It binds us by our nature as human beings, while law binds us, to the extent that it does, only by the grace of morality.

To date, the relation between natural law and positive law or man-made law has been one of the fascinating aspects of natural law. According to MacCormick, “*For long the leading jurisprudential image of natural law theory presented it as defined by the thesis that unjust laws are necessarily non-laws*”.¹⁷ On the validity of positive laws, Murphy elucidates through the prism of a “*weak natural law thesis*” and “*strong natural law thesis*”. The “*weak natural law thesis*” holds that law unbacked by decisive reasons for compliance is defective precisely as law. The “*strong natural law thesis*” holds that law unbacked by decisive reasons for compliance is no law at all. And common to both is the premise that positive law or man-made law must conform to natural law.

READING NATURAL LAW

The larger-than-life canvass of natural law sometimes leaves students of natural law bemused, often questioning how and from where to start reading it. A.P. d’Entrèves, in the prefatory chapter of his book *Natural Law* deals with this question. He writes,

In my opinion what really calls for attention on the part of the modern student is the function of natural law rather than the doctrine itself, the issues that lay behind it rather than the controversies about its essence.

Another matter is that natural law as a part of ethics and politics is intrinsically different from the notion of the law of nature, which the scientists elaborated.¹⁸ In the domain of ethics and politics, there is something *sui generis* about it, which has kept it alive and going in the realm

¹⁷ Robert P George, *Natural law Theory: Contemporary Essay* (Oxford University Press 1992) 106.

¹⁸ HLA Hart, *The Concept of Law* (Clarendon Press 2007) 186.

of jurisprudence. In this regard, Gurvitch¹⁹ identifies the six different uses of the term natural law, including:

1. As a moral justification of all laws
2. As the prior element of the law
3. As an ideal by which existing positive law can be judged
4. As referring to immutable and not variable rules
5. As “autonomous” law is valid because it is based on an ideal
6. *Droitspontane* as opposed to law fixed by the state.

According to Paton, these six divisions seem to overlap significantly, making the study of natural law complex. Further, one may also consider additional categories representing other natural law aspects, namely:

1. Ideals that guide legal development and administration
2. An essential moral quality in the law that prevents a total separation of the ‘is’ from the ‘ought.’
3. The method of discovering perfect law
4. The content of perfect law deducible by reason
5. The conditions *sine quibus non* for the existence of law.

Such conceptual fuzziness or open-endedness is undoubtedly an obstacle to a proper and clear understanding of what natural law means or connotes. Nevertheless, a student of natural law ought to find some golden thread that runs through the above conceptual maze. This golden thread can be that foundational idea that has been the bedrock of the various theories of natural law in some form or other at some point in time. The starting point for such efforts must be through the multiple meanings, and interpretations applied.

DIGNITY OF LIFE

Part of the pursuit is to determine what natural law has meant to society. Verdross writes, “*natural law is the sum of rationally discernible principles of social ordering which comport*

¹⁹ Georges Gurvitch, *L'Expérience Juridique Et La Philosophie Pluraliste Du Droit* (A Pedone 1935) 103.

with the dignity of human beings and are required to make possible their co-existence in society.” To Paton, “dominating all the doctrines of natural law is the thought that law is an essential foundation for the life of man in society and that it is based on the needs of man as a reasonable man and not on the arbitrary whim or a ruler.” Soltan introduces concepts like conflict prevention, justice, power, etc. He writes,²⁰

Principles of natural law transform power into authority. We can speak here of the sovereignty of justice, or of certain kinds of good ends, discoverable by a science of good ends, and enforceable in courts. These are good ends, then, which are relevant to the resolution and prevention of conflict.

Bringing in an element of constitutionalism, Cranston writes, the concept of 'due process' draws its nourishment from natural or higher law so also the concepts of 'reason' and reasonableness' draw the juice for their life from the law of reason which for the common law lawyer is nothing but natural law.²¹

In sum, natural law theories propose to identify the fundamental aspects of human well-being and fulfillment, i.e., basic human goods and norms of human conduct.²²

DEVELOPMENT OF NATURAL LAW

The history of natural law is a tale of humankind's search for absolute justice. In the last 2,500 years, natural law has appeared in some form or other as an expression of the search for an ideal higher than positive law. The notions of natural law have changed and evolved with changing social and political environments, with one constant at its center; an appeal to something higher than positive law. The constant i.e., "*something higher than positive law*," responds to the question of what makes a theory a "*natural law theory*", given that many theories of natural law have developed over a long period after natural law emerged in Greek philosophy?

In several works, an examination of natural law generally begins with Antigone's unwritten laws and then stoics. Cicero enters briefly and is accompanied in "*cameo appearances*" by

²⁰ Karol Soltan, 'Natural Law, Universal Human Rights and Science' (2003)12 *The Good Society* <<https://muse.jhu.edu/article/171429/pdf>> accessed 2 July 2022.

²¹ Maurice Cranston, *What are Human rights?* (Bodley Head 1973).

²² Keith E Whittington and R Daniel Kelemen (ed), *The Oxford Handbook of Law and Politics* (OUP 2008) 399.

Aquinas, Grotius, and Blackstone.²³ According to Mathew, natural law is a heritage of the Greek²⁴ and Christian thought. It goes back to Grotius and before him to Suarez and Francisco de Victoria and further back to St. Thomas Aquinas and still further back to St. Augustine and Church fathers. It even goes further to Cicero, the Stoics, the great moralists of antiquity, and its great poets, particularly Sophocles. From the Stoics until the eighteenth century, Western ethical thought has, in one way or another, revolved around some version of natural law.²⁵ The seventeenth and eighteenth-century thinkers understood natural law was prominent in ancient and medieval thought. However, it acquired a new role with the division of Christianity and the emergence of modern statehood in their eyes. On this, Haakonssen observes:

At the turn of the eighteenth century we have... a major discussion across Protestant Europe that can be said to be a three-cornered contest between, first, a variety of traditional confessional standpoints according to which morality has its basis in revelation; second, the new, provocative voluntarism started by Hobbes and Pufendorf and continued by Thomasius; and, third, a rationalist and realist view of natural law that had significant debts to scholastic, especially Thomistic, theory and is typified by Clarke, Leibniz and Christian Wolff. The interaction between these intellectual currents was, however, exceedingly complex.

The classical natural law of the seventeenth and eighteenth centuries was a legal by-product of the forces that transformed Europe due to the Protestant revolution. However, it does not convey that classical natural law marked a break or detachment from medieval and scholastic legal theory. Many "*links and influences*" connected Aristotelian and scholastic thinking with the doctrines of the classical law-of-nature philosophers, especially those of the seventeenth century. Notwithstanding the "*influences and links*," characteristics associated with the classical natural law set it apart from the medieval and scholastic natural law. A somewhat universalistic view on the origins of natural law comes from Ratnapala,²⁶

²³ Costas and Gearey, *Critical Jurisprudence* (Hart Publishing 2005) 16.

²⁴ Stephen James, *Universal Human Rights: Origins and Development* (LFB Scholarly Publishing 2007); S Buckle *Natural Law A Companion to Ethics* (1999).

²⁵ Ana Marta González, *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept* (Routledge 2008) 16.

²⁶ Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2009) 119.

The idea of a higher moral law that positive human law must not violate has a long and continuous history in both Western and Eastern thinking. It is found in Greek philosophy at least from the time of Heraclitus of Ephesus (c. 535–475 BC). It has a central place in Judeo-Christian doctrine as set out in the writings of Augustine, Thomas Aquinas and the Scholastics. It lived in the natural rights discourses of Grotius, Hobbes, Locke, Pufendorf and others. In Vedic (Hindu) philosophy the moral law of governance is revealed in the Dharmasastra. In traditional Sinic culture, Confucian philosophy subordinated law to ethics. The religious *Sharia* is a powerful influence on the law of Islamic nations. In our age, basic human rights are posited as universal higher norms binding on nation states. In Western philosophy such higher moral law is commonly known as natural law.

NATURAL IN “NATURAL LAW”

Hume long ago wrote that the word *natural* is commonly taken in so many senses and is of loose signification. According to Bix, there was a certain ambiguity in the works of Cicero and other related remarks of Greek and Roman writers regarding the reference of natural in natural law. The prevalent ambiguity was primarily because of the lack of clarity about whether standards were “*natural*.” Finnis raises a question;²⁷

What does the mainstream of natural law theory intend by using the word “*natural*” in that name for the theory?

According to Davitt, if the word “*natural*” means anything, it would be the nature of a man. And when used with “*law*,” “*natural*” must refer to an ordering that is manifested in the inclinations of a man’s nature and to nothing else.²⁸ Simply put, it is natural because it is discoverable by reason. Modern natural law theorist Maritain believes that the first principles of natural law are known not rationally or through concepts but by an activity that Maritain, following Aquinas, called “*synderesis*”. Thus, “*natural law*” is “*natural*” because it reflects human nature and is known naturally.²⁹ According to Boyle, “*the fundamental prescriptions of*

²⁷ *Stanford Encyclopedia of Philosophy* (2020 edn).

²⁸ Murray N Rothbard, ‘Introduction to Natural Law’ (*Mises Daily Articles*, 2021) <<https://mises.org/library/introduction-natural-law>> accessed 2 July 2022.

²⁹ *Stanford Encyclopedia of Philosophy* (Fall edn 2001).

natural law are held to have sense and reference, and indeed to be truths of a kind".³⁰ In the present age, these truths hold immense value in individual and institutional minds within systems across the world.

NATURAL LAW AND ITS APPLICATION

The expression "application of natural law" invites two contexts: the first concerns using natural principles in law-making and reforms. The second concerns the extent to which law or legal judgment has relied upon the principles of natural law. Scholars have given a diversity of views on the application of natural law in general. Olivecrona writes, natural law is a system of norms and principles suitable for guiding the conduct of free agents.³¹ According to Hittinger, natural law can be reserved for an important but narrow problem, i.e., the articulation of some basic human goods or needs that any system of positive law must respect, promote, or in any case protect. On that premise, "natural law would disclose the overlap of law and morality requisite for legislation and the public and legal vindication of individual rights."³²

In the domain of domestic and international law, three frameworks have most closely been tied to the idea of natural law. These include (1) the universal/human rights frameworks, (2) jus cogens norms in international law, and (3) constitutional law and interpretations. Each of the three have played a vital role in securing and advancing natural law principles.

UNIVERSAL/HUMAN RIGHTS

The phrase universal human rights implies that human rights are universal standards which apply to all human societies. The universal rights theory is viewed as an extension of natural law theory. In other words, modern conceptions of human rights have their origin in the idea of natural rights. The concept of natural rights essentially connotes those conditions which enable the attainment of moral ends shared by all human beings. For natural rights theorists, these rights are objective as long as the ultimate human end is objectively true and not in question. Since the human legal order must not be contrary to men's ends, a law contrary to the

³⁰ Joseph Boyle, 'Natural law and the Ethics of Traditions' in Robert P George, (ed), *Natural law Theory: Contemporary Essays* (Clarendon Press 1994) 4.

³¹ Karl Olivecrona and Thomas Mautner, 'The Two Levels in Natural Law Thinking (2010) 1 *Jurisprudence*.

³² Russell Hittinger, 'Natural law and Virtue: Theories at Crossroads' in Robert P George (ed), *Natural law Theory: Contemporary Essays* (Clarendon Press 1994) 42.

natural right is no law. It may be enforced, but it lacks legitimacy. Thus, the theory of natural rights implies moral objectivism and value monism, i.e., the belief that moral values represent objective truths that are not in conflict but are harmonious or hierarchically ordered.³³ According to Maron,³⁴

It has been assumed that in order to classify a specific constitutional human right or freedom as a natural right the literal reference to it as “natural” or “inherent” will be decisive. Both these terms reveal a supra-positive source of origin for a given human right, i.e., the binding force of this right is not derived from a normative act. The constitution-maker, speaking about the natural or inherent nature of a particular right, thus communicates that he is not its creator, but only he confirms and guarantees this right.

In light of his investigations into seventeenth-century natural law theory, Olivecrona finds that the “sacrosanct character of the natural person” is at the heart of modern natural law theory. This feature explains the nature of the wrongdoing, the justifiable use of force, and the creation of rights and obligations.³⁵ On the connections between natural law and universal rights, Weinreb writes, “This connection, properly understood, respects natural law's enduring tradition and, at the same time, reflects the contemporary analysis of the concept of rights. It takes seriously the task, essential for a full theory of rights, of establishing the independent reality of rights, rather than deriving them dependently from obligations or posited rules”. According to Weinreb, natural law is a philosophy of rights.³⁶

³³ Gunnar Beck, ‘The Idea of Human Rights between Value Pluralism and Conceptual Vagueness’ (2007) 25 Penn State International Law Review.

³⁴ Grzegorz Maroń and Przeważał Prawa Konstytucyjnego, ‘References to Natural Law in the Constitutions of Modern States’ (*Research Gate* 2020) 27 <www.researchgate.net/publication/348448102_References_to_Natural_Law_in_the_Constitutions_of_Modern_States> accessed 2 February 2022.

³⁵ *ibid* [201].

³⁶ Lloyd L Weinreb, ‘Natural Law and Rights’ in Robert P George (ed), *Natural law Theory: Contemporary Essays* (Clarendon Press 1994) 298.

JUS COGENS NORMS OF INTERNATIONAL LAW

In international law, *jus cogens* norms are superior or compelling norms, which are to be adhered to by all members of the international community. On the status of *jus cogens* norms, Article 53 of the Vienna Convention on Law of Treaties (1969) provides:³⁷

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 26 (Compliance with peremptory norms) provides:³⁸

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

According to Janis, *jus cogens* norms have a distinctive character in international law.³⁹ In *Jus Cogens: Compelling Law of Human Rights*, Parker refers to *jus cogens* as being developed as a natural law concept while being incorporated as part of legal positivism and modern international law. He further writes, “*jus cogens* is an attribute of natural law”.⁴⁰ The following qualities of *jus cogens* norms further illuminate on the importance of “*higher norms*” in international law;

1. *Jus cogens* norms are non-derogable.

³⁷ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

³⁸ International Law Commission, *Responsibility of States for Internationally Wrongful Acts, with commentaries* (A/56/10, 2001).

³⁹ Mark Weston Janis, ‘The Nature of Jus Cogens’ (1988) 3 Connecticut Journal of International Law 359, 361.

⁴⁰ Karen Parker, ‘Jus Cogens: Compelling the Law of Human Rights’ (1989) 12 Hastings International and Comparative Law Review 411, 414.

2. They are fundamental norms.
3. They provide validation to rules of law.
4. They represent principles of natural law.
5. They have universal application and validation, i.e., they represent the interests of the international community and humanity. According to Parker, an aspect of the universality of *jus cogens* is its presence in national legal systems regardless of the type of national legal system.
6. They inform positive laws including the substantive and procedural aspects. According to Parker, there are judicial advantages of *jus cogens*, they provide legal standing and allow for the assumption of universal jurisdiction.

There are several works of international, regional, and domestic institutions that establish the importance of *jus cogens* norms. These include the works of the International Law Commission, the human rights treaty bodies, the International Court of Justice, the regional human rights courts, the domestic courts, etc. In 2022, the International Law Commission adopted the *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)*. The Commission, in its Report, identifies norms (non-exhaustive list) that constitute *jus cogens* norms. These include the (a) the prohibition of aggression, (b) the prohibition of genocide; (c) the prohibition of crimes against humanity, (d) the basic rules of international humanitarian law, (e) the prohibition of racial discrimination and apartheid, (f) the prohibition of slavery, (g) the prohibition of torture, and (h) the right of self-determination.⁴¹ The Commission also noted the use of *jus cogens norms* in the working of international and regional courts, national courts, States and other actors. The Report of the ILC is of particular importance in determining the legal jurisprudence on the subject matter. *Jus cogens* norms, according to the ILC, perform a dual function of reflecting and protecting the fundamental values of the international community.

On that note, the application of *jus cogens* in the advancement of legal reforms has been noted on several occasions. This can be understood in light of the recent efforts to reform the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

⁴¹ International Law Commission, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), with commentaries* (A/77/10, 2022).

or Punishment (UNCAT, 1984) to include acts of torture committed by private persons. In its present form, the UNCAT covers within its scope acts of torture committed by State actors. In this regard, Emilie Pottle speaks for expanding the scope of the Pottle states,⁴²

In my view, the protection of the inherent dignity of the person is the rationale which underpins, or in the case of the UNCAT, ought to underpin, the rules prohibiting torture. Torture represents the most serious violation of the right to physical integrity. Though typically conceived of as the mistreatment of (male) detainees by their captors, it encompasses sexual violence and has evolved into a *jus cogens* norm.

The need to protect the inherent dignity of the person is also evident in the legal instruments which express the prohibition. The preamble to the UNCAT states that the parties to the Convention recognise the ‘equal and inalienable rights of all members of the human family’ and ‘those rights derive from the inherent dignity of the human person’. The preambles to the so-called ‘general human rights treaties’ — the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) — contain declarations in similar terms. This rationale means that it is necessary to protect human beings from torture whether the perpetrator is a public official or not. If what matters is that the victim has suffered a serious violation of her rights, then the status of the perpetrator as a public or private actor is not relevant.

Another illustration is the use of *jus cogens* in the interpretations of regional human rights courts. The Inter- American Court on Human Rights, for instance, in its Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants (2003), while addressing the nature and scope of anti-discrimination laws raised some pertinent questions:⁴³

What is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general

⁴² Emilie Pottle, ‘What is Torture? Making the Case for Expanding the Definition to Include Private Individuals as Perpetrators’ (2021) 19 *Journal of International Criminal Justice* 407.

⁴³ Li-Ann Thio, ‘Equality And Non Discrimination in International Human Rights Law’ (*The Heritage Foundation*, 31 December 2020) <<https://heritage.org/sites/default/files/2020-12/SR240.pdf>> accessed 2 February 2022.

international law and, in this context, can they be considered to be the expression of norms of *jus cogens*?

Can an American State establish in its labor legislation a distinct treatment from that accorded legal residents or citizens that prejudices undocumented migrant workers in the enjoyment of their labor rights, so that the migratory status of the workers impedes per se the enjoyment of such rights?

In response, the court mentions:

...States have the general obligation to respect and ensure the fundamental rights. To this end, they must take affirmative action, avoid taking measures that limit or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right. That non-compliance by the State with the general obligation to respect and ensure human rights, owing to any discriminatory treatment, gives rise to international responsibility. That the principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international law and domestic law.

That the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*.

That the fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals. That the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person.

That States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.

The above studies and cases provide insights on the application of natural law in various institutional settings, particularly in the deliberations on matters of immense importance to the international community and individual legal systems. These instances substantiate on the timeless quality and present-day relevance of natural law.

CONSTITUTIONS AND CONSTITUTIONAL INTERPRETATIONS

To many scholars, applying natural law theory in domestic constitutions is an exciting research area. In the book *References to Natural Law in the Constitutions of Modern States*, Maroń undertakes a comparative study on different constitutions of the world, particularly the countries out of 193 countries of the world.⁴⁴

In this regard, the case of the Indian constitution is particularly illuminating. The Indian constitutional jurisprudence is centered on a natural law philosophy, revealing its dependence on its value and depth for establishing legal arguments and rules. About India, it has a constitutional history of more than fifty years. It has been witnessed to many constitutional upheavals and epochal moments. The transitions it has made through judicial decisions of the highest judicial court are appreciated and lauded. In light of Article 21 of the Indian Constitution, the court's seminal natural law-based interpretations have been seen.⁴⁵ Article 21 states;

No person shall be deprived of his life and liberty except according to the procedure established by law.

Under the provision, one of the central themes of discussion has been the "*due process clause*". The concept of 'due process' draws its nourishment from natural or higher law and encompasses the rights of "*personal security*" and of "*personal liberty*."⁴⁶ In the case of *Maneka Gandhi v. Union of India*,⁴⁷ Chief Justice Beg noted:⁴⁸

I am emphatically of opinion that a divorce between natural law and our Constitutional law will be disastrous. It will defeat one of the basic purposes of our Constitution...the "*idea of a natural law as a morally inescapable postulate of a just order, recognising the inalienable and inherent rights of*

⁴⁴ Grzegorz Maroń and Przewgląd Prawa Konstytucyjnego, 'References to Natural Law in the Constitutions of Modern States' (*Research Gate*, 2020) <https://researchgate.net/publication/348448102_References_to_Natural_Law_in_the_Constitutions_of_Modern_States> accessed 2 July 2022.

⁴⁵ Vijayashri Sripati, 'Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)' (1998)14 *American University International Law Review* 413.

⁴⁶ *The Collector of Customs Madras v Nathella Sampathu Chetty* [1962] AIR 316.

⁴⁷ *Maneka Gandhi v Union of India* [1978] AIR 597.

⁴⁸ *ibid* [21].

*all men (which term includes women) as equals before the law persists. It is, I think, embedded in our own Constitution.”*⁴⁹

He further added:⁵⁰

The idea of a natural law as a morally inescapable postulate of a just order, recognising the inalienable and inherent rights of all men (which term includes women) as equals before the law persists. It is, I think, embedded in our own Constitution.

On the Maneka Gandhi judgement, Tope writes;⁵¹

The effect of the judgment in the *Maneka Gandhi case* is really revolutionary. It is submitted that the concept of reasonableness of restrictions has been introduced in the area of protection of life and personal liberty. Hence, it appears that the notions of natural law are indirectly introduced in the interpretation of Article 21....Supreme Court has indirectly introduced the concept of due process of law in the interpretation of Article 21.

To date, Indian constitutional jurisprudence continues to evolve and strengthen its fundamental principles based on ideals of natural law. According to Vakil,⁵²

Just a few months after *Maneka Gandhi* was decided, Justice Krishna Iyer, in *Madhav Hoskot v. State of Maharashtra*, held, point-blank, that under article 21, read with the other rights, “*one component of the fair procedure is natural justice.*” Compounding his dismissal of the careful reading of the principles of natural justice as implicated by rights and statutes, Justice Krishna Iyer went on apply these principles to hold that the petitioner in *Hoskot* had the right to be served a copy of a judgment against him in time for him to file an appeal, and further, that the state was obligated to secure the provision of free legal services to him when he was indigent or otherwise disabled from procuring them himself. “*Both these are state responsibilities under Article 21,*” he went on to hold, in a dramatic leap from the reasoning in *Maneka Gandhi*. “*Every step that makes the right of appeal fruitful*

⁴⁹ *ibid.*

⁵⁰ *ibid* [17].

⁵¹ *ibid* [216].

⁵² Raeesa Vakil, ‘Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights’ (2018) 16 International Journal of Constitutional Law.

is obligatory, and every action or inaction which stultifies it is unfair and ergo, unconstitutional.” Justice Krishna Iyer also invoked article 39-A, part of the Indian Constitution’s list of judicially unenforceable “*Directive Principles of State Policy*” as “*an interpretative tool for Article 21*” to support his claim on natural justice.

Like the case of India, several others national courts have relied on the natural law philosophy to advance several arguments in constitutional matters.

CONCLUSION

An element of exclusivity about natural law has kept it alive and going across generations. Even some of the jurists that adhered to the principles and tenets of legal positivism have shown an inclination towards the principles of natural law, especially as regards the relation between law and morality.

In essence, natural law covers rules of conduct that apply and bind all humankind. In the words of Strauss, “*by natural law is meant a law which determines what is right and wrong and which has power or is valid by nature, inherently, hence everywhere and always.*” Over the many centuries, the domain of natural law has been internalised and applied to give life, hope, reform, and humaneness to the laws of societies and nations. With the application of natural law in the realm of legal rules, concepts like universal jurisdiction (in the prosecution of crimes against humanity), procedural standing (access to justice and remedies), humanising of the law (obligations of state and non-state actors), basic rights (non-derogable and universal rights), and so on have attained the status of fundamental principles. To date, this influence informs the most complex situations before individuals, societies, and nations.