Natural Constitutionalism and the Attainment of Ideals and a More Decent Human World

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Abstract:

This work focuses on the ideals of a more decent human world and the visibility of realizing it, bearing in mind differences between the societies. The attempt to achieve this led to the establishment of different international and national organizations such as UNO, UNICEF, AU, NATO, ECOWAS and many more. But the inability to achieve universally accepted ideals is due to imposition of universal norms and fundamental principles across societies with different cultures. This work proposes natural constitutionalism as a way of creating and realizing the ideals of a more decent human world. A natural law is just and obvious to all; it crosses ideologies, faiths and personal thinking and naturally guarantees justice.

Key words: Constitutionalism, Culture, Ideology, Justice, Law.

INTRODUCTION

The attainment of an ideal and a more decent human world is the concern of the contemporary society. It is a welcome development to lovers of peace and progress but a decent human world is utopia in nature. It continues to fascinate the concerned people because of the thought that it will provide opportunities for bringing to reality more and deepest desires of one’s capacities, a life well lived, a life that is deeply satisfying, fruitful, and worthwhile. The attempt to achieve this goal instigates the introduction of universal norms and fundamental principles but the realization of this lofty goal remains a rarity, because there is no decent society anywhere. Efforts to enforce a universal norms and fundamental principles have resulted in catastrophic consequences in many of the countries concerned because what both the western and nonwestern thoughts have as an ideal may not be regarded as an ideal in some other societies. That is the reason why this work is now introducing a natural constitutionalism as the most appropriate means of realizing an ideal and a more decent human society. This work is divided into five different sections: Constitutionalism: A conceptual analysis, Natural law and constitutionalism, understanding of an ideal of a more decent world, significance of natural constitutionalism to a more human world and the conclusion.
Constitutionalism: A Conceptual Analysis

Constitutionalism simply means a belief in a constitutional government. It is an idea that is often associated with the political theories of John Locke who claimed that government can and should be legally limited in its powers and that its authority depends on its observing those limitations. Thomas Hobbes and John Locke have both defended the notion of constitutionally unlimited sovereignty versus that of sovereignty limited by the terms of a social contract containing substantive limitations. On constitutionally unlimited sovereignty, Thomas Hobbes insisted on the identification of sovereignty and government insofar as it requires a (virtually) complete transfer of all rights and powers from sovereign individuals to a political sovereign whose authority was to be absolute, thus rendering it possible to emerge from the wretched state of nature in which life is "solitary, poor, nasty, brutish and short". In Hobbes' theory, supreme sovereignty must reside in the supreme governmental person or body who enjoys unlimited power and authority to rule the commonwealth. Anything less than an unlimited sovereign would, destroy the very possibility of stable government. On the other hand, John Locke claimed that sovereignty is limited by the terms of a social contract that contain substantive limitations. As Locke held, unlimited sovereignty remains with the people who have the normative power to void the authority of their government (or some part thereof) if it exceeds its constitutional limitations. Limited government coupled with unlimited sovereignty, that is exactly what we call constitutional democracies where the people's sovereign authority is thought to be unlimited but the government bodies — e.g., the legislature(s) and the courts — through whom that sovereignty is exercised on the people's behalf is constitutionally limited.

John Austin thought that the very notion of limited sovereignty is incoherent. For Austin, all law is the command of a sovereign person or body of persons, and so the notion that the sovereign could be limited by law requires a sovereign who is self-binding, who commands him/herself. But no one can "command" himself, except in some figurative sense, so the notion of limited sovereignty is for Austin an incoherent idea. Though the feature under contention

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has some surface plausibility when applied to the British Parliamentary system, where Parliament is often said to be "supreme" and constitutionally unlimited, but it faces obvious difficulty when it is applied to most other constitutional democracies such as the one found in the United States and Germany, where it is clear that the powers of government are legally limited by a constitution. Austin claimed that sovereignty may lie with the people or some other person or body whose authority is unlimited and Government bodies — e.g., Parliament or the judiciary — can be limited by constitutional law, but the sovereign — i.e., "the people" — remains unlimited.

Thus, Austin account of “the people’s sovereignty,” brings out the need to distinguish between the two different concepts: sovereignty and government. Sovereignty can be defined as the possession of supreme (and possibly unlimited) power and authority over some domains and on the other hand, government as those persons or bodies through whom that sovereignty is exercised. Once some such distinction is drawn, we see immediately that sovereignty might lie somewhere other than with the government. And once this implication is accepted, we can coherently go on to speak of limited government coupled with unlimited sovereignty. This is exactly what one should say about constitutional democracies where the people's sovereign authority is thought to be unlimited and the government bodies are limited.

In the words of Nwabueze⁵; government is universally accepted to be a necessity since man cannot realize himself except within an ordered society. Yet the necessity of government creates its own problems for man; the problem of how to limit the arbitrariness inherent in government and to ensure that power is to be used for the good of the society. It is the limit of this arbitrariness of political power that is expressed in the concept of Constitutionalism. However, Constitutionalism recognizes the necessity of the government but insists on a limitation being placed upon its powers. Nwabueze further substantiates his position with this: “There can be no doubt that the core and the substantive element of constitutionalism is the limitation of government by a constitutional guarantee of individual civil liberties enforceable by

an independent tribunal”⁶. He further submits emphatically that; constitutionalism implies limited government⁷. Accordingly, a government is postulated to be not only a creature of the constitution but also to be ipso facto subordinate to it.

**Natural Law and Constitutionalism**

⁵ Nwabueze B. O. (1993)p48

⁶ Nwabueze 1973p48

⁷ Nwabueze 1973p48
The central proposition of natural law doctrine is that the law of nature ought to be the governing law for all things and all activities, including mankind and human relations. The fundamental hypothesis or assumption behind this approach is that there is a law or a body of laws which governs all things, whether these be gravity, motion, physical and chemical reactions, animal instincts or the actions of man .... Natural law theory supposes that there is a ‘law' (or set of principles) of nature according to the tenets and principles of which all things, including man himself, ought to behave.”

Marcus Tullius Cicero (106-43 B.C.), said this concerning the natural law:

There is in fact a true law — namely, right reason — which is in accordance with nature, applies to all men and is unchangeable and eternal. By its commands, this law summons men to the performance of their duties; by its prohibitions, it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law, and it requires no Juriconsult to expound and interpret it. It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment.9

Cicero’s description of natural law is based on the speculations of the Greek philosophers, and is a classic statement of the position. It summarizes, in its essentials, the views of many non-Christian and Christian natural law theorists. Significantly, his concept of natural law was “reflected in the Emperor Justinian’s codification of Roman law, and has ever since been fundamental to an understanding of Western jurisprudence”10.(Paul, B.1973:449)

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8 Finch, J. (1979) Introduction to Legal Theory, Sweet & Maxwell, London p14


Thomas Aquinas 11, sought to reconcile the Greek concept of natural law with Christian theology. Aquinas began by positing an eternal law — the Divine Reason by which God governs the universe — and then proceeded to state that man as a creature has the eternal law imprinted on him and by it derives the natural inclination to proper acts and ends.12 Aquinas states:

.. the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature’s participation of the eternal law.13

Thomas Aquinas developed his understanding of natural law from both philosophical and theological sources. According to Aquinas, a law is “a rule or measure of human acts, whereby a person is induced to act or is restrained from acting”14. Elsewhere, he describes a law as a “dictate of practical reason emanating from a ruler”15. At a very general level, then, a law is a precept that serves as a guide to and measure of human action. Thus, whether an action is good will depend on whether it conforms to or abides by the relevant law. A human action is good or bad depending on whether it conforms to reason. In other words, reason is the measure by which we evaluate human acts. Thus, Aquinas thinks that the laws that govern human action are expressive of reason itself.16

Furthermore, Aquinas claimed that every law is ultimately derived from what he calls the eternal law.17 The “eternal law” refers to God’s providential ordering of all created things to

11 Thomas Aquinas (1225-1274)


15 Thomas Aquinas (1981: 91.1)

16 Thomas Aquinas (1981: 90.1)

17 Thomas Aquinas 1981: 93.3)
their proper end. We participate in that divine order by virtue of the fact that God creates in us both a desire for and an ability to discern what is good (he calls this ability the “light of natural reason”). It is the participation in the eternal law by the rational creature that is called the natural law.\textsuperscript{18}

As to this, natural law is but an extension of the eternal law. For by it, God ordains us to final happiness by implanting in us both a general knowledge of and inclination for goodness. To Aquinas, the natural law is a fundamental principle that is weaved into the fabric of our nature. As such, it illuminates and gives us a desire for those goods that facilitate the kind of flourishing proper to human beings.\textsuperscript{19}

Hugo Grotius (1583-1645), in his influential work on international law, The Law of War and Peace, defined natural law as follows: “Natural law is the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational nature, has in it moral necessity or moral turpitude; and consequently that such act is commanded or forbidden by God, the author of nature.”\textsuperscript{20} Grotius held that natural law was universal, unchangeable, and supreme. He wrote: “The law of nature is so immutable that it cannot be changed even by God himself. For though the power of God is immense, there are some things to which it does not extend. . . . So God himself allows himself to be judged by this rule.”\textsuperscript{21}

Thomas Hobbes\textsuperscript{22}, stated in his treatise on politics, Leviathan, that “A law of nature, lex naturalis, is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life. . . .”\textsuperscript{23} The law of nature is thus a “dictate of reason”\textsuperscript{24}. John Locke (1632-1704), the influential English political philosopher, asserts that: “The state of Nature has a law of Nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it. . . .”\textsuperscript{25}

\textsuperscript{18} Thomas Aquinas (1981: 91.2; Cf. 93.6)

\textsuperscript{19} Thomas Aquinas (1981: 94.3)

\textsuperscript{20} Coker, (1938:411)

\textsuperscript{21} Coker, (1938:412)

\textsuperscript{22} Hobbes, Thomas, (1642) De Cive (The Philosophical Rudiments Concerning Government and Society) (various editions)p57


\textsuperscript{24} Hobbes, (1939:163).

He states that those who transgress the law of nature declare that they live “by another rule than that of reason and common equity” and have renounced “reason, the common rule and measure God hath given to mankind”\(^{26}\). Locke contends that the law originally given to Adam to govern his actions and those of his descendants was “the law of reason”\(^{27}\).

Charles Rice, defines natural law by saying:

> Morality is governed by a law built into the nature of man and knowable by reason. Man can know, through the use of his reason, what is in accord with his nature and therefore good. Every law, however, has to have a lawgiver. Let us say up front that the natural law makes no ultimate sense without God as its author. ‘As a matter of fact,’ said Hans Kelsen, probably the foremost legal positivist of the twentieth century, ‘there is no natural-law doctrine of any importance which has not an essentially religious character.’ The natural law is a set of manufacturer’s directions written into our nature so that we can discover through reason how we ought to act. The Ten Commandments and other prescriptions of the divine law specify some applications of that natural law\(^{28}\).

Natural law is “the light of reason inherent in us by nature, through which we perceive what we ought to do and avoid. . . .”\(^{29}\)

. Hence, natural law, according to its proponents, is “the light of reason,” “the dictates of reason,” or simply, “right reason.” This Reason is the law.

Besides, to the Christian thinkers, natural law is not a product of necessity or of arbitrary divine will, but as the main instrument by which a benevolent and omnipotent Lawgiver guided the community of his creatures to happiness. Free will accounted for the differences in human laws, because, in their understanding of the world, men could choose whether to conform their actions to the abiding natural law and cooperate with the Lawgiver’s plan. The idea that God has, providentially given all human beings the natural ability to discern and obey the right rules.

\(^{26}\) Locke, 1947:79, 80

\(^{27}\) , Locke, 1947:101


of action was highly influential in subsequent Western thought, and played a conspicuous role in the rhetoric and reasoning of some revolutionaries.

Furthermore, natural law is presented in the work of Egyptian legal scholar and creator of the Egyptian Civil Code Al-Razzak. According to him, “in the absence of any applicable legislation, the judge shall decide according to the custom and failing the custom, according to the principles of Islamic Law. In the absence of these principles, the judge shall have recourse to natural law and the rules of equity.”

Natural law is often contrasted with positive law, which consists of the written rules and regulations enacted by government. The term natural law is derived from the Roman term jus naturale. Adherents to natural law philosophy are known as naturalists. Naturalists believe that natural law principles are an inherent part of nature and exist regardless of whether government recognizes or enforces them. Naturalists further believe that governments must incorporate natural law principles into their legal systems before justice can be achieved. There are three schools of natural law theory: divine natural law, secular natural law, and historical natural law. Divine natural law represents the system of principles believed to have been revealed or inspired by God or some other supreme and supernatural being. These divine principles are typically reflected by authoritative religious writings such as Scripture. Secular natural law represents the system of principles derived from the physical, biological, and behavioral laws of nature as perceived by the human intellect and elaborated through reason. Historical natural law represents the system of principles that has evolved over time through the slow accretion of custom, tradition, and experience.

Natural constitutionalism is derived from natural law, it is an unwritten body of universal moral principles that underlie the ethical and legal norms by which human conduct is sometimes evaluated and governed. It is a political ideology and legal system which believes that there is a natural law, just and obvious to all, that crosses ideologies, faiths and personal thinking, that naturally guaranties justice. Natural constitutionalism is a body of law which established the government, articulated the rights of the citizens that were not to be violated by the government, and stipulated what the government could do and how it could do it. This testifies to the fact that there is a realm of law above the enactments of any particular government and this has its roots in antiquity. The natural law was thought to provide a standard by which the laws passed by governments could be evaluated. It was also a law that was above the enactments of sovereigns and hence possessed a higher claim on the obligation of the citizen.

There are some objections against natural law, as expressed by the legal positivists most strongly, perhaps, by the German scholar Hans Kelsen. He regards natural law as a body of

30. Abd Al-Razzak Al-Sanhuri,(1949) Egyptian Civil Code, Article 1
sentimental fictions. He holds that the state is the only true source of law. The views of Hans Kelsen and the Analytical Jurists are similar. They held that all laws are decreed by the political sovereign. Whatever may be their argument; all laws take their precedent from natural law. Aquinas argued that human laws that contravene natural law are "acts of violence," and "a perversion of law." Such laws, he argued do not bind the conscience. They have no legal validity and cease, in this regard, to be law.

Understanding of an Ideal and Decent World

An ideal and decent human world could be summed up as the aspirations of people, it involves opportunities for a life that is productive and delivers, security and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men. It also aimed toward a world that will provide opportunities for coming to fruition of one's deepest desires or one's worthiest capacities, a life well lived, a life that is deeply satisfying, fruitful, and worthwhile. An ideal and decent world is a traditional ideal that both western and non-western highly exalted. A decent human world is utopia in nature but philosophers like Candides Tuter, Pangloss, were maintaining the idea that we live in the “best possible world” where everything is arranged for the best. What we regarded as evil will be conducive to the good of some other creatures, therefore necessary in the grand design. As a result, we must bear the negative effects of such a design for the general good of human civilization. Voltaire and Leibniz were against Candide view. Voltaire claimed that it is obvious that this world is not the best possible world because there are so many manifests of evils in it31. Leibniz also claimed that our inability to know how changing certain events in the world would affect other events and our inability to know how such changes would affect the overall goodness of the world makes it impossible to defend the claim that the manifest evils in the world constitute evidence that this is not the best possible world32.

Taking into cognizance the experience of wars and civil strives and the denial of human rights in the society, and the fact that the societies have “not been reconstructed in a manner that can empower the people to realize their human potentials in a significant manner”33, we


can agree with Theodicy\textsuperscript{34} that surely, this is not the best possible world. This reality instigates numerous thinkers and activists all over the world the need “to organize society for purposes of governance and social living”\textsuperscript{35}, recognising the fact that it is not possible to have the best possible world but established different international and national organizations such as UNO, UNICEF, AU, NATO, ECOWAS and many more. The intention was to create an order society. In an order society; people must be able to coordinate their actions and they must cooperate to attain common goals. Coordination requires that people develop stable expectations about others’ behavior. If people are to live together, they must not only be able to coordinate their activities but also to interact productively to do things that help rather than hurt others.

**Significance of Natural Constitutionalism to a more Humane World**

The imposition of universal norms and fundamental principles across developed and developing societies with different culture may not be realizable. Societies are not constituted in the same way. Though cultural boundaries are not cast in iron because human beings live in a world of interlocking relationships but when cultures interact, the acceptance and rejection of cultural items depend largely on the need felt by the given society on its suitability or otherwise to the already existing cultural organization. That is the reason why some cultural beliefs are determined by the traditions, customs and folkway or folklores of each society, which are not necessarily shared by every society. As Sumner put it, “what is right is determined by the folkways of each society”\textsuperscript{36} (Sumner 1960). If we add to this fact of cultural variation the issue of how an individual’s values reflect those of his own social group and time, we may then begin to question the universal norms and fundamental principles. This is based on the claim that our moral attitudes and judgments are learnt from our social environment. Even our deepest convictions about justice and the rights of man are originally nothing but the internalized view of our society. This has been the major reason why scholars as well as the concerned individuals have not been able to achieve the much more expected ideal and more decent human world.

For the anticipated ideal of a more descent human world to be realized, then natural rights based on natural law must be reclaimed. Political discourse based on the common philosophical legacy of natural constitutionalism will be more coherent and more civil.

\textsuperscript{34} Theodicy 1952. Edited by Austin Farrer and translated by EM.Huggard. NewHaven: Yale Up


\textsuperscript{36} Sumner,W.G.(1960) Folways: A study of of the Sociological Importance of Usages, Manners, Customs, mores and morals. New America Library of World Literature Inc p341
According to David Butleritchie\textsuperscript{37}, a contextual constitutionalism grounded in natural law through what he calls organic, claiming that such a process is most healthy, when it is left to grow from within its own particular context. A natural constitutionalism is a political ideology and legal system based on convention that, there exists a natural law just and obvious to all. This law cut across ideologies, faith and personal thinking and the core sense of justice is universal to all societies.

Naturally, it existed in all societies, and that is not to say that each society had exactly the same social or moral practices but subject to the culture, aspiration and adaptation of each society. The acceptability or otherwise of any norms or ways of life may not receive the same ovation in both developed and developing nation. That is the reason why whatever is in consonance with each society should be left to grow and remain within, because it is more healthy when it is left to develop within the context of a particular society. In other words, an organic constitution is the one that is formed in the crucible of a distinct social and political context. An attempt to try to deny that context by imposing universal norms, in this case by laying so-called fundamental principles across a developed and developing society, is both dangerous and troubling.

\textbf{Conclusion}

Universal norms and fundamental principles are the trade mark of the international and national community. The international and national communities are communities “glued together” by international and national values system\textsuperscript{38}. These communities accept the existence of particularly important superior values. They had developed a superior legal system that is being adhered to by their community. With this, they have achieved a lot in maintaining peace worldwide, but what is left is the ideal of applying universal norms and principles which are alien to many of the member communities and the consequences of which have remained, in most cases, devastating. The impact of imposed universal norms and fundamental principles on contemporary society is negative; the expected dividend that lead to the imposition of universal norms was never materialized. The attempt to force an ideal no matter how excellent it may be by international and national organization on another society in this modern age is


\textsuperscript{38} Copare E.de Wet, The international constitutional order,55 International and Comparative Law Quarterly (2006)51, at76.
bound to be a difficult task, more so when the reform is coming from outside. No society is static agreed but any positive reform can only start from within even in a gradual way and not from outside. For somebody from outside to force a new way of life on another is arbitrary; it cannot work.

Universal norms and principles cannot work in both developed and developing communities. If it works in developed communities, it may not work in developing communities. There have been objections that UNO, UNICEF, AU, NATO, ECOWAS as well as other international organizations have succeeded in maintaining peace through various resolutions and principles but many of the steps taken so far have been resulting in negative consequence on contemporary society. Many of these countries are boiling today, all the sacrifice being made by the foreign powers to liberate and impose a new ways of life is now being destroyed. For example; the dismal failure of western intervention in Afghanistan, where the elimination of the Taliban has proven to be impracticable, the 2003 invasion of Iraq by the America has yielded no good result because today, Iraq is burning to ashes with deadly inroad of ISIS militants reversing whatever the imperialist ever established after the overthrowing and murdering of Saddam Hussein. The elimination of Gaddafi family and the Jamahiriya practitioners had turned Libya to a failed state run by numerous rival militia groups with helpless government in Tripoli, and the military act of NATO in Yugoslavia are a clear case of anarchy. The adventure is not bringing in any positive change in those countries but calamity and violence. All these is as a result of imposition from outside. If the reform is internal, it may not have generated such destruction. The morality of my claims here is that; moral values cannot be inter-culturally evaluated. Otubanjo substantiates this position with two related issues: first, it challenges the claim that there is a universal, independent, ethical standard in terms of which we can evaluate moral values in other societies. It proposes that the assessment and explanation of any moral judgment should be done within the framework of the society or culture to which it applies. The implication is that the moral norms of any society are the standard. The claim then, as L.M. Himnan puts it, is that:

The standard against which criticism is possible are internal to the ways of life itself and are distinctive from those which are found in other ways of life; with the consequences that there are no common standards against which two different ways of life may be compared to the advantage of one of them


41 Himnan, L.H. (1983), Can a Form of Life be Wrong? Philosophy Vol. 58 No 225 p23
The assumption here is that moral ideas, principles and actions are tied to other presuppositions in a society, which we can understand after we have laid bare the systems of knowledge, values and symbols that structure the mind of the people. In this way, each society becomes an autonomous arbiter of its meaningfulness and justification. This presupposes, gratuitously though, that sets of such absolute presuppositions are equal in number to existing cultures or societies. This assumption poses a threat to the existence of universal morality. That is the reason why we are now introducing natural constitutionalism as a way out. It is through natural constitutionalism that both international and national communities can accommodate all shades of views and opinions. Cases should be addressed according to the norms and acceptable ways of life of that society. They have been together for long and they know how to resolve any issues concerning them. Adhering to natural constitutionalism will not have any negative effect on international and national communities. There is no doubt that UNO, UNICEF, AU, NATO, ECOWAS as well as other national and international organizations have achieved a lot in maintaining peace across all continents but the success of their effort will remain a resounding success if and only if each society's problems are addressed base on the natural law of the society concerned. Cases and problems are to be addressed in consonance with the natural law of their environment. The way peace is achieved in my community may or must be different from that of others. Until the acceptable method known to one locality is applied, peace may remain elusive. Universal norms and fundamental principles may not achieve the much needed ideal and a more decent world.

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