

# [It common to all humankind and is](https://assignbuster.com/it-common-to-all-humankind-and-is/)

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Itis indisputable that the first philosophy to emerge was natural law. Naturallaw emanated from the times of Plato and Aristotle, who are considered thephilosophers that laid its foundation. It has then evolved over a period oftime- from the Greek schools of thought, to the Stoics, to Christianity, the Medievaland Renaissance times and lastly, to the Contemporary era. For the pastcenturies it has dominated, this period often referred to as the ‘ Age ofReason’, resulted in it being laid as the foundation for numerous legal systemsof the world at that time. However, natural law theory on its own has receivedits fair share of critics and in the 17th century, a Frenchphilosopher known as Auguste Comte propounded a modern scientific approach withan epistemological perspective known as the positivism theory which hasdominated since then. This period was characterized by scientific discoveriesand inventions that further supported the positivist theory, leading to thenatural law theory becoming unpopular.

Auguste Comte stated that the only validknowledge is knowledge gained through the scientific methods of experimentationor observation.            Thenatural law theory is the concept of a body of moral principles that is commonto all humankind and is recognizable by human reason alone as propounded by StAugustine. It is argued that beyond the man-made laws there is a higher lawwhich are universal and eternal that are waiting discovery by human reason towhich man-made laws must conform to for them to be valid.

Various natural lawtheorists held two ideas as to what the ‘ higher law’ might be; for example, Aristotle believed that the higher law were the moral codes that every manought to emulate and abide by as man has been given intuition to differentiateright from wrong while others like St Thomas Aquinas believed that the higherlaw was law derived from divine revelation from God. It wasn’t until thedoctrine of Christianity that natural law was given a religious perspective. Despite the theorists holding two separate ideologies as to what the higher lawentails, a common ground held by both was that natural law was eternal.            Onthe other hand, unlike natural law which was eternal and based on themetaphysical, positivism was empirical, secular human law that defined law asit ‘ is’ and not as it ‘ ought to be’. This theory puts across that law is solelythe creation of man or a sovereign power i.

e. government basically, a socialconstruction. The term positivism, arose from its Latin root, positus which means to posit or firmlyaffix the existence of something. Thevalidity of these laws comes from the enactment of legitimate authority and areaccepted by society as such. A classical positivist Thomas Hobbes, developedthe social contract theory through which a citizen signs away such of theirnatural rights to a sovereign for the common good and as are necessary fortheir security as well. He argues that law is made by man and not by a divinebeing.

Naturallaw proposes that to be valid, laws should derive from certain fundamentalmoral premises thus a law that contravenes morality is not valid. Natural lawis closely associated with morality and in historically influential versions, with the intentions to God. It attempts to identify a moral compass to guidethe law-making power of the state and to promote the ‘ good’. Aquinasdistinguished four kinds of law, these were the eternal, natural, human anddivine laws.

Eternal law is the decree of God which governs all creation whilenatural law is the human ‘ participation’ in the eternal law and is discoveredby reason1.  Natural law pushes for law to reflectmorality since the term ‘ natural’ doesn’t refer to the law of nature but ratherpresents the idea that man, being part of nature, has an intuition thatinclines him towards certain ends such as self-preservation and basic moralreasoning. Althoughthe positivist approach is completely different as it considers law to beseparate and distinct from morality. It contrasts with natural law, holding thatthere is no necessary connection between law and morality and that the force oflaw comes from some basic social facts although positivists differ on whatthose facts are2. Therefore, according to this theory, no laws should be subscribed to any moralcodes or higher law other than that of the sovereign that made them. This hasresulted in numerous controversies as issues have arose debating on whether lawshould be obeyed if it doesn’t conform to any moral values. An example is therenown Hart v Devlin debate thatresulted from a report generated in the 1950s.

Inthe year 1957, Sir Wolfenden and his committee generated a report known as theWolfenden Report that proposed homosexuality and prostitution be disregarded ascriminal offences and instead be legalised with restrictions. His report statedthat it was not the duty of the law to concern itself with morality assuch.  The report argued that thecriminal law was to preserve public order and decency, to protect the citizenfrom what is offensive and injurious. Therefore, the law should not intervenein the private lives of citizens or seek to enforce a particular pattern ofbehaviour3.            However, this report led to publications from Lord Devlin, a British judge opposing itsdemands. He argued this by explaining that law without morality destroysfreedom of conscience and that some form of common morality was necessary tokeep a society together. In addition to that, Devlin said there was a set ofbasic principles that should be followed by the legislature. First, theindividuals were allowed the maximum of freedom consistent with the integrityof the society, and privacy should be respected as much as possible.

Secondly, punishment should be reserved for that which creates disgust among right-mindedpeople and society has the right to eradicate any practise which is soabominable that its very presence is an offence. Lastly, the law should setdown a minimum standard of morality4. Devlin believed that thelaw needed to reflect the moral values of society for it to attain itslegitimacy. Several people agreed with his arguments as they thought the reporthad gone too far, however, an analytical positivist, H. L. A Hart disagreed. Hart declined Devlin’s arguments by proposing that using law to enforce moralvalues was unnecessary, undesirable and morally unacceptable. He agreed withthe report’s proposals that the law indeed should not concern itself with theprivate life of its citizen as long as the law was not broken, people could doas they saw fit.

Moreover, in his book The Concept of Law, Hart offered five different positions taken bylegal positivists; (a) Thecontention that laws are commands of the sovereign backed by coercive force. (b) The contention that there is nonecessary connection between laws and morals or between law as it is and as itought to be, (c) The contention thatthe analysis as to the meaning of legal concepts is worth pursuing and is to bedistinguished from historical inquiries into the origins or causes of law andsociological inquiries into the relationship between law and other socialphenomena, (d) The contention that alegal system is a closed logical system in which correct legal decisions can bededuced by logical means from pre-determinate legal rules and lastly, (e) The contention that moraljudgements of law cannot be defended5. Furthermore, it isevident that Hart believes in the idea of Separation Thesis which asserts thatthe condition of legal validity does not depend on the moral merits of thenorms in question. However, this resulted in the Hart v Fuller debate when Hartpublished an article on the separation of law and morals which was responded byLon Fuller, a contemporary natural law theorist in his book, the Morality of Law.            Additionally, opposed to the Separation Thesis ideology, the Overlap Thesis also exists whichsupports the natural law theory as well as the idea that concept of law andmorality intersect in some way. Despite the contemporary positivists statingthat law is distinct from morality, Lon Fuller believed otherwise. He did notsupport the traditional theory of natural law that linked man-made laws todivine law, but he sought for laws to conform to moral standards and principles.

In his widely discussed book the Moralityof Law, Fuller argues that all systems of law contain an ‘ internalmorality’ that imposes individuals a presumptive obligation of obedience6. He developed principlesof legality that he believes every legal system must conform to, to preventtyranny which all laws are supposed to meet, they should be; (1) sufficiently general, (2) publicly promulgated, (3) prospective, (4) at least minimally clear and intelligible, (5) free of contradictions, (6)relatively constant (7) possible toobey, and (8) administered in a waythat does not wildly diverge from their obvious or apparent meaning7. He suggests that these principles guarantee that all law will embody certainmoral standards of respect, fairness, and predictability that constituteimportant aspects of the rule of law.

Fuller argued that these rules werefundamental in order to avoid atrocities like the Holocaust from occurring everagain, as the Nazi regime made laws through legal procedures to harm and killseveral innocent Jews, which despite its legality, was immoral and unjust.            NaturalLaw begins with the premise that all our rights come from God or Nature and areinherent to our being.  Natural lawbirthed the concept of natural/individual rights and this was proposed by JohnLocke as well as Finnis as rights that were bestowed to every individual. It isevident that every individual according to natural law has a moral duty thattakes priority over his/her own personal rights and needs. Finnis sets out hisown theory of natural law, he argues that there are certain ‘ basic forms ofhuman flourishing’ which Aquinas referred to as the basic goods that everyperson is inclined to achieve. These basic goods comprised of; self-preservation/sustaining life, to seek knowledge and shun ignorance, reproduction, living in societies as man is social in nature, pursue happiness, seek God or what is morally upright and avoid what is wrong and offensive8.

Additionally, John Locke described natural rights as the right to life, liberty and propertyas fundamental and primary. Therefore, it is important to note that naturalrights are entitled to mankind that no sovereign or fellow man should deny.             Whereasthe positive law on the other hand, believes that our rights are granted by thegovernment hence prescribing what is right or wrong and people are expected toabide by the prescriptions.

It simply argues that any and all laws are nothingmore and nothing less than simply the expression of the will of whateverauthority created them. According to Thomas Hobbes, laws are the rules andregulations commanded by a sovereign put down in writing with its citizensbeing part of the process and such documentations could be the Constitution or statutesamong others. Compared to natural law, positivism is considered written lawthus it can be amended from time to time, unlike natural law which is eternaland everlasting. Positivism differs in all areas as laws are only applicable toa geographical and political territory that are controlled by the government ofthat specific area.

Besides the basic individual rights that have commongrounds in most states, other aspects of law differ. Although natural law isuniversal and based on reason and individuals have the free will to chosebetween right and wrong hence this theory is commonly categorised as unwrittenlaw.            In conclusion, many natural lawtheorists believe in natural law as being the backbone of all legal systems.

Greekphilosopher, M. T Cicero asserted in his book, the Republica that; True law is the right reason in agreement withnature. It is of universal application, unchanging and everlasting. It is a sinto try and alter this law nor is it allowed to attempt to repeal part of it andis impossible to attempt to abolish it9. However, natural lawbegan to be rejected because of its idea of a universal natural law common toall men and the coming of positivism was characterized by secularism andrationalism. Immanuel Kant, a German philosopher, believed that positive lawwas public manifestation of moral law and he argued that morality arises onlyfrom freedom. Natural law also corresponds to basic human drives and needs asmentioned earlier concerning the basic goods and natural rights.

The bone ofcontention between these two theories is whether law is linked to morality ornot hence they are independent of each other. However, personally I think thatpositivism to some extent contains aspects of natural law in relation tonatural individual rights and that morality does indeed take up a fraction oflaw. It is not necessary to attribute laws to a divine being however, moralityis fundamental but only to some extent.

1 Louis Pojman and JamesFieser, Ethics; Discovering Right and Wrong (Wadsworth/Thomson Learning 2002) 129. 2 Phillip Soper, LegalPositivism. in Robert Audi (ed), Cambridge Dictionary ofPhilosophy (Cambridge University Press 1995) 46. 3 CatherineElliott and Frances Quinn, English Legal System (10edn, Pearson Education Limited 2009) 637. 4Ibid, n3, p 637. 5HLAHart, Concepts of Law (3 edn, Oxford University Press 2012). 6 Lon L fuller, The Morality of Law (YaleUniversity Press 1969). 7Ibid n6, p 33-38. 8JW Harris, LegalPhilosophies (2 edn, Oxford University Press 2011). 9 MTCicero, De Republica, iii, xxii, 33.