

It common to all  
humankind and is

Design



It is indisputable that the first philosophy to emerge was natural law. Natural law emanated from the times of Plato and Aristotle, who are considered the philosophers that laid its foundation. It has then evolved over a period of time- from the Greek schools of thought, to the Stoics, to Christianity, the Medieval and Renaissance times and lastly, to the Contemporary era. For the past centuries it has dominated, this period often referred to as the 'Age of Reason', resulted in it being laid as the foundation for numerous legal systems of the world at that time. However, natural law theory on its own has received its fair share of critics and in the 17th century, a French philosopher known as Auguste Comte propounded a modern scientific approach with an epistemological perspective known as the positivism theory which has dominated since then. This period was characterized by scientific discoveries and inventions that further supported the positivist theory, leading to the natural law theory becoming unpopular. Auguste Comte stated that the only valid knowledge is knowledge gained through the scientific methods of experimentation or observation. The natural law theory is the concept of a body of moral principles that is common to all humankind and is recognizable by human reason alone as propounded by St Augustine. It is argued that beyond the man-made laws there is a higher law which are universal and eternal that are waiting discovery by human reason to which man-made laws must conform to for them to be valid.

Various natural law theorists 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 man ought to emulate and abide by as man has been given

intuition to differentiate right from wrong while others like St Thomas Aquinas believed that the higher law was law derived from divine revelation from God. It wasn't until the doctrine of Christianity that natural law was given a religious perspective. Despite the theorists holding two separate ideologies as to what the higher law entails, a common ground held by both was that natural law was eternal. On the other hand, unlike natural law which was eternal and based on the metaphysical, positivism was empirical, secular human law that defined law as it 'is' and not as it 'ought to be'. This theory puts across that law is solely the creation of man or a sovereign power i.

e. government basically, a social construction. The term positivism, arose from its Latin root, positus which means to posit or firmly affix the existence of something. The validity of these laws comes from the enactment of legitimate authority and are accepted by society as such. A classical positivist Thomas Hobbes, developed the social contract theory through which a citizen signs away such of their natural rights to a sovereign for the common good and as are necessary for their security as well. He argues that law is made by man and not by a divine being.

Natural law proposes that to be valid, laws should derive from certain fundamental moral premises thus a law that contravenes morality is not valid. Natural law is closely associated with morality and in historically influential versions, with the intentions to God. It attempts to identify a moral compass to guide the law-making power of the state and to promote the 'good'. Aquinas distinguished four kinds of law, these were the eternal, natural, human and divine laws.

Eternal law is the decree of God which governs all creation while natural law is the human 'participation' in the eternal law and is discovered by reason<sup>1</sup>. Natural law pushes for law to reflect morality since the term 'natural' doesn't refer to the law of nature but rather presents the idea that man, being part of nature, has an intuition that inclines him towards certain ends such as self-preservation and basic moral reasoning. Although the positivist approach is completely different as it considers law to be separate and distinct from morality. It contrasts with natural law, holding that there is no necessary connection between law and morality and that the force of law comes from some basic social facts although positivists differ on what those facts are<sup>2</sup>. Therefore, according to this theory, no laws should be subscribed to any moral codes or higher law other than that of the sovereign that made them. This has resulted in numerous controversies as issues have arisen debating on whether laws should be obeyed if it doesn't conform to any moral values. An example is the renowned Hart v Devlin debate that resulted from a report generated in the 1950s.

In the year 1957, Sir Wolfenden and his committee generated a report known as the Wolfenden Report that proposed homosexuality and prostitution be disregarded as criminal offences and instead be legalised with restrictions. His report stated that it was not the duty of the law to concern itself with morality as such. The report argued that the criminal law was to preserve public order and decency, to protect the citizen from what is offensive and injurious. Therefore, the law should not intervene in the private lives of citizens or seek to enforce a particular pattern of behaviour<sup>3</sup>.

However, this report led to publications from Lord Devlin, a British judge

opposing its demands. He argued this by explaining that law without morality destroys freedom of conscience and that some form of common morality was necessary to keep a society together. In addition to that, Devlin said there was a set of basic principles that should be followed by the legislature. First, the individuals were allowed the maximum of freedom consistent with the integrity of the society, and privacy should be respected as much as possible.

Secondly, punishment should be reserved for that which creates disgust among right-minded people and society has the right to eradicate any practise which is so abominable that its very presence is an offence. Lastly, the law should set down a minimum standard of morality<sup>4</sup>. Devlin believed that the law needed to reflect the moral values of society for it to attain its legitimacy. Several people agreed with his arguments as they thought the report had gone too far, however, an analytical positivist, H. L. A. Hart disagreed. Hart declined Devlin's arguments by proposing that using law to enforce moral values was unnecessary, undesirable and morally unacceptable. He agreed with the report's proposals that the law indeed should not concern itself with the private life of its citizen as long as the law was not broken, people could do as they saw fit.

Moreover, in his book *The Concept of Law*, Hart offered five different positions taken by legal positivists; (a) The contention that laws are commands of the sovereign backed by coercive force. (b) The contention that there is no necessary connection between laws and morals or between law as it is and as it ought to be, (c) The contention that the analysis as to the meaning of legal concepts is worth pursuing and is to be distinguished from historical inquiries into the origins or causes of law and sociological inquiries

<https://assignbuster.com/it-common-to-all-humankind-and-is/>

into the relationship between law and other social phenomena, (d) The contention that a legal system is a closed logical system in which correct legal decisions can be deduced by logical means from pre-determinate legal rules and lastly, (e) The contention that moral judgements of law cannot be defended<sup>5</sup>. Furthermore, it is evident that Hart believes in the idea of Separation Thesis which asserts that the condition of legal validity does not depend on the moral merits of the norms in question. However, this resulted in the Hart v Fuller debate when Hart published an article on the separation of law and morals which was responded by Lon 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 which supports the natural law theory as well as the idea that concept of law and morality intersect in some way. Despite the contemporary positivists stating that law is distinct from morality, Lon Fuller believed otherwise. He did not support the traditional theory of natural law that linked man-made laws to divine law, but he sought for laws to conform to moral standards and principles.

In his widely discussed book the *Morality of Law*, Fuller argues that all systems of law contain an 'internal morality' that imposes individuals a presumptive obligation of obedience<sup>6</sup>. He developed principles of legality that he believes every legal system must conform to, to prevent tyranny 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 to obey, and (8) administered in a way that does not wildly diverge from their

obvious or apparent meaning<sup>7</sup>. He suggests that these principles guarantee that all law will embody certain moral standards of respect, fairness, and predictability that constitute important aspects of the rule of law.

Fuller argued that these rules were fundamental in order to avoid atrocities like the Holocaust from occurring ever again, as the Nazi regime made laws through legal procedures to harm and kill several innocent Jews, which despite its legality, was immoral and unjust. Natural Law begins with the premise that all our rights come from God or Nature and are inherent to our being. Natural law birthed the concept of natural/individual rights and this was proposed by John Locke as well as Finnis as rights that were bestowed to every individual. It is evident that every individual according to natural law has a moral duty that takes priority over his/her own personal rights and needs. Finnis sets out his own theory of natural law, he argues that there are certain 'basic forms of human flourishing' which Aquinas referred to as the basic goods that every person 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 offensive<sup>8</sup>.

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

It simply argues that any and all laws are nothing more and nothing less than simply the expression of the will of whatever authority created them.

According to Thomas Hobbes, laws are the rules and regulations commanded by a sovereign put down in writing with its citizens being part of the process and such documentations could be the Constitution or statutes among others. Compared to natural law, positivism is considered written law thus it can be amended from time to time, unlike natural law which is eternal and everlasting. Positivism differs in all areas as laws are only applicable to a geographical and political territory that are controlled by the government of that specific area.

Besides the basic individual rights that have common grounds in most states, other aspects of law differ. Although natural law is universal and based on reason and individuals have the free will to choose between right and wrong hence this theory is commonly categorised as unwritten law. In conclusion, many natural law theorists believe in natural law as being the backbone of all legal systems.

Greek philosopher, M. T Cicero asserted in his book, the Republic that; True law is the right reason in agreement with nature. It is of universal application, unchanging and everlasting. It is a sin to try and alter this law nor is it allowed to attempt to repeal part of it and is impossible to attempt to abolish it. However, natural law began to be rejected because of its idea of a universal natural law common to all men and the coming of positivism was characterized by secularism and rationalism. Immanuel Kant, a German philosopher, believed that positive law was public manifestation of moral law and he argued that morality arises only from freedom. Natural law also

<https://assignbuster.com/it-common-to-all-humankind-and-is/>



corresponds to basic human drives and needs as mentioned earlier concerning the basic goods and natural rights.

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

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