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SUBJECT-LEGAL THEORY I

TOPIC-COMPARATIVE STUDY OF NATURAL LAW AND POSITIVE LAW

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CONTENTS

CHAPTER I

INTRODUCTORY OVERVIEW

Jurisprudence: The study of different schools of legal philosophy and how each can affect judicial decision making.

Natural Law adherents presuppose that positive law derives its legitimacy from natural law and hold that, to the extent that natural law and positive law differ, natural law must prevail.

A system of universal moral and ethical principles that are inherent in human nature and that people can discover by using their natural intelligence (*e.g.*, murder is wrong; parents are responsible for the acts of their minor children).[1]

Legal Positivists hold that there is no higher law than that created by legitimate governments and that such laws must be obeyed, even if they appear unjust or otherwise at odds with natural law

A body of enforceable rules governing relationships among individuals and between individuals and their society.[2]

Positive Law: The written law of a particular society at a particular point in time (*e.g.*,the U.S. Constitution, the Texas Securities Act, the Internal Revenue Code, and published judicial decisions).

[1] http://www.gobookee.org/introduction-to-jurisprudence/
[2] http://www.gobookee.org/introduction-to-jurisprudence/

the natural law philosophy occupies an important place in the realm of politics, law, religion an ethics from the earliest times. it has played the role of harmonizing synthesizing and promoting peace and justice in different periods and protecting public against injustice, tyranny, and misrule. commending the function of natural law in liberating people from politico legal disorder and tracing its evolution, blackstone observed-

"the natural law being co-existent with mankind and emanating for go himself, is superior to all other laws. it is binding over all the countries at all the times and no man made law will be valid if it is contrary to the law of nature"[3].

the Natural law theory reflects the perpetual quest for absolute justice. thus it should not be misconceived that the natural law has a mere theoretical significance. its practical value is a historical fact as it generated a wave of liberalism and individual freedom and inspired people to revolt against totalitarian rule in france and germany. the individual law owes its origin, development and validity to th natural law philosophy. the law of nation derives its force and authority from the natural law.

Dr. friedmann has commented that the history of natural law is a tale of the search of mankind for absolute justice and its failure. therefore, with the changes in social and political conditions, the notions about the natural law have also been changing. thus natural law has acted as a catalyst for bringing about

[3] Blackstone, commentaries on introduction on jurisprudence. P.39

transformation of the old prevailing legal system. it brought about a change in the old roman law of Justinian period. the greatest contribution of natural law theory to the legal system is its ideology of a universal order governing all men and the inalienable rights of the individuals.[4]

legal thinkers have expressed divergent views regarding the extent of natural law. the natural law philosophy dominated in Greece during 5th BC. when it was believed that it is something external to man. sophists called it as an order of things which embodies reason. Socrates, plato, Aristotle, also accepted that postulates of reason have a universal force and men are endowed with reason irrespective of race or nationality. Cicero supported natural law since it is the creation of reason of the intelligent man who stands highest in creation by virtue of his faculty of reasoning. he believed in universal applicability of natural law because it Is based on the general morality of the human society.

the concept of natural law has been differently interpreted by writers at different times. some of them contend that natural law consists of ideals which guide legal development and administration while others charactertise it as quest for perfect law deducible by reason. the supporters of natural law theory believe that there is a basic elements in law which prevents a total separation of law as it is from the law as it ought to be values undoubtedly play an indispensable role in the development of law.

[4]Friedmann, legal theory- Page 43-45.

In the ancient societies, natural law was believed to have a divine origin. during the medieval period it had a religious and super natural basis but in modern times it has a strong political and legal mooring. it has been rightly pointed out by lord Lloyd that natural law has been devised as a mere law of self-preservation or a law restraining people to a certain behavior. it has found expression in modern legal system in the form of socio-economic justice. the entire human rights philosophy is an outcome of the growing importance of the principles of natural justice. the natural law theory act6s as a catalyst to boost social transformation thus saving the society from stagnation.

The concept of natural law as employed in legal or political theories should be distinguished from the kind of natural laws that figure in the sciences. Natural law theory does not set out to unravel a set of laws of nature that can describe and explain natural (physical, chemical or biological) phenomena. It is plausible that the scientific concept of natural laws is derived from an older view according to which natural phenomena are thought to `obey' the laws of a superior being or God. In the Stoic doctrine, for example, both human and inhuman behaviour was understood by reference to the decrees of a supreme Lawgiver. Gradually, however, the two concepts drifted apart, as will be pointed out in more detail below.

Secondly, the context of legal and political theories, the concept of natural law is not used as a tool of explanation. Most natural law theorists do not set out

to explain moral, legal or political arrangements by reference to (human) nature, but to justify and to criticise them. Nature is not an explanans, but a normative tool in order to distinguish good from bad law. Here again, the distinction has not always been that strict. Older doctrines of natural law use nature indiscriminately both as explanation and as a normative device. Gradually, however, also these two notions drifted apart.

Legal positivism is an account of the concept of law.

On this view, it is part of the very nature of law (i.e., either explicit or implicit in our conventions for using the term "law") that its existence and content can be fully explained by the contingent social activity of persons who serve as officials in the system; this means not only that the existence and content of legal norms obligating citizens are explained by social activity, but also that the existence and content of legal norms that define how law is to be made, changed, and adjudicated are explained by social activity. All law, including so-called rules of recognition, is manufactured by social activities. Accordingly, legal positivism denies that there are any necessary moral constraints either on the content of the law or on the interpretive activities of judges. Historically prominent positivists include Jeremy Bentham, John Austin, Hans Kelsen, H.L.A. Hart, and Joseph Raz.[5]

[5] Friedmann- legal theory 5th Ed P.268

CHAPTER II

Background

It would thus be seen that there is no unanimity about the definition and exact meaning of natural law and the term natural law theory has been interpreted differently at different times depending on the needs of the developing legal thought. but the greatest attribute of the natural law theory is its adoptability to meet new challenges of the transient society.[6]

the exponent of natural law philosophy conceive that it is a law which is inherent in the nature of man and is dependent of convention, legislation or any other institutional devices.

Dias and Hughes describe natural law as a law which derives its validity from its own inherent values, differentiated by its living and organic properties from the law promulgated in advance by the state or its agencies.

According to cohen, natural law is not a body of actual enacted or interpreted law enforced by courts, it is in fact a way of looking at things and a humanistic approach of judges and jurists.[7] it embodies within it a host of ideals such as morality, justice, reason, good conduct, freedom, equality, liberty, ethics and so on.

[6] Lloyd- introduction to jurisprudence, page-79-81
[7] cohen and cohen, reading in jurisprudence and legal philosophy (1950) P. 660

From the jurisprudential point of view, natural law means those rules and principles which are supposed to have originated from some supreme source other than any political or worldly authority. some thinkers believe that these rules have a divine origin, some find their source in nature while others hold they are the product of reasons. even the modern sociological jurists and realist have sought recourse to natural law to support their sociological ideology and the concepts of law as a means to reconcile the conflicting interests of individual in the society.

According to Prof. Salmond [8]"jus gentium" was a purely Roman idea attained by Roman lawyers long before and knowledge of jus naturale had come to them grom Greek philosophy that Romans came to identify their own jus gentium with jus naturale of the Greeks. But the learned author himself does not believe in the correctness of this statement. It is submitted that jus natural had been known to Romans much before they developed their political and legal systems. However, Romans made two-fold distinctive contribution towards jurisprudence. First, the idea of jus gentium was purely Romans made two –fold distinctive contribution towards jurisprudence. First the idea of jus gentium was purely Roman unknown to scientific vocation for developing legal system itself on the touch –stone of ideal universal principle of right reason.

In legal theory and in ancient Hindu, Greek and Roman Law natural law has a primordial place. Indeed Natural Law theory has a history, reaching back centuries B. C and the vigour with which it flourishes notwithstanding periodic eclipse, especially in the

[8] J.W. Salmond, The Law of Nature, 11 at P. 129-130.

nineteenth century, is a tribute to its vitality. There is no theory; many versions have evolved throughout this enormous span of time…….. No other firmament of legal and political theory is so bejeweled with stars as that of natural law, which scintillates with contributions from all ages.[9]

Natural Law as conceived by its exponents is that law, which is inherent in the nature of man or society, and is independent of convention, legislation or other institutional devices. The phrase "natural law", however, has a flexible meaning. Dias and Hughes describe that natural law meant different and often contradictory things in the course of its legal history. It has been utilized to justify social institutions and to condemn them and to encourage both social change and status quo. Natural law as such has been used as the ethical justification of law as a whole; as the ideal source of law and the standard positive law emanating from this ideal; as the invariant for testing the rules of law in contrast with the changing and uncertain; as autonomous law deriving its validity from its own inherent values as spontaneous law differentiated by its living and organic properties, from the law promulgated in advance by the State of its agents. The chief features of this school are:

Its method is basically an a priori method different from empirical method, the former accepting things or conclusions in relation to a subject taken for granted without an enquiry or observation. The empirical or a posteriori approach try to find out all arguments or causes in relation to the subject matter.

Its meaning and nature has been varying, confusing and self-contradictory. In the natural sense it has been understood as synonym to physical universe, it has been used in the sense of natural reason, a law which conforms to the natural order of universe; it has also

[9] Dias, Jurisprudence, 653, (Ed 4th 1976)

been correspondingly used with force or physical power or moral, ideal or law with varying content or social justice.

The principles of human conduct that are discoverable by "reason" from basic human nature are absolute, immutable and universal.

It has been used as weapon and a shield to change or maintain status quo. Dias and Hughes rightly remark the emotive content of the word "law" has been utilized to inducement to accept or change the existing state of affairs. For example, in England natural law in the hands of Hobbes became a shield to maintain status quo while in the hands of Locke it became an instrument of change. In the twentieth and twenty-first centuries the natural law philosophy is universally adopted both as shield and a weapon. In India the philosophy of natural law is enshrined in Chapter III relating to fundamental rights of the individuals and Chapter IV embodying the socio-economic goals of State policy for promotion of material welfare of the common man. The theory of natural philosophy has been advanced both ways[10] to defend of or override individual liberty for common well being. This eternal dualism has been the chief characteristic of natural law philosophy.

The concept of Rule of law in England, the due process of law in the United States and the procedure established by law in India embody juristic traditions of natural law philosophy wherein the Sovereign body must act under law in the administration of justice. This is in essence a natural law thinking by which the positive law is subjected to the inhibition of a moral order.

[10] see Golak Nath v. state of Punjab-AIR 1967 SC 1643.

Natural Law in the Ninenteeth Century

The Natural Law School became unpopular in the nineteeth century. David Hume demolished the law of nature and said all law is “human conventions”. Hume’s legal philosophy had great impact upon Jeremy Bentham. Bentham attacked Blackstone’s concept of pretended law of nature and set the notion of utility as a standard for legislation against the vagueness of natural law. The natural law philosophy started eroding. The reasons for its erosion are : First, rise of sovereign nation states which set aside the restraints of higher law. The development of the doctrine of sovereignty by Bodin, Michaevelli, Hobbers and Bentham destroyed the organic concept of Chritiandom which led to the establishment of sovereign independent states. Montesquieu’s Espirit of Laws or (Espirit des Lois) says are influenced by environment, conditions such as climate, soil, religion, custom, commerce, etc. This approach undermined the natural law doctrine also. Second, nineteenth century witnessed dramatic achievements in physical sciences and the impact of Darwin’s evolutionary hypothesis upon every field of thought profoundly affected social and through it jurisprudence and the philosophy of law. The scientific age as ushered by Comte which removed traditional shackles and, therefore, jurists set before themselves greater use of induction which contributed to further erosion of the natural law. It denied the existence of anything that could not be apprehended by the senses or broken down by analysis or reduced to formulae or weighed, counted or measured. It was Auguste Comite (1798-1857) who gave up all forms of vague and loose thinking

about social phenomena in the form of metaphysical, abstract and theological speculations. He laid down that social phenomenon including law should be approached through the process of observation, analysis and classification just as physical bodies are studied in physical sciences. He described such approach to social phenomena as "positivism". It may be pointed here that Bacon, Galileo and Descartes had already expounded the idea of positivism in other fields. It was Comte who enunciated the doctrine of the Law of Three Stages (a) the Primitive theological stage with a belief in super-natural forces, (b) the Medieval Metaphysical stage gaining experience through knowledge and (c) present Positive or Scientific stage rejecting Nature's law and such other abstractions which were believed to be working behind these phenomena. Further Hobbes and Bentham scorned at the natural law which according to them was not at all law. According to both of them law was sovereign's command and not an embodiment of reason. Austin carried further the idea of Bentham and rejected Kant's identification of law with morals etc. In such an hostile environment the natural law theory could not survive.[11]

Natural Law in the Twentieth Century

The barrenness and ineffectiveness of positivism as mode of legal and political action became obvious after the disastrous consequences of the two World Wars. These Wars presented a great moral challenge to the moral convictions of the jurists throughout the world. As a result of these wars the smug complacency of

[11] Prof. S.N.Dyani-Jurisprudence and Indian legal theory, central law agency Page 41.

positivisms yielded to the quest for a standard above and beyond the State, based on right reason and the self-evident principle of the dignity of the individual. Therefore, it led to find a new formula for legal, social and political justice. In other words, there was a new movement for the revival of natural law jurisprudence. So to deal with question of the rational and moral bases of law new theories of natural law have emerged. There are various groups of thinkers who are of the view that the new social tensions and needs cannot be served by reference to rigid frame work of positive law. A new renaissance of natural law "free law" or sociological jurisprudence has emerged as a reaction to positive law. In Germany neo-Kantian Stammier postulated a "Natural law with variable content" the function of which is to provide an instrument for criticizing the existing body of law. Francois Geny is declaring war against the "fetishism of law" as appealed to "free scientific research" distinguishing between the dictum and the construct and thus finding by institution the irreducible rational date of natural law.[12]

[12] Prof. S.N.Dyani-Jurisprudence and Indian legal theory, central law agency Page 42-43.

CHAPTER III

MEANING AND CONCEPT OF NATURAL AND POSITIVE LAW

The word 'law' means order, hence natural law is simply the natural order. In the sense in which natural law is relevant to jurists, it is the natural order of persons -- specifically, the order of natural persons: human beings that are capable of rational, purposive action, speech and thought. In short, natural law is the natural order of the human world.

Laws are patterns of order. Hence, natural laws are patterns of natural order -- and, in the juristically relevant sense, patterns of order among natural persons.

Theory and praxis of natural law

A student of natural law studies the natural order of the human world. His primary theoretical objective is to discover and to identify the natural laws of the human world -- in short, it is to answer the question 'What is the natural law?' Clearly, that theoretical objective implies no positive or negative valuation of that order -- its purpose is not to argue that the natural law ought to be respected. The theoretical study of natural law is a 'value-free' undertaking.

Of course, not only jurists but also economists, anthropologists, and practitioners of other scientific disciplines as well, study the patterns of order in the human

world. However, whereas, for example, economists focus on how orderly patterns of coordinated actions emerge in the human world, jurists focus on the order of persons as such. Their concern is with the conditions in which human persons can be and are distinguished properly from one another and from other things. By implication, they are also concerned with the conditions in which persons are or are likely to be confused with one another or with other things.

The primary practical objective of the juristic study of natural law is to propose rules or practical principles that, if followed by human beings, are likely to maintain, strengthen and restore respect for the natural order of the human world. They are the principles and rules of justice. The word 'justice' literally means that which is conducive to ius. Like the word 'law' itself, 'ius' denotes the natural order of persons that are capable of solemn speech (Latin iurare, French jurer), of undertaking and honoring commitments and agreements (which are also called iura). In short, justice is the art of making law (Latin ius) prevail[13].

Of course, the practical objective of the juristic study of natural law presupposes not only that we [can] know what the order of the human world is but also that it is a respectable order -- one that people ought to respect. In its practical aspect, the study of natural law is not a 'value-free' undertaking. A significant part of the philosophy of natural law concerns analysis and evaluation of arguments that set out to prove or to disprove the statement that people ought to respect the natural law.

[13] http://users.ugent.be/~frvandun/Texts/Logica/NaturalLaw.htm

The most obvious (and to most people for all practical purposes sufficient) reason why we ought to respect the natural law primarily involves the fact that not doing so usually causes immediate harm or loss to some innocent people and is likely in the long run to be harmful to many more. The harm results from the fact that in not respecting the natural law one fails to distinguish properly between persons and other things, or between one person and another.

Note, however, that the assumption of the respectability of the natural law is compatible with the assumption that not respecting the natural law may, and often does, benefit those who do not respect it and perhaps others as well. However, unlike the utilitarian philosophers, the natural lawyers make a distinction between, on the one hand, justly or lawfully acquired benefits and justly or lawfully suffered harms and, on the other hand, benefits acquired and harms suffered as a consequence of unjust or unlawful actions. They can do this if the distinctions between persons, and between persons and other things are objective--which is something that few people doubt.

Opponents of natural law believe that there is no natural order of the human world or else that it is not a respectable order. Hence, they see no reason why they (or anybody else) should respect the distinctions that define that order.

Natural Law Beginning with Greeks

Natural law is that set of principles of human conduct which has some kind of immutability – a principle based on reason, or “divine God” or on a supposed social contract. Jurisprudence, therefore, as a branch of human knowledge, concerned with

rational speculation begins with Greeks. It were the Greeks who gave a conception of universal law for all mankind under which all men are equal and which is binding on all people.[14]

According to **Heraclities (**530-470 B.C)- The concept of natural law was developed by Greek philosophers around 4th century B C. Heraclities was the first greek philosopher who pointed at the three main characteristic feayure of law of nature, namely, (i) destiny (ii) order (iii) reason. he stated that nature is not a scattered heap of things but there is a definite relation between the things and a definite order and rhythem of events. accoding to him nature is one of the essential elements of natural law.

Socrates (470-399 B.C.)-The name of Socrates occupies a prominent place among the stoic philosophers of the ancient time. he was a great admirer of thruth and moral values. he agrued that like natural physical law, there is a natural moral law. it is because of the 'human insight' that a man has the capacity to distinguish between good and bad and is able to appreciate the moral values.

Plato (427-347 B.C.) Socrates disciple Plato carried further the natural law philosophy through his concept of ideal state which he termed as republic. he contented that only intelligent and worthy person should be a king. he argued that justice lies in ordaining man's life thorugh reason and wisdom and motivating him to control his passion and desires. according to him the laws of state are a pale shadow of an absolute idea of perfect laws against which man-made las may be measured.

According to **Artistotle** (384-320B.C) law is either universal or special. Special law consists of written enactments by which men are governed. The universal law consists of those unwritten rules which are recognized among all men ……. Universal law is that

[14] Prof. S.N. Dhyani, Jurisprudence and Indian legal theory,P-37

which conforms to Nature alone. The Greek thinkers, however, enunciated different forms of natural law based on expediency or self-interest or right reason. The predominant objective before all of them has been to postulate ideal standard for human conduct devoid of arbitrariness and at the same time universally just or right. Greek philosophical speculation about justice or ethics therefore, became the basis of ancient jurisprudence. A sect of Greek thinkers called Stoics popularized the maxim, "Live according to nature". It was from Nature conceived as rational – as animated by Universal Reason of the World – that the law of nature was deemed to proceed. It was through the possession of reason that man is enabled to know the precepts of law and to conform his conduct thereto. Thus, "Live according to nature" was the end of man, that to the dictates of an eternal and unchanging law of nature all human actions should be conformed. It has been rightly observed it is to Athens and not to Rome that we owe those doctrines which formed the speculative basis of ancient jurisprudence, and which continue to this day to influence juridical thought. The main among those doctrines is that of jus natural.[15]

Roman Period

Romans were far greater legal scientists than their counterpart, the Greeks. The Romans accepted Greek conception of natural law and used it as an instrument of legal development and legal reform. The jus naturale is to the civil law as the ideal law is to the real law. The law which any people establishes for itself is peculiar to itself and is called the civil law (or jus civile) as being the particular law of the State. But the law which natural reason has established for all men is observed by all people alike and is called the law of nations (jus gentium) being that which all nations use. The last was the jus naturale based on universal reason common to mankind. Thus jus gentium was identified

[15] Dr. N.V. Parangaje- studies in jurisprudence and legal theory, 6th Ed,P-102-103

with jus natural and incase of conflict between jus gentium and jus civile the validity was to be adjusted in accordance with the principles of jus natural. The principles of jus natural which Romans inherited from Greeks became an ideal law for reconciling the rules of jus gentium and jus civile.

According to **Cicero** - Marcus Tulluies Cicero was a great Roman lawyer, stateman and orator. his legal philosophy is contained in his famous work De Legibus. According to him, true law is right reason in argument with nature; it is universal application, unchanging and everlasting…and there would not be different laws at rome and at Athens, but one eternal and unchangeable law which will be valid for all nations at all times.[16]

Christian Period

After the end of Roman era we find Greek theory of natural law coming into contact with theology of the Hebrews. Nature is identified with God and law of nature with law of God independent of revelation or institution or scripture of old and New Testament. St. Augustine divorced natural law from physical universe and made it a part of spiritual unity founded upon grace and encompassing earth and sky. Natural law, therefore, was considered as will of the God revealed to man by Holy Scripture. He distinguished between temporal law which is made by men and from divine mind. According to Christian fathers all laws, government and properly were to be discarded and ignored . Church as the exponent of divine law could interfere with and override the state law and the supremacy.

[16] Prof. S.N. Dhyani, Jurisprudence and Indian legal theory,P-38-39

Sant Thomas Aquinas (1225-1274)- among the theologicians of the medieval period, the name of Thomas Aquinas deserve a special mention. he is considered to be the representative of the natural law theory of his age. in his view, social organization and state are natural phenomenon St. Aquinas pointed out that man can control his own destiny to a considerable extent but he is subject to certain basic impulses such as impulse of self-preservation, reproduction of his species, bringing up children etc. for improving his future and attainment of perfection.

St. Thomas Aquinas gave a fourfold classification of laws namely (i) law of God or external; (ii) natural law which is revealed through " reason" (iii) divine law or the law of scriptures (iv) human laws which we now called Positive Law.[17]

Medieval Period

With the establishment of Holy Roman Empire the theories of natural law enter a new phase. first ,the supreme authority of the Church is being established as compared to feudal lords. Secondly, there is a universal desire to maintain peace and harmony after a long spell of chaos and confusion due to religious wars. Therefore, to preserve stability and expound supremacy of Roman church both as highest temporal and ecclesiastical power the theory of natural law comes in defence of prevailing social system. St. Aquinas divided law in two parts distinguished as lex eternal and lex naturalis. The former being the product of divine reason while the latter of human reason. The former is the law of universal nature, that is to say law of God, the latter is the law of human nature. The lex

[17] Prof. S.N. Dhyani, Jurisprudence and Indian legal theory,P-39

eterna as the dictate of divine reason natural law proceeds merely from the rational nature of man or human reason and governs the actions of men only.

Hugo Grotius (1583-1645)- Hugo Grotius was a great stateman, philosopher and jurist of his time. he was a dutch scholar and a staunch supporter of renaissance and reformation. he propounded the theory of functional natural law in his laws of war and peace (1625) and formulated the principles of international law which were equally applicable to all states both, during war and peace. he referred these principles relating to law of nations as natural law. he departed from st. Thomas Aquinas scholar concept of natural law and reason and held that natural law was not merely based on reason but on right reason, i.e, self supporting reason of man.

Thomas Hobbes (1588-1679)- hobbes theory of natural law was based on natural right of self-preservation of person and property. he made use of natural law to justify the absolute authority of the ruler by endowing him power to protect his subjects. thus he completely denounced the religious and metaphysical character of natural law.

Thomas hobbes propounded his theory of social contract relating to evolution of the state. he had himself participated in the civil war between king Charles I and british parliament and supported the former. therefore he obviously supported the absolute power and authority of the ruler. he accepted the ideal principles underlying natural law but did not give it much credence for it lacked sanction which, in his view was essential to command obedience from the people.

John Locke (1632-1704)- as stated earlier, the new political theories which emerged as a result of renaissance, favoured absolute sovereignty of the state—undernining the importance of the individual. it may be stated locke's idea of social contract was founded on new secular approach to natural law whereby the power of the government was conceded on trust by the people to the rulers and any infringement of the conduct by the rulers was treated as a breach of the people's fundamental natural rights which justified revolt against the government.

Jean Rousseau(1712-1778) the changed circumstances and political unheavals of the eighteenth century brought about a radical transformation in the politico-legal idealogy of the thinkers of that time. rousseau gave a new interpretation to social contract and natural law to suit the new situation. he pointed out that social contract is not a historical fact as contemplated by hobbes and locke, but it is merely a hypothetical conception.

Immanuel Kant (1724-1804)- the natural law philosophy and doctrine of social contract was further supported by kant and fichte in eighteenth century. they emphasized that the basis of social contract was reason and it was not a historical fact. kant drew distinction between natural law contracts and the acquired rights and recognized only the former which were necessary for the freedom of individual.[18]

Modern Period

[18] Dr.N.V. Paranjape-studies in jurisprudence and legal theory, P-107-110

In the fifteenth century after Reformation the authority of the Church collapsed and with it the theological foundation of legal theory also came to an end. Hugo Grotius in the continent and Hobbes in England initiated a new legal theory which disregarded divine will as irrelevant in the philosophy of law. Thus, jurisprudence was emancipated from theology and it became a part of human nature – source of law being the rational nature of man – a metaphysical concept distinguished from theological concept. Another aspect of Reformation was the freeing of the individual from feudal society. The theory of freedom of individual as unit of society became an outstanding feature of natural law. Natural Law, said Grotius (1583 – 1645) is the dictate of right reason indicating that any act from its agreement or disagreement with the rational nature of man has in it a moral turpitude or a moral necessity, consequently such act is forbidden or commanded by God. – the author of Nature.

Grotius, however, made it clear that natural law would remain valid even if God did not exist – a rationalist enunciation of law – building a theory of law independent of theological presuppositions. The doctrine of natural law was further expounded by Pufendorf, Leibnitz and Montesquieu. In the hands of these jurist natural law became purely rational and secular in principle.

In the hands of **Thomas Hobbes** (1588 – 1679) natural law theory acquires a different character. According to him man's life in the "state of nature" was one of fear and selfishness and life of man was solitary, poor, nasty, brutish and short. To escape this calamity men entered into "social contract" whereby they surrendered their rights to the king who was to guarantee the natural rights of man

i.e. preservation of life and security of property. Preservation of human life and security of property are the only natural rights of man which sovereign is bound to safeguard. “Law of nature”, says Hobbes, is the dictate of right reason conversant about these things which are either to be done or to be omitted for the preservation of life. By this formal definition of natural law he works out his ethical and political system without natural law.

In Locke individual retains his natural liberty while entering into a contract with the king who is answerable to the people for preservation of life, liberty and property. In Kant law of nature or as he prefers to call it the moral law appears as categorical imperative of the practical reason. Law, in other words, is the law of nature which is the command or dictate of right reason. In Rousseau the “social contract” theory is so devised in which individual is not subjected to arbitrary will of other individual or society but to the “general will” and to obey this is to obey oneself. Law and government, therefore, are the reflection of “general will”. Rousseau as such admits all the presumptions of natural law – that is basic freedom of the individual man, the state of nature the formation and destruction of State by contract – a theory of popular representative democracy. Accepting the principle of inalienable rights, Rousseau discovers a kind of political union in which freedom is not alienable. Every man in obeying the state obeys himself with full reciprocal renunciation of all individual rights. The American

Revolution and the French Revolution represented the triumph of natural law ideas.[19]

Examples of natural law are,

Natural laws are based on the philosophical theory that humans are inwardly capable of self government. Legislated law is positive law, that has this perspective.

Positive law

'Law', indeed, now usually refers to some national system of social regulation -- a system of social regulation imposed by the rulers of a nation-state and otherwise coordinated by their agents and servants. By extension, 'law' now refers also to regulatory systems to which the rulers and diplomatic agents of various nation-states have agreed. All of this goes under the academic label of 'positive law', which covers any one of the many particular imposed ('posited') systems of regulation by legal rules that we find in various politically organized societies.

Positive law consists of the elements of such a system, for example its legislative, executive, administrative, judiciary and military and police 'organs', its offices and officers, the rules they follow and apply, and the decisions they make. Those systems have no necessary connection with natural law or justice. They define only what is legal in a particular society, not what is lawful among human beings.

[19] Prof. S.N. Dhyani, Jurisprudence and Indian legal theory,P-40

The positive law is not the natural order of the human world. It is the artificial order that some powerful people (individuals and groups) in a particular society currently try to impose on others. It is an order, not of relations among human persons as such, but of relations among social positions, roles and functions. Thus the positive law of a particular country tells us what powers, immunities, rights, duties, claims and liabilities legally attach to the social positions, roles and functions of a general, a minister, a representative of the people, a citizen, a registered alien, a pensioner, a police man, and so on. In the same way, the rules of chess tell us what a king, queen, knight, pawn or other piece is or can or cannot do.[20]

Like a king or queen in chess, a general, citizen or police officer is not a natural person but a position or function in a particular sort of game (usually and grandiloquently referred to as 'a social system'). Typically, the position is occupied and the function performed by a human natural person but that need not be the case. It is a grave mistake to confuse the position with its occupant. Whatever the positive law [of this or that country] may tell us about what a citizen is, or can or cannot do, it tells us nothing about what a human person who happens to fill that position at a given moment is or what he or she can or cannot do.

Positive law, then, pertains primarily to 'artificial persons', to social positions, roles and functions within a particular social organization, especially one that is imposed by a state or a group of states. It pertains to human beings only

[20] Dias jurisprudence- 5th Ed,butterworth P-332

indirectly, to the extent that they are supposed to supply the physical and intellectual labor that those positions require. In other words, it pertains to human beings as means or resources for organizing social activity.

However, it is conceivable -- in some cases, it already is a fact -- that automated machines take the place of human suppliers of socially required labor. Conceivably, a social organization could develop so that it becomes independent of the availability of human persons to supply particular skills. Then human beings are reduced to the status of mere objects to which social action can be applied. If and when that happens the relations between human individuals and 'society' are analogous to the relations between cattle and a farmer or between a collection of pets and their caretaker. Such an outcome is in fact the wish of [philosophical] socialists, who accept at least one and usually both of the following propositions: 1) Individuals belong to society, which therefore has the right to make them obey its prescriptions; 2) Society should take care of individuals because individuals are incapable of decently managing their own lives and affairs.

Positive law, when taken to its logical socialist extreme, is the scheme by means of which 'society' manages its human and other resources, analogous to the schemes a farmer uses to manage or take care of his human and other resources.

It follows that positive law has no logical or necessary connection with human life and action. The concept of 'positive law', as noted before, is the concept of an artificial order -- an order of artificial persons.

However, no matter how much social regulation there may be, as long as human nature is what it is and always has been, the search for knowledge and understanding of the natural order of the human world remains a valid objective.

Example of Positive Law are

Statutes, judicial verdicts, and ordinances are example of positive laws. Positive laws are written and enacted by government lawmakers, courts and administrative agencies. Such laws are dated back to ancient times that were primary passed on by the executive body at local, regional or national level.

Austin's definition of law: a "rule laid down for the guidance of an intelligent being by an intelligent being having power over him." There are two kinds of law: positive law (rules commanded by political superiors to their inferiors) and divine law (rules that God
commands all human beings to follow). Law are commands, which Austin defines as an
expression of a wish by someone who has the willingness and ability to enforce compliance. ("If you cannot or will not harm me in case I comply not with your wish, the
expression of your wish is not a command.")

Unlike **Aquinas,** Austin does not distinguish divine and natural law. Austin

assumes that God's commands to us are the true morality. Austin distinguishes divine
law/the true morality from "positive morality," or the beliefs about what's right/wrong,
just/unjust that are held by the majority of people in some society. The positive morality of our society is correct insofar as it coincides with divine law and incorrect insofar as it
deviates from it. It's worth noting that Austin had an unorthodox view of the content of
divine law. Austin believed that God commands us to be utility maximizers, making
utilitarianism the true morality.

Positive laws are commanded by "political superiors." Austin calls these superiors the "sovereign," and he defines "sovereign" as the person or persons who are not in the
habit of obeying anyone else, and whom everyone else is in the habit of obeying. Positive laws are general commands by people who themselves are not bound by them, and who can enforce obedience from everyone else. The idea that the "sovereign" is above the law is one that Austin shares with the 17th century political philosopher Thomas Hobbes

Austin, then, defends two ideas:

i) the command theory of law, and

ii) the separation thesis

It's perfectly consistent to think that the separation thesis is true, but the command theory is false. That's precisely what H.L.A. Hart believes..[21]

-- Plenty of countries have laws, without having a "sovereign" in Austin's sense. In constitutional democracies, government has limited powers and is accountable to the people in elections. The President of the U.S., the Prime Minister of Great Britain, etc. are not "above the law," and thus, are not "sovereigns."

-- Hart: Austin's command theory of law may have some plausibility if one focuses on criminal law (where people who break the rules are subject to punishment), but it has much less if one considers other bodies of law, such as contract law or tort law. If I fail to fulfill the requirements for a valid will (e.g. I have it witnessed and signed by only one person, not the two required by law), the state doesn't punish me. It simply deems the will void and refuses to carry out whatever wishes I express in it about who inherits by estate.

-- Austin's command theory doesn't work for international law, because there is no

[21] http://www2.law.columbia.edu/faculty_franke/CLT/Summary%20ofJohn%20Austins%20Legal%20Positivism.pdf

international sovereign, that is, no entity with the power to force all countries to obey

international law.[22]

Hart's Contribution to Positivistic Jurisprudence

There is a century gap between legal theories of John Austin and Professor H. L. A Hart. John Austin's model of positivism conditioned by anti-natural law scientific theories and Jeremy Benthem's legal thinking emanated in his Lectures on Jurisprudence in the Universal of London finally concretised in Province of Jurisprudence Determined. In 1832 H..L.A. Hart, Professor of Jurisprudence in the University of Oxford produced his monumental work The Concept of Law in 1961 highlighting the various difficulties and inadequacies besetting Austin' theory of Jurisprudence. The concept of law is thus a critical evaluation of the development of positivism in law from John Austin to Hart. Indeed Professor Hart has been careful to exclude all the defects from which John Austin's jurisprudence has been suffering and thereby has enunciated a much reformed and socially oriented positivism theory of law.[23]

Hart's Dual System of Law

Hart has been anti-Austinian who has rejected the Austinian model as it is exclusively based on the triology of command, sanction and sovereign which Austin described as "key to the science of Jurisprudence". Such pattern, says Hart, is exclusively applicable to criminal pattern of law and is inapplicable to

[22] W. Friedmann- legal theory,5th Ed, P-268-269
[23] Prof. S.N.Dhyani-jurisprudence and Indian legal theory,P-60

modern legal systems. Hart's analysis of legal system is quite elaborate and sociological and not merely a kind of command or orders of gunman or gangster. In place of Austin's monolithic legal structure Hart provides a dual system of law consisting of two types of rules which he describes as primary and secondary rules. Primary rules are those which lay down standards of behavior and are rules of obligation – that is the rules which impose duties. The Secondary rules, on the other hand, are such rules which specify the rules in which primary rules may be ascertained, amended, rescinded and enforced. The addition of secondary rules to a set of primary rules is says Hart, "a step forward as important to society as the invention of the wheel". It is this step which Hart declares as "the step from pre-legal into the legal world". The combination of primary rules of obligations and the secondary rules of recognition, says Hart, is the "key to the science of Jurisprudence". Thus it is the union of primary and secondary rules which constitute the core of the legal system and can be justify regarded as the "essence" of law.[24]

Rule of Recognition – a neo Austinian Sovereign

According to Hart the regime of primary rules suffer from doubt or uncertainty as to the question about what the rules of community are or what is their exact scope. The remedy for uncertainty is the introduction of what Hart calls the rule of recognition which authoritatively settles what the rules are or what their scope is. The rule of recognition provides the criterion for identifying the valid law. It is the rule of rule of recognition which provides the standard to distinguish things

[24] Prof. S.N.Dhyani-jurisprudence and Indian legal theory,P-61

which are law and which are not law. This rule of recognition is analogous to Austin's sovereign. Rules of recognition like Austin's sovereign just exist, while the latter die the former fade away (into disuse). The rule of recognition Hart concludes exists only as a complex but normally concordant practice of the courts, officials and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact. As it is not possible to question the legal validity of the commands of an Austinian sovereign, neither can we question the legal validity of Hart's rule of recognition. In short, the rule of recognition is Hart's important feature of positivistic theory of law in the twentieth century.[25]

Internal Aspect of Law

Hart rejects Austin's legal framework solely based on coercion for its being penal, punitive, prohibitive and preventive in nature discouraging certain conduct by providing sanction. Whereas, according to Hart the main thrust of legal system is to confer power on officials to implement the rule or law by taking into account the internal and external aspect of law. According to Hart law cannot be understood merely in terms of sanction or coercion. It is indeed much beyond it and is essentially in spirit remedial, and procedural, embodying principles of minimal natural justice and morality which were excluded and rejected by Austin.

According to Professor Hart, rules of a legal system has, what he calls the "internal aspect" or inner point of view. Hart says, law depends not only on external social pressures which are brought to bear on human beings to prevent

[25] Ibid,P-61

them from deviating from rules but also on the inner point of view that human being takes towards a rule conceived as imposing an obligation. In case of a society which has no more than a set of primary rules, it would be necessary for citizens not only generally to obey the primary rules but also consciously to view such rules as standards of behavior violation of which are to be criticized. Likewise the internal point of view law relates not only to a body of citizens but to officials of the systems also. These officials not merely "obey" the secondary rules but must take an "inner view" of these rules.

In short, Hart's positivism is more complex than that of Austin. He rejects many assumptions of Austin, for instance, law as command which obliges persons to obey such orders. He makes a difference between "being obliged" as matter of fact an "being under an obligation" a condition which involves general acceptance of norm of standard of behavior which calls upon the subject to abide. In such situation the subjects are bound or obligated in a normative fashion because of authority vested by rule in the officials and public men to issue rules. Similarly, Hart has criticized Austin's notion of sovereignty. He says a mere "habit of obedience" cannot explain the continuity of law, that is to say, when a monarch dies at that point in Austin's view there is no person commanding habitual obedience of the people in society, hence there is no law in that society until someone succeeds to give orders backed by sanction[26].

[26] Prof. S.N.Dhyani-jurisprudence and Indian legal theory,P-62

CHAPTER IV

COMPARATIVE STUDY OF NATURAL LAW AND POSITIVE LAW

Is natural law necessary for identifying positive law?

No one doubts the existence of positive law (hereafter PL), but we wonder about its rightness. No one doubts the rightness of natural law (hereafter NL), but many wonder if it actually exists. PL exists even when unjust, but for NL to exist it is not enough to be just. One way of comparison between them may be articulating the notion of the existence of law or its being in force. Being in force of the intrinsic value per se, i.e. in virtue of its moral merits, has been distinguished from being in force as formal validity and from being in force as factual existence. But this is not very convincing, because a norm that was valid only axiologically and was not part of a normative system in some way effective would be pure and simple morality and nothing else. Law, unlike morality, requires some degree of factual existence. One of the few cases of "existence" of NL that we know of is the Nuremberg Tribunal, which condemned Nazi leaders for having obeyed unjust positive laws, i.e., for having violated NL though obeying PL, according to Radbruch's Formula which states that where statutory law is intolerably incompatible with the requirements of justice, statutory law must be disregarded in favour of justice.

The essential requisites of NL do not include factual existence and so it is not "law" in the narrow sense. However, we may wonder whether effectiveness and formal validity are all that it is required for there to be "a legal system " and whether perhaps it is not also necessary a certain correspondence to criteria of justice, at least as regards the legal system as a whole. If it is felt that PL as a whole, in addition to being effective, must at least satisfy minimum needs for justice, then the problem of the relation between PL and NL really arises, but within PL itself. Hence the question needs to be formulated as follows: what role is played by values or principles of justice that are not dependent on human will in the concept of positive law?

PL is constructed by man, and is hence an art fact. But this in itself does not mean that all its constitutive elements are controlled by human will. We know that this is certainly not the case for a series of logical and factual conditions the violation of which would imply the impracticability of PL, i.e., its non-existence (for example, prescribing the necessary or the impossible). Besides these constraints are there legal norms from which no derogation is permitted?

Before answering this question, we need to take a look at the history of the main conceptions of the relations between PL and NL. The great legal cultures were built up around some general idea of what law should be like. For the Romans, PL did not consist primarily in an arbitrary act of imposition of rules of conduct, but in a set of rules deriving from the very nature of social relations. For this reason the jurist Gaius (2^{nd} century AD) could say that the first source of law is not

statute but nature. Legal science itself is not knowledge of laws, but of things, i.e., of right things (iusti atque iniusti scientia), that is to say of the normality of social relations. Cicero in De Officiis explains the fundamental legal categories (such as labour, property, self-defence and family) by making reference to basic inclinations of human nature like self-preservation and procreation. Reason itself is an inclination that induces human being to associate with his fellows, giving rise to the political community and its fundamental institutions. In the Middle Ages, NL operated within canon law, to which we owe – as has been demonstrated by Harold Berman (1983) and Brian Tierney (1997) – the importance of intention, consensus and individual will in contract law, marriage law and penal law, the first affirmation of natural rights. Moreover, the influence exerted by the rationalism of the Enlightenment on the codification process deserve mentioning. Lastly, how can we not recognise the enormous influence of the natural rights on the Universal Declaration of Human Rights **(**1948**)** and, through it, on the constitutional law of contemporary states and on general international law?

These are only a few of the many examples of how "in fact" an idea of NL has influenced a general understanding of PL and its contents. However, the fact that a conception of NL has inspired a PL culture does not mean that NL itself is relevant for a PL system. Indeed, we may think that this is the role and the task that the meta-legal has always had in the formation of legal rules. And so we have

to go back to the main question: is reference to moral and political values an essential element for identifying positive law? [27]

Three faces of the relationship between positive and natural law

We can only answer a question like the one just raised by appealing to a theory of PL and at the same time to a conception of NL. In the normative sphere the problem of the relationship between PL and NL becomes inseparably mixed up with the problem of the relationship between a conception of one and a conception of the other Since the ways of conceiving the positivity and naturalness of law are multiple, we will have different conceptions of the relations between them. Here the issue must be looked at from the point of view of the positivity of law

The relevance of NL might be detected within three main profiles of legal theory: the foundation of the obligation to obey legal rules, the content of legal rules, and the form of legal rules themselves. For each of these three points we can ask ourselves whether we need to have recourse to NL.

Why do we have to obey the law?

Legal positivism rejects the idea that the legal bindingness can be essentially or necessarily based on moral values or on principles of justice, one reason being that, since value judgments are controvertible, the certainty and autonomy of law

[27] http://web.nmsu.edu/~dscoccia/376web/376lpaust.pdf

would be lost. In order to ascertain the existence of law, it is necessary to describe it in terms that are purely factual, empirical, based on the observation and interpretation of social facts. This rules out the possibility of it being ultimately legitimate to have recourse to natural morality. Consequently, we have to separate the concept of validity seen as existence of law from the moral duty to obey its rules (Ross 1961). But if the identification of law does not serve to create a foundation for a truebindingness, then legal theory loses part of its importance and moral theory (or NL doctrine) becomes more attractive for law (Cotta 1983). Precisely in order to avoid this outcome, Kelsen identified the existence and validity of a norm with its binding force, its strong obligatoriness, i.e., with the obligation to behave as it prescribes. In this way, the legal system takes on a moral quality, one that is not empirical even though not one linked to NL. Kelsen's intention is to confer on legal theory itself the normative advantages of the NL doctrine, stripping it of its metaphysical and axiological contents. This appears to be necessary since no normativity can be deduced from empirical facts. The result is a concept of legal duty which is of the same genus of the moral one. In this we can still see a certain presence of NL within PL, i.e., the idea of bindingness that is proper to NL doctrine is preserved without its recourse to substantial moral values. For this reason, together with the need not to move away from empiricism, contemporary theory of legal positivism has gone the way of conventionalism (Green 1999).

A settled doctrine, which started from the ideas of Hart, maintains that "there are conventional rules of recognition, namely, conventions which determine certain

facts or events that are taken to yield established ways for the creation, modification, and annulment of legal standards". Hence positivity indicates reference to certain facts that in turn are determined by conventional rules regulating the identification and exercise of authority. Therefore the central point in this concept of positivity lies in the nature of these conventional rules of recognition. How are they related to NL?

These conventions constitute the practice at issue. This means that there exists no law prior to the legal practice made up of the recognition's conventions (practice theory of norms). This rules out any law existing prior to PL and hence also any "NL", but it does not yet rule out the possibility of NL being present within legal practice itself.

For this to be ruled out, it must be felt that the normativity of law is only grounded in the fact that all participants in the practice consider the rule a reason for acting. As it is well known, this was contested by Ronald Dworkin (1977), when he maintained that judicial decisions also have recourse to principles of critical morality connected in some way to institutional traditions. The argument whereby legal conventions cannot provide reasons for acting that are different from the ones internal to legal practice itself does not rule out the possibility of law also being identified on the basis of moral and political considerations, since it is always possible that these are reasons internal to PL, as Dworkin and inclusive legal positivists maintain, though in a different sense

Another conventionalist argument against NL is the following: if one were to obey the authority for other reasons than those that depend on the authority itself, then this would be superfluous .This rules out the idea of reference to moral values being an essential **(**and contingent too**)** element for identification of law. However, this argument depends on the role that is assigned to the legal authority, which can have a creative or productive task and/or an interpretative task. The latter binds the authority to showing that its interpretation of the fundamental values is correct even if it is not the best. This justification implies that the reasons why a norm is issued become part of the essential characteristics of the PL together with the element of formal validity. Here too one can recognise a certain presence of NL.[28]

The content of the legal rule and natural law

The second question is whether it is a necessary condition for being PL that a norm is consistent with NL. Obviously it is not an issue of fact but a normative one, i.e., one needs to know whether a valid PL can in principle have any content – this was the opinion of Kelsen, who in the formal good of peace saw the only general aim of law – or whether there are ethical limits to contents. Jurists in the past admitted that law requires an "ethical minimum", seen by some rather as a

[28] http://ivr-enc.info/index.php?title=Positive_Law_and_Natural_Law

positive morality and by others as a natural morality. More recently it has been stated that law necessarily makes a “claim to correctness” However, the doctrine that legal norms can have any content, even the most unjust and the most seriously offensive for human dignity, is also unacceptable for many legal positivists. Hart’s doctrine of “the minimum content of natural law” is also one famous indication of this orientation. “Reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, shows that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control”. Here we are clearly not talking about positive morality but natural morality. It is not a simple observation of what actually happens in legal systems, but is a description of what must be expected, given certain conditions.

According to Hart, these bound normative conditions are functional to the attainment of the general aim of survival, which is seen as the reason why certain prohibitions and obligations and certain legal institutions are present in some way in all legal systems. The difference between survival and peace, both Hobbesian and Humean aims, consists in the fact that the former appeals to a conception of human nature as it is in the present conditions of existence, while the latter does without this, deeming that the only evil that law wants to avoid is the illegitimate use of force. The NL doctrine of “commonsense” accepted by Hart is very

restricted compared to the traditional one, both because like the modern one it regards only the means and because it deems that the common aim is only survival. Precisely on the latter point there is a debate going on in contemporary political and legal philosophy between a "thick" conception of fundamental values, like for example that of Finnis, and a "thin" conception of primary goods, like for example that of Rawls. [29]

The form of the legal rule and natural law

The third and last issue is whether the fact that legal rules must have a given form and not another and the fact that the legal system as a whole must have a given structure and not another are not a sign of NL constraints. Is not the form of legality itself a moral value? The theory of the rule of law is traditionally linked to the essential characteristics that a legal norm must have: publicity, generality, non-retroactivity, clarity, consistency, constancy through time, practicability and congruity in application and so on. All these conditions are formal in broad sense, but they must be these and no others for the law to perform tasks referring to substantial objectives or values like respect for liberty, equality and people's expectations. While all agree in principle on the way to describe the elements of rule of law, there is major disagreement on the identification of these objectives or these values. Even a "formal" conception has to justify itself in some way and this should be a "substantial" way.

[29] http://ivr-enc.info/index.php?title=Positive_Law_and_Natural_Law

As confirmation of this, Kelsen consequently expunges the theory of rule of law from the pure theory of law, i.e., from the object of legal science, considering it as a prejudice linked to NL. Hart deems it a necessary but not a sufficient condition for justice, in that it is "compatible with very great iniquity". Nonetheless, there are marked analogies between Hart's "principles of natural justice" and Fuller's "internal morality of law". The procedural dimension of law presupposes a liberal view of human being, in that it is based on the presupposition that the human being is capable of self-determination, of understanding and following norms and making up for their defects. For this reason law is a purposive human undertaking. Hence – according to Fuller - there is a "morality" of procedures dictated by their internal reason for existing and the general aims for which they are made. That a public body must not perform acts ultra vires, i.e., beyond its own competences, is undoubtedly a moral procedural principle, and that the freedom of citizens must not be threatened by arbitrary acts by public powers is a substantial moral principle. These internal and external constraints of procedures have appropriately been configured as "a natural law of institutions and procedures". This means that the content of PL, at least in its procedural part, is neither arbitrary nor ethically irrelevant. Lastly, if we consider the nature of the obligation of functionaries in relation to these secondary rules, we have to recognise that they are closer to the moral ones than to the strictly legal ones, since they are founded on the principle of fidelity to law seen as a cooperative undertaking whose internal good is that of attaining justice in the best possible way with the legal materials available. [30]

[30] http://ivr-enc.info/index.php?title=Positive_Law_and_Natural_Law

Natural Law theorists such as Plato, Aristotle, and St. Thomas Aquinas argue that a law is only just and legitimate if it promotes the common good. For Legal Positivists like JohnAustin, H.L.A Hart, and Thomas Hobbes, a law is legitimate if it has been enacted through the proper channels by someone with the power to do so regardless of the content of that law. While each theorist presents his own explanation, each seeks to answer these crucial questions about law and society.

On the more moderate end of the Legal Positivist tradition is a philosopher who was influenced by both Natural and Positivist jurisprudence. Thomas Hobbes argues that the law receives its legitimacy from a social contract between the people who are governed and their sovereign. He likens government to a biblical sea monster .Like an anatomical head, the sovereign rules over the body of subjects whose power is beneath it. Like the monster, the government is all-powerful. Yet unlike Austin, he believes there to be limits to political obligation. He argues that when a citizen's life is in danger, they have the right to disobey the government or a law.

Challenging Austin's idea that the law is legitimate because of the credible force of the sovereign is H.L.A. Hart. He agrees with Hobbes' idea that laws are social contracts between the government and the people. He contends that legitimate law is not just commands backed by real force and sanctions, but because it has been enacted through primary and secondary rules. If a law has been dually enacted where primary rules regulate conduct and secondary rules allow primary rules to be created or altered then it is legitimate andmust be obeyed. Additionally, Hart sees that Austin's Command Theory presents a problem in the varying types of laws that he believes need to be in place,

“notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers) which cannot, without absurdity, be construed as orders backed by threats.

Similar to the concept of legitimate law is the concept of what is just. Natural Law theorists Plato and Aristotle advance the idea justice is a virtue. It is an inseparable part of Austin, John. "Lectures on Jurisprudence."

Natural law theory exaggerates the relation of law and morality. Positive law is a reaction against particularly that aspect of Natural law theory. It insists on a distinction between human law, which they call positive law and moral and scientific laws. Human laws are posits of human society while scientific laws are independent of what we take them to be. (You will note, sometimes, that writers refer to what I call 'mores' as 'positive morality' in contrast to 'rational morality'.)

The Classical version of positive law theory is John Austin's (1797-1859)"command theory." His model was that of a definition and his goal was to give a definition of law that removed all evaluative language. We see some continuity with Aquinas' natural law. While he rejected the blurring of law and morality, he did give a similar "unified" definition of law: "A rule laid down for the guidance of an intelligent being by an intelligent being having power over him." God and men both make laws so his distinction is between the laws of God (reason) and those of historical human societies made by political "superiors." He insisted on distinguishing the theory of (concept of) law from the "science of

legislation" which had to do with the criticism (evaluation) of the law (c.f. Dworkin's theory of legislative justice).

Austin is a prime example of a positivist in legal theory, but his was only one version which we call "command theory:" Law, Austin reasons, has the status of command. Austin then defines 'command" as any signification of a desire by the sovereign. He then defines the sovereign as "the determinate rational being or body that the other rational beings are in the habit of obeying." Each of these further definitions is an attempt to substitute a descriptive analysis of some prescriptive concept. The notion of a 'command', for example, includes a normative element of authority and imperative (as distinct from a presumptive request). Similarly 'sovereign' has a normative element of legitimacy. He tries to define these both away through the notion of shared habits. One of Austin's motives was to block moralistic theories of legitimacy such as those the USA used for forty years in refusing to recognize China. If a government is in stable effective control of a territory, then its writ just is the law of that land.

Some of the most devastating criticisms of Austin's Command theory comes from other "positivists." One is H. L. A. Hart, whom we will read frequently in this class. He raised the problem alluded to above of the mob of gangsters on an island. Their demands on the local population seem to meet Austin's definition but we would call their's the opposite of a rule of law[31]

[31] http://ivr-enc.info/index.php?title=Positive_Law_and_Natural_Law

CHAPTER V

RIVALS OF LEGAL POSITIVISM

There are two principal rivals to legal positivism. The first is the classical natural law view of St. Thomas Aquinas and William Blackstone. On this view (as traditionally interpreted), it is part of law's very nature that it is just; it is therefore a conceptual truth that no norm inconsistent with the natural moral law can count as a law (in any legal system).[32]

As Blackstone put the point: This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, immediately or immediately, from this original. The classical natural law view denies all three positivist theses. The claim that the criteria of legality in every conceptually possible legal system include consistency with the natural moral law is, as is readily evident, simply the negation of the Separability Thesis. This claim implies that the content of the law is not fully determined by social facts since it also depends on morality. It also implies that the content of the criteria of legality is not fully determined by the conventional practices of officials since conformity to the moral law is a legality criterion regardless of what officials say or do.

[32] http://www.academia.edu/467975/Inclusive_Legal_Positivism_Legal_Interpretation_and_Value-Judgments

The second rival to positivism is Ronald Dworkin's third theory of law. According to Dworkin's theory, the law of a community includes not only the statutes and decisions promulgated through the conventionally-grounded practices of a legal system, but also those moral principles that provide a justification for the coercive enforcement of those statutes and judicial decisions. As Dworkin puts it in Law's Empire, "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice". Judges, on Dworkin's view, ought to decide hard cases by reference to those principles that show existing legal practice in its best moral light.[33]

LEGAL POSITIVISM AND NATURAL LAW THEORY

There are two "natural law" theories about two different things:

i) a natural law theory of morality, or what's right and wrong, and

ii) a natural law theory of positive law, or what's legal and illegal.

The two theories are independent of each other: it's perfectly consistent to accept one but reject the other.

Legal positivism claims that ii) is false. Legal positivism and the natural law theory of positive law are rival views about what is law and what is its relation to justice/morality.

Natural Law Theory of Morality

i) Even things which are not man-made (e.g. plants, rocks, planets, and people)

[33] http://heinonline.org/HOL/LandingPage?handle=hein.journals/trinclr8&div=13&id=&page=

have purposes or functions, and the "good" for any thing is the realization of its purpose or function.

ii) The good for us human beings is happiness, the living of a flourishing life. Happiness or flourishing consists in the fulfillment of our distinctive nature, what we "by nature" do best. That involves the development and exercise of our capacities for rationality, abstract knowledge, deliberative choice, imagination, friendship, social cooperation based on a sense of justice, etc. The moral virtues (e.g. courage, justice, benevolence, temperance) are character traits that help us fulfill our true nature. The life of the heroin addict or of the carnal hedonist is not a good one, because it is inconsistent with our natural function.

iii) Natural law is the set of truths about morality and justice; they are rules that we must follow in order to lead a good or flourishing life. We can know what these principles are by means of unaided human reason. [The natural law theory of morality rejects ethical subjectivism ("right and wrong are all a matter of opinion") and affirms ethical objectivism ("some moral opinions are more valid, reasonable, or likely to be true than others")].[34]

Immoral acts violate natural law. Hence, immoral behavior is "unnatural" (in the sense of"contrary to our function," not "nowhere to be found in the natural

[34] http://ivr-enc.info/index.php?title=Natural_Law

world"), whereas virtuous behavior is "natural." For example, lying is unnatural, Aquinas holds, because the function of speech is to communicate to others what is in our minds. When we use words to mislead others, we are using them contrary to their proper function.

Natural Law Theory of Law

Whether a certain rule is a law, creating legal obligations to comply with it, all depends on its source. Valid laws are simply rules that come from certain people (kings, city councils, etc.), in accordance with certain procedures, that the society enforces. A rulecan be a genuine, valid law even though it is grossly unjust. According to H.L.A. Hart, a contemporary legal positivist, the essence of legal positivism is the "**separation thesis.**"

Separation thesis:[35] having a legal right to do x doesn't entail having a moral right to do it, and vice versa; having a legal obligation to do something doesn't entail having a moral right to do it, and vice versa; having a legal justification to do something doesn't entail having a moral justification, and vice versa; etc.
In order to know what your legal rights are, you need to look at what laws your society has. In order to know what your moral rights are, you need to figure out what is the true morality. You might have legal rights that the true morality says you shouldn't have (e.g. the right to own slaves), and your society might deny you legal rights that the true morality says you should have (e.g. the right to be free, to own one's own body and labor power).

[35] https://www.google.co.in/?gws_rd=cr&ei=GEqOUoymJYmGrQevk4G4Ag#q=separation+thesis

-- Some of the most influential defenders of legal positivism are the 19th century philosophers John Austin and Jeremy Bentham, and the 20th century legal philosopher

NATURAL LAW VERSUS POSITIVE LAW

If the natural law is discovered by reason from "the basic inclinations of human nature .. absolute, immutable, and of universal validity for all times and places," it follows that the natural law provides an objective set of ethical norms by which to gauge human actions at any time or place. The natural law is, in essence, a profoundly "radical" ethic, for it holds the existing status quo, which might grossly violate natural law, up to the unsparing and unyielding light of reason. In the realm of politics or State action, the natural law presents man with a set of norms which may well be radically critical of existing positive law imposed by the State. At this point, we need only stress that the very existence of a natural law discoverable by reason is a potentially powerful threat to the status quo and a standing reproach to the reign of blindly traditional custom or the arbitrary will of the State apparatus..

While natural-law theory has often been used erroneously in defense of the political status quo, its radical and "revolutionary" implications were brilliantly understood by the great Catholic libertarian historian Lord Acton. Acton saw clearly that the deep flaw in the ancient Greek—and their later followers'—conception of natural law political philosophy was to identify politics and morals, and then to place the supreme social moral agent in the State. From Plato and Aristotle, the State's proclaimed supremacy was founded in their view that "morality was distinguished from religion and politics from

morals; and in religion, morality, and politics there was only one legislator and one authority."[36]

The past was allowed no authority except as it happened to conform to morality. To take seriously this Liberal theory of history, to give precedence to "what ought to be" over "what is" was, he admitted, virtually to install a "revolution in permanence."

And so, for Acton, the individual, armed with natural law moral principles, is then in a firm position from which to criticize existing regimes and institutions, to hold them up to the strong and harsh light of reason. Even the far less politically oriented John Wild has trenchantly described the inherently radical nature of natural-law theory:

The philosophy of natural law defends the rational dignity of the human individual and his right and duty to criticize by word and deed any existent institution or social structure in terms of those universal moral principles which can be apprehended by the individual intellect alone.

If the very idea of natural law is essentially "radical" and deeply critical of existing political institutions, then how has natural law become generally classified as "conservative"? Professor Parthemos considers natural law to be "conservative" because its principles are universal, fixed, and immutable, and hence are "absolute" principles of justice. Very true—but how does fixity of principle imply "conservatism"? On the contrary, the fact that natural-law theorists derive from the very nature of man a fixed structure of law independent of time and place, or of habit or authority or group norms, makes that law a mighty force for radical change. The only exception would be the surely

[36] http://web.nmsu.edu/~dscoccia/376web/376lpaust.pdf

rare case where the positive law happens to coincide in every aspect with the natural law as discerned by human reason.

conclusion

In this chapter I argued that there is no "challenge of methodological positivism" because, given that it is part of the nature of law to create norms of conduct that provide reasons for action simply by being laws, the nature of law cannot be explained without appeal to first-order moral reasoning. As I showed above, the two arguments I presented for that conclusion, ASE and ANL, also provide direct support for weak natural law. The arguments support weak natural law because the perspective of the person who views law qua law as providing practically rational reasons for action, and is practically rational in that judgment, ultimately creates the "central case" of law that distinguishes weak natural law from other theories in the natural law tradition.

In conclusion, because weak natural law accepts that moral argument is necessary to explain law's normativity and, as I demonstrated in Chapter 4, also provides a descriptively accurate account of legal validity, weak natural law is a general theory of law that is more explanatorily fruitful and at least as descriptively accurate as the legal positivist theories considered in this dissertation. As I demonstrated throughout this dissertation, the objections from the legal positivist tradition to natural law theories simply do not provide objections to weak natural law, and, for all of reasons discussed above, there is no "challenge of legal positivism."

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