CHAPTER - 2

Rejection of the idea of Naturalism and Rise of Positivism

2.1 Meaning of Natural Law

The Natural law is based on moral values and ethics values. Natural law theory maintains that the law should be based on the morality and ethics values. Natural law also known by different name of Law of Nature, Universal Law, Law of God, Divine Law, External Law, Unwritten Law and Moral Law so on and it is dominating the whole structure of law, political and social philosophy of present period. Natural law theory prevails commonly over the whole world in the same way and any positive law (man made law) which is opposing to natural law theory is of no legitimacy. Therefore natural law is not body of definite enacted rules and interpreted laws which is enforced by courts but it is discovered by human through the use of rights reasons. Today, natural law theory has made its existence in all legal systems in the kind of socio-economic justice.

In the ancient times, natural law was known as those unwritten principles and rules of law which are superior to any other law in respect which all other laws should be made. These principles were considered as everlasting and unchangeable. In medieval age, natural law was given a religious touch, having a divine origin. In modern classical era, it occupied non-religious character.

The term natural law has been interpreted differently at different times depending on the prevailing legal opinion:

According to Cohen, “Natural law is not a body of actual enacted or interpreted law enforced by the courts; it is in fact a way of looking at things and a humanistic approach of jurists and judges.”¹

According to Blackstone, “Natural law being co-existent with mankind and emanating from God himself is superior to all other laws. It is binding over all the

countries at all the times and no men made law would be valid if it is contrary to the law of nature.”

**According to Diaz,** “Natural theory of Law deals with norms which are higher and which are involved in search of absolute justice. It is touchstone of all activities and the ruled as well as the ruler is bound with it”. It can be divided into two parts:-

First Part:

1. Natural law is the higher law. If the law is contrary to natural law, it becomes invalid. Law in ancient and medieval period was prevalent in this sense.

2. Natural law is an ideal law and natural law has framed its principle without affecting the constitutional law.

3. Natural law is the dictate of the reasons.

4. According to Diaz, natural law has been used in 5 ways: -
   
   I. Natural law as an ideal which directs the development of the law.
   
   II. it contains rules of morality, which does not allow permanent separation between law as it (in present) and law as it ought to be (in future)
   
   III. It is a way to search absolute law.
   
   IV. Natural law is derived from reason.
   
   V. Natural law is necessary for the legitimacy and existence of any law.
   
   VI. Hence natural law is basically deals with the dictates of the reasons and rationality.

From above definitions it is clear that Natural law means those principles which are emanated from some highest sources other than the political sovereign. The exponents Socrates, Plato, Hobbes of natural law claim that there is system of right or justice

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4 Ibid
common to mankind which is independent of positive law. It has been an appeal to complete Justice, authority and rules superior than positive law.

The word ‘natural’ can be used to signify that some of those criteria or standards of norms which are existence prior to any human choices. On this conception, these prior standards are not the product of either individual or collective choosing or positing so it can not be repealed. However they may be violated, defied or ignored.\(^5\)

In primitive society, law was found mingled with religion and morality. Law made by God is ideal. The central notion of this theory is that\(^6\):

1. They depend on the essential nature of the universe.
2. Those principles can be discovered by the natural reason.
3. They are necessarily valid because they are logically connected.
4. Ordinary human law is truly law only to the extent it conforms to those principles of natural law.
5. Man made law contrary to natural law, is no law at all.

Therefore, the principles of natural law can be ascertained by reason and common sense. Those principles of natural law are as follow\(^7\):

1. There is a structural reality embedded in very nature of things which man has the capacity to discover by his reason.
2. Each being has natural purpose or end or goal.
3. There is an order of inclinations in each being which ‘pushes’ it towards its end.
4. Goodness is the fulfillment and completion of this end.
5. Man can thus know not only what he is but he can also know what he is to do.


\(^6\) Dr. Veena Madhav Tonapi, Text Book on Jurisprudence, 16-17(Universal Law Publishing Company, New Delhi, 2010).

6. This knowledge is general and man can understand that there are certain fundamental principles of justice and morality, which govern all human conduct.

It is possible to draw the following principles from various theories of natural law:

I. There are absolute moral values and ideals because emerging from those moral values; natural law can be used as touchstones in a test of the validity of other laws (positive law).

II. There exists in nature an order which is rational and which can be discovered by man, so that the norms of human conduct may be considered as a ‘law of nature’.

III. Nature, if observed and understood correctly, will provide criteria allowing us to become aware of universal, eternal and comprehensible values from which we may derive appropriate value-statements.

IV. That which is good is in accordance with nature; that which is evil is contrary to nature.

V. A law which lacks moral validity is wrong and unjust. Natural law invalidates certain manifestations of the positive law and provides an ideal towards which the positive law should strive.\(^8\)

However, Natural law thinking has occupied a pervasive role in the field of ethics, politics and law from the time immemorial. As observed by many jurists it is essentially an assertion of faith in a standard of values. In the words of J. Stone, “natural law is an assertion of faith rather than a demonstration. Its dialectical weapons are right reason; nature with appendage rational nature, state of nature conformity with nature, sociability and the like, the concensus of all mankind, or of some essential part of mankind, the divine will.” However, at some periods natural law’s appeal was essentially religious or supernatural but in the modern times, it has formed an important weapon in political and legal ideology. Jurists of different ages assigned different meaning to this term natural law. For Stoics, it is divine law(jus divindum)- the command of God imposed upon men. For Cicero, natural law is the law of reason, as being established by that reason by which the world is governed and

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also as being addressed to and perceived by the rational nature of men. For Aristotle and Thomasius it is also the unwritten law (Jus Non Scriptum) in one sense of the expression as being written not on brazen tablets or on pillars of stone, but solely by the finger of nature in the hearts of men. It is also the universal or common law (jus commune, jest gestium) as being of universal validity, the same in all places and binding on all the peoples and not one thing at one place and another at another place, as are the civil law of the states. Whereas the jurists of modern times natural law consists mainly of the principles of morality. ⁹

According to Divine Law, the system of the principles is revealed or inspired by the God or some other supreme and supernatural power. ¹⁰

In reality, law consists of rules in accordance with reason and nature has formed the basis of a variety of natural law theories ranging from classical times to the present day. The central notion is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason and that ordinary human law is only truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid of necessity, because the rules for human conduct are logically connected with truth concerning human nature. This connection enables to ascertain the principles of natural law by reason and common sense, and in this the natural law differs from rules of ordinary human law (positive law) which can be found only by reference to legal sources such as Constitutions, codes, statutes and so on. But since law can only be true law if it is obligatory, and since law contrary to the principles of natural law cannot be obligatory, a human law at variance with natural law is not really law at all, but merely an abuse of violation of law. ¹¹

Natural law theory seeks to explain as a phenomenon which is based upon and which ought to approximate to some higher law contained in certain principles of morality. These philosophers regard the universe and human society as being under the governance of some Deity, who has laid down constant principles, which must eternally control all creation. These principles constitute higher law which is

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¹⁰ Dr. Avtar Singh and Dr. Harpreet Singh, *Introduction to Jurisprudence*, 63 (LexisNexis, ed. 4th, 2015).
universal, that is, common to all societies, immutable, i.e. it cannot be changed through human agency. All human arrangements, including law must conform as far as possible, to these principles. These natural laws are based on value judgements because those judgments emanates from some absolute source and are in accordance with nature and reason.\(^\text{12}\)

Natural law or natural justice is known by several names as like ‘fundamental justice’, ‘substantial justice’, ‘fair play action, ‘universal justice’, ‘moral justice’, ‘divine justice’ etc. Prof. Dias opines that natural law theory has a long history before Christ (B.C.). Heraclitus of Greece laid the basis of natural law. Greek philosophers Socrates, Plato and Aristotle purporting that the law existed for the purpose of facilitating the pursuit of the good life, by members of the community. Decline of natural law theory started since 18\(^\text{th}\) century. The development of science and technology made the man in a unique position. Gradually, positive law occupied the position of natural law.\(^\text{13}\)

Natural law in the strict sense and as an explicit theory emerged, with the Stoics. But the evolution of the concept can be traced with fairly definite outlines through Socrates, Plato & Aristotle, with some reverberations in Greek literature.\(^\text{14}\) The most influential writers within the traditional approach to Natural Law is undoubtedly St. Thomas Aquinas (1224-1274). According to Aquinas, positive law is derived from natural law. Natural law dictates what the positive law should be. For example natural law requires that there should be prohibition of murder. The phrase “lex iniusta non est lex” i.e. an unjust law is not law is often ascribe to Aquinas.\(^\text{15}\)

Natural law proponents consistently make four claims in regard to Natural law\(^\text{16}\)-


\(^\text{13}\) Dr. N.Krishna Kumar, *Jurisprudence & Comparative Law*, 16-17 (Central Law Publications, Allahabad ed. 1, 2007).


1. There are unchanging principles of law that exist in ‘nature’.

2. These principles of law are accessible to all men at all times and are discovered by the right reasons.

3. These principles of law apply to all men at all times and in all circumstances.

4. Man made laws, (example those promulgated by state) are just and authoritative insofar as they are derivable from the principles of law of nature.

5. The natural law theory is based on the belief that certain principles of law are inherent in the very nature of things and that man can discern these by means of reason.

Natural law theory like legal positivism has appeared in a variety of forms and in many guises. One of the most elaborate statements of natural law theory can be found in Aquinas who distinguished four types of law: eternal, divine, natural, and man-made. So, according to Aquinas, eternal law reflected God's grand design for the whole shebang. Divine law was that set of principles revealed by Scripture, and natural law was eternal law as it applied to human conduct. Man made law was constructed by human beings to fit and accommodate the requirements of natural law to the needs and contexts of different and changing societies.17

Divine theory was one of the earliest theories of the origin of state. By this theory the state is the creation of God, just as God has created human beings on earth, so he has also created the state. This theory was very popular in ancient time. The Greeks attributed a divine origin to the state. It was a Greeks, an association of the sages who gave the law. The divine theory more and more took the form of the divine rights of the king.18

Natural law which may be said to have occupied a pervasive role in the realms of ethics, politics, and law, is the oldest part of law and belongs to the remotest past. No other philosophy moulded and shaped American thinking and American institution to such as extent as did the philosophy of natural law in the form given to it in the 17th

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17 “Theories of Law Natural Law, Legal Positivism, The Morality of Law Dworkin's "Third Theory of Law" Legal Realism and Critical Legal Studies,” Available at: http://www.jus.unitn.it/users/patterson/course/topics/materiale/analyticjurissupplemental (visited on April 20, 2016)
and 18th centuries. Dominating all the principles of natural law is a notion that law is an essential foundation for life of man in the society and that is based on the needs of man as a reasonable being and not on the arbitrary whim of ruler. There are however, many theories of natural law. They have more often been classified into authoritarian and individualistic, into progressive and conservative, into religious and rationalistic, into absolute and relativist theories.19

The natural law tradition represents one of the perennial, as well as most respected, positions on legal reasoning and law in the Western world. It is a tradition that goes back to ancient Greece and Rome, particularly to Aristotle and the Stoics, but historically finds its most influential formulation in Thomas Aquinas.20

Jurisprudence gives ample scope for creative and innovative thinking. Because of that thinking which were based on the writer’s attitude imagination as well as their logical skill. There are five schools of law i.e. Historical School, Analytical School (Legal Positivism), Sociological School, Natural Law School, and Realist School. Researcher would discuss two main theories which are as follows -

1. **Natural Law Theory**: - Natural law is a law which is not a body of actual enacted or interpreted law which is enforced by courts. It is a humanistic way of looking at things. It embodies within itself the high ideals like justice, morality, reason, good conduct, freedom, equality, and liberty etc. it is law which is inherent in the very nature of man as a rational being and does no depend on anything for its validity. It derives its validity from its inherent values21. The term natural law has been interpreted differently at different times depending on the prevailing legal thought. In the ancient times, ‘natural law’ was known as those unwritten principles of law which are higher than in obedience. All other laws should be made according to natural law principles were treated as eternal and unalterable. In medieval age, natural law was given religious touch, having divine origin. In modern classical era, it once again occupied non-religious character. In the present era, natural law is value

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21 It concerned with moral values of human beings.
loaded. It is not absolute but relativistic concept. It is no long permanent in nature but changing and varying. The following are the jurists who contributed in the natural law theory:

I. Heraclitus  
II. Socrates  
III. Aristotle  
IV. Cicero  
V. Grotius  
VI. Hobbes  
VII. Locke  
VIII. Rousseau

2. Legal Positivism: The word "positivism" itself derives from the Latin root “positus”, which means to posit, postulate, or firmly affix the existence of something. Legal positivism attempts to define law by firmly affixing its meaning to written decisions made by governmental bodies that are endowed with the legal power to regulate particular areas of society and human conduct. According to legal positivists that If a principle, rule, regulation, decision, judgment, or other law is recognized by a duly authorized governmental body or official, then it will qualify as law. Conversely, if a behavioral norm is enunciated by anyone or anything other than a duly authorized governmental body or official, the norm will not qualify as law in the minds of legal positivists, no matter how many people are in the habit of following the norm or how many people take action to legitimize it. Therefore legal positivism means command of sovereign backed by sanction. Legal positivists share the common aim of helping people understand the law as it actually is. The following are the jurists who contributed in the Legal Positivism theory:

I. Bentham  
II. Austin  
III. Kelsen  
IV. H.L.A. Hart.

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The ancient Jurists may have regarded the law as received from divine sources and based on reasons but in the modern world, where the most laws have a known man made laws.

2.2 Historical Background of Natural Law

Natural Law school is very old school in legal history and theory. It denotes belief in a system of right or justice common to all men prescribed by the supreme controlling force in the universe. It is distinct from the positive law laid down by any particular state or organization. Starting point of natural law theory are ‘reason’ and ‘the nature of man.’

According to Friedmann, “the history of the natural law is tale of the search of mankind for the absolute justice and its failure. Thus, with the respect to political and social changes in the society, the forms and notions of natural law keep changing. It has contributed a lot to the legal system. The main contribution of the natural law theory is its ideology of a universal order of governing all men and inalienable rights of the individuals.”

The history of natural law can be traced back to 2500 years in an attempt to find out something higher and nobler than positive law. For the juristic consideration, the most important difference would appear to be that between natural law and positive law:

1. Natural law as a higher law and positive law is valid only to the extent which harmonious with natural law.
2. Natural law was known as unwritten law in obedience of which all other laws should be made.
3. Originally, nature was something considered external to man. But later under the Stoic philosophy nature indicates the inner reason of man as well. Man’s reason as part of nature.

24 B.M. Gandhi, V.D. Kulshreshtha’s Landmarks in Indian and Constitutional History, 386 (Eastern Book Company, Lucknow, ed. 8th, 2005).
27 Enacted Law (positive law)
A discussion on natural law theory shall be presented in the historical order to give an idea of the various ideologies that it tried to establish from time to time and its effect on law. Natural law theories may be broadly divided into four classes:

1) Ancient period
2) Medieval period
3) Period of renaissance
4) Modern period

2.2.1 Ancient Period of Natural Law.

The concept of natural law theory was developed by Greek philosophers around 4th century BC and laid down the essential features.

The Greeks philosopher—Socrates, Plato and Aristotle emphasized the distinction by nature and law, customs or convention. That what the law commanded varied from place to place, but what was ‘by nature’ should be the same everywhere. Aristotle’s considered by many of jurists to be the father of natural law.28

Thus, like other sciences of law have its roots in Greek philosophy. The Greek term ‘Nomos’ used for ‘Law’ was used like other word ‘Dharma’ in Hindu jurisprudence which meant many a thing, namely, tradition, custom, usage, religion, ethics, morality, nature and law as means of social control. Therefore the ‘Law’ i.e. ‘Nomos’ was regarded by the Greek as an instrument of social control independent of human will and of universal application.

Divine theory was one of the earliest theories of the origin of state. By this theory the state is the creation of God. just as God has created human beings on earth, so he has also created the state. This theory was very popular in ancient time. The Greeks attributed a divine origin to the state. It was a Greeks, an association of the sages who gave the law. The divine theory more and more took the form of the divine rights of the king.29

28 Ibid
29 Supra note 18 at 53.
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 are binding on all people. According to Aristotle 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 recognised among all. A sect of Greek thinkers called Stoics popularized maxim- ‘Live according to nature.’ The among those doctrines is that of jus naturale’.  

Heraclitus, Aristotle, Socrates, Plato are important jurists who propounded theories grouped as ancient theories of natural law. They emphasized the distinction between nature and law. Aristotle is considered to be the father of natural law. According to him, man is part of Nature, and he possess active reason by which he can shape his will. By this reason, man can discover the eternal reasons behind justice. Natural justice is that which everywhere has the same force and does not exist by the way people think.

2.2.1.1 Heraclitus (530-470 B.C.)

The concept of natural law was developed by the Greek philosopher around 4th century B.C. Heraclitus was the first Greek philosopher who pointed at the three main characteristic features of law of the nature, (1) destiny, (2) order, (3) reason. He stated that nature is not a scattered heap of things but there is a definite relation between thee things and definite order and rhythm of events. According to him, ‘reason’ is one of the essential element of law. The unsteadiness and repeated changes in the early small states of Greece made legal philosophers to reflect that law was meant to serve the interest of those who were in supremacy and the people are continually struggling for better life. This unstable political circumstance gave birth to design of natural law.

31 Supra note 10 at 63.
32 Dr. N.V.Pranjape, Studies in Jurisprudence and Legal Theory, 141 (Central Law Agency, Allahabad, ed. 7th, 2013)
2.2.1.2 Socrates (470-399B.C.)

Another philosopher occupies a prominent place. Socrates said that like natural physical law there is natural law. Man possesses ‘insight’ and this ‘insight’ reveals to him the goodness and badness of things and makes him know the absolute and eternal moral rules. The human ‘insight’ is basis to judge the law. Socrates did not say that if the positive law is not in conformity with moral law it would be disobeyed. His pupil Plato supported same theory. But it is in Aristotle that we find a proper and logical elaboration of the theory.\(^{33}\)

2.2.1.3 Plato:-

Socrates disciple Plato carried further the natural law theory further through his concept of ideal state which he termed as republic. He contented that only intelligent and worthy person should be king. He argued that justice lies in ordinating means life through reason and wisdom and motivating him to control his passion and desires. In his republic Plato emphasize the need for perfect division of labour and held that each men oath to do his work which he is called upon by his capacities. According to Plato law of states are pale shadows of an absolute idea of an perfect laws against which man made law may be measured.\(^{34}\)

2.2.1.4 Aristotle:-

Aristotle is said tobe the father of natural law theory. According to him, justice refer to two related ideas i.e. particular justice and other is general justice. Particular justice is part of general justice which is concerned with treating others equitably. General justice, when a person’s action are completely virtuous in all matters relating to others. the natural law is classically contrasted with positive law of political community, society or state and thus serve as a standard to criticize the said positive law.\(^{35}\)


\(^{35}\) Supra Note 25 at 110-111.
Aristotle made considerable contributions to Greek legal philosophy. He conceived man to have a dual character as a part of nature and as master of nature; he conceived natural law as inherent in human reason; he stressed the need to supplement law with equity; he declared law to bind not only the people, but the government as well; and he classified justice into equal and distributive justice and remedial justice. Distributive justice provided for equal treatment of those who are equal before law. Remedial justice which concerned with administration of law of punishing crimes and repairing wrongs has to be administered without regard to the person of the wrong doer.\textsuperscript{36}

2.2.2 Roman Period: the concept of natural law was first developed by Greek philosophers but developed to its fullest in Rome\textsuperscript{37}. The Romans inherited the legacy of Greek philosophy of law which in the hands of practical Romans jurists became a science of law- known as Roman system of Law- to serve needs of Roman Empire. According to Roman Jurists every man must live according to his nature- as a part of Cosmos or universal order. Later on, the concept was developed by the Roman jurist Gaius, who divided all laws in three categories: \textsuperscript{38}

1. Jus Natural- natural law
2. Jus Genetium- identical to international law

The trichotomy of jus naturale, jus civile and jus gentium and their scientific reconciliation for serving social needs was the greatest contribution made by Roman jurists to Roman jurisprudence.

Thus the classical jurist Gaius, for instance declares in his institutes: “All nations who are ruled by law and customs make use partly of that which is common to all men. For whatever law any people has established for itself is peculiar to that state and is called jus civile, as being peculiar law of that state. But whatever natural reason has established among all the men is equally observed by all mankind, and is called jus

\textsuperscript{36} Dr. N. Krishna Kumar, Jurisprudence and Comparative Law 4(Central Law Publications, Allahabad, 1 ed.2007).
\textsuperscript{37} Supra note30 at 67.
\textsuperscript{38} Supra note 22 at 72.
gentium, because it is the law which all nation employ.” Thus the jus civile reffered to by Gaius was a law that was applicable to Roman citizen only.\textsuperscript{39}

Thus the chief feature of natural law in ancient age is that it is based on the precise reasons, universal in its application and rigid and eternal in its nature.

Reasons, as a universal force pervading the whole cosmos, was considered by the Stoics as the basis of law and justice. Divine reasons, they held, dwells in all men everywhere, irrespective of nationality or race. There is one common law of nature, based on reason, which is valid universally throughout the cosmos. Its postulates are binding upon all men in every part of the world. Their ultimate ideal was a world-state in which all men would live together harmoniously under the guidance of divine reason.\textsuperscript{40}

2.2.2.1. Cicero’s Doctrine of Natural Law (106-43 B.C.)

The doctrine of natural law was pursued in ancient Rome. It came from the discovery that men of all races and countries living under Roman rule seemed to have some common rules of life, some objective standards of right and wrong given to them by mere fact of their being men with human nature. This body of principles common to all men the Romans called ‘natural law’ and they based on it a considerable part of their legislation. Cicero occupies a pre-eminent place in the history of the Roman political thought and jurisprudence. His true importance “lies in the fact fact that he gave to the Stoic doctrine of natural law a statement in which it was universally known through out the western Europe from his own day down to the nineteenth century.” Natural law for Cicero is a universal law of nature arising equally from the fact of God’s providential government of the world and from the rational and social nature beings which makes them akin to God. Natural law for him, same everywhere and is unchangeable. It is binding on all men and all nations. No legislation that contradicts it is entitled to the name of law, for no ruler and no people cam make it right wrong.\textsuperscript{41}

\textsuperscript{40} Ibid, 13.
\textsuperscript{41} Supra note 7 at 28.
Thus, this idea of a natural law obtained great influence throughout the period when the Roman Empire spread and the whole of civilized humanity was thought to form one universal community, in which all men were equal by virtue of their common rational nature. The stoic philosophers and the Roman lawyers elaborated this idea and Cicero gave it a famous definition. He speaks of true law as being right reason in agreement with nature, of universal application and unchanging; that there is no need for us to look outside ourselves for an interpreter of it, though God is the author of this law and the judge who enforces it. That Christianity, filling the vacuum caused by the breakdown of the Roman empire, adopted the belief in a law of nature can be seen from the fact that the idea of natural law appears as a basic conception both in the law-books of the Christian emperor Justinian and in Canon law. Throughout the Middle Ages the ultimate appeal regarding morals, politics, law and also divinity was to natural law, and by natural law the schoolmen meant a law promulgated by God in a natural way and known by reason, i.e. a law other than God's positive law which is known by revelation.\(^42\)

The Roman Orator, Cicero (106-43 BC), contended that positive law ought to be assessed against the ‘true law’ which can be accessed through ‘right reason’ as this law is in ‘agreement with nature’ and the eternal law of God. He believed that single universal law governs the whole universe. Cicero believed that moral principles are as applicable to political matter as they are in private matters and that true law is right reason, comfortable to natural, universal and eternal. But it was not until St. Thomas Aquinas (1224-74) that natural law theory took on its most solid form.\(^43\)

2.2.2. Medieval Period of Natural Law:

Law and religion remained largely undifferentiated in the medieval period. The forms of law making and adjudication were permeated with religious ceremonials, and the priests played an important role in the administration of justice. The king as the supreme judge, was believed to have been invested with his office and authority by


Zeus himself. Thus law came to be regarded not as an changing command of divine being, but as a purely human invention, born of expediency and alterable at will.\textsuperscript{44}

The period from 12\textsuperscript{th} century mid-fourteenth century is generally reckoned as the ‘medieval age’ in the European history. In the middle ages, Christian religion influenced the idea of natural law. This period was dominated by the ecclesiastical doctrines which the Christian Father propagated for establishing the superiority of Church over the State. A theory of universal law described that law of God was propounded for establishing and guiding legal relationships between individuals. The natural law of Roman variety acquired theological character during medieval period. Since the law acquired divine character it became absolutely binding over all peoples and laws- whether customs or constitutions or any other human laws. According to Christian father, positive law should not conflict with natural law, if conflicts, it is not law and does not bind the conscience of the subject, thus law is reason according to them and not mere arbitrary whim of the ruler.

Throughout the middle ages, the theology of the Catholic Church set the tone and pattern of all speculative thought. As Gierke has pointed out, two vital principles animated medieval thought: unity, derived from the God, and involving one faith, one Church, and one empire, and the supremacy of law, not merely man-made, but conceived as part of the universe.\textsuperscript{45}

The Christians were taught to despise all worldly things on the earth and to expect to destruction of the world and ultimate right to God’s kingdom. All human constitutions as property, law and slavery were product of the sin as a result of the fall of the man. They are all imperfect as compared to these in the city of God. Despite this, human law is to be obeyed till this world lasts and justice is very much needed in this human world. The justice is part of the divine law to govern us till sinful existence on this earth endures. Natural law now came to be accepted the part of the divine law by God and was to be expounded by the head of the catholic church, the Pope. St. Augustine was the notable exponent of Christian approach to law.\textsuperscript{46}

\textsuperscript{44} Supra note 39, pp. 4& 5.
2.2.2.1 St. Augustine (354-430)

One of the early Fathers of the Church, taught that the absolute ideal of laws of nature had been evident in the ‘golden age’ of mankind, which had preceded the fall of man. That age had seen man in a state of innocence and justice; he had lived under the guidance of the rules of reason. After his fall, the ‘absolute law of nature’ could no longer be realized. As result, human law, together with property and institutions had appeared. Positive (man-made) law must strive so as to assist man in fulfilling the command of God’s eternal law: law of this type does not necessarily make men good.

In its role of guardian of *lex aeterna* (God’s eternal law), the church must exercise total sovereignty over the State. If worldly law conflicts with the eternal, natural law, the provisions of that worldly law should be ignored; worldly law which was unjust could not be ‘law’. 47

‘Justice’ has central place in Augustine’s philosophy. ‘A state is a band if robbers at large without justice’ is what he opined. Lex Injusta Non Est Lex (unjust law is not law) is the most problematic pronouncement by Augustine. He placed God’s reason besides God’s will at the highest source of the unchangeable, eternal, divine law binding directly on men and all others creatures. At a second level, Augustine (Professor of Philosophy) placed no less unchangeable natural law, being the divine law as man is given the reason, heart, and soul to understand it. The third level, of temporal, or positive law was warranted by the eternal divine law, even though it changed from time to time and from place to place, so long as it respected the limits laid down by the divine and natural law. Augustine kept justice in mind and not existence of human law. 48

2.2.2.2 Scholastic St. Thomas Aquinas (1226-1274)

Thomas Aquinas supported the natural law. The basis of scholastic thought is that natural law is derived from the Law of God. Law is defined as an ordinance of reason for the common good made by him who has the care of the community and promulgated. Since the world is ruled by the divine providence, universe is governed by divine reason. Divine law is supreme law and is revealed through man. Natural law is part of divine law, that part which reveals itself in natural reason. Man, as a

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47 Supra note 8 at 38.
48 Supra note 46 at 178
reasonable being, applies part of divine law to human affairs and is able to distinguish between good and evil. All human law is derived from eternal law as revealed in natural law. According to Thomas Aquinas state is natural institution born out of elementary social needs of men, to enable them to feel secure and serve general food. State laws must not be tyrannical. Thomas Aquinas’ theory of property stands between unqualified rejection of private property propounded by the father of church and elevation of the right to property into natural right by Locke. He draws a distinction between the acquisition and use of property. The use of things by the man must not be for his own benefit but for the common goods. He justifies the difference between rich and poor. He considers the right to the acquisition of the property as one of the matters left by natural law to the state as a proper agency for regulation of social life. St. Thomas Aquinas wrote: "Law is nothing else than a rational ordering of things which concern the common good." Or, as Cicero put it: "True law is right reason in agreement with Nature."49

Thomas Aquinas gave a fourfold classification of laws, namely50:

a. **Lex Aeterna (Law of God or External Law)** - it means divine reason- known only to God. God’s plan for the universe. It governs celestial and territorial spheres, animal and inanimate kingdoms and heavenly bodies such as stars, moon, sun etc.

b. **Lex Naturalis (Natural Law)** - which is discoverable by reasons.

c. **Lex Divina (Divine Law or Law of Scriptures)** consists of directs revelation of divine purpose through Vedas to Hindus, Quran to Muslims or through the saints. through the Bible to Christians.

d. **Lex Humana (Human Law)** which we now called positive law. Thomas Aquinas opined that positive law should be accepted only to the extent to which it is compatible with natural law or external law.

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Thus, Naturalism has in the past awakened many moods and will continue so to do in the future. There is the mood of defiance, the mood of despair, the mood of mystic exaltation, and, lastly, the mood of sober acknowledgment. Naturalism is itself a quality or outlook which has emerged during man’s history and is thus an instance of that novelty which evolution brings and which thought must recognize. The classic religions of Greece and Rome had been state and social religions, more concerned with the preservation of society than with the fate of the individual. Personal and family rites there were which aimed at the peace and well-being of the shade of the departed. But the future life had in it little to fascinate and intrigue the living. Suffice it to point out that this vitalizing contact of the individual soul with divinity was won by eating the flesh of the incarnate God or partaking of food which had magical affinity with the God. There can be no doubt that the Christian sacrament had its roots in these ideas, just as the use of oils and unguents in the ritual of the church rested on widespread beliefs in the magical efficacy of such substances which had long been used in the thermae and temples. Perhaps the use of ointments to preserve the body in embalming aided in the rise of these beliefs. This movement was next raised to a higher level by astrology and gnosticism. The heavenly gods and goddesses were more distant and less anthropomorphic. The contact with them must come through the spirit. In the later Empire this movement had swept the older religion aside and become dominant. And those philosophies which had a mystical strain in them, such as Platonism, Stoicism, and Pythagoreanism, made their adjustments. But this period was all too brief. Even with Plato we find seeds of decay. Naturalism could not fight free and maintain itself. It was anticipation and prophecy rather than an achievement. The knowledge on which it built was too thin and personal and with too little social prestige. The possibilities and temptations of supernaturalism loomed too great. Reason became the servant of emotion and imagination. In other words of the Blackstone the great British jurist of the 18th century:

Those law must be obeyed which are accordant with nature; the other are null infact, and instead of obeying them they ought to be resisted. Human laws must not be

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permitted to contradict natural law; if a human law commands a thing forbidden by the natural law or divine law, we are bound to transgress that human law.52

According to Aquinas, positive law is derived from natural law. On some occasions the natural law dictates what the positive law should be. For example, natural law requires that there should be prohibition of murder. Thus phrase “lex iniusta non est lex” (an unjust law is not law) is often ascribed to Aquinas.53

2.2.3. Renaissance Period-

Renaissance and Reformation in the fifteenth and sixteenth centuries led to a revolt against the supremacy of Church in temporal affairs of the states and monarchs.

The renaissance led to an emphasis on the individual and a rejection of the universal collective society of medieval Europe. This period led to the development of rationalism, general awakening and the resurgence of new ideas in all area of knowledge. There was a change in the field of commerce and new businesses were established which wanted more protection from state. Besides this, colonization led to the development of nationalism and emergence of new ideas in different field of knowledge.54

The effects of new discoveries in renaissance period demand for absolute sovereignty of state and supremacy of positive law for overthrowing the dominance of church.

The jurists of renaissance period supporting the sovereignty of the state were propounded. ‘Reason’ is the foundation stone of all these theories but it is secularized ‘reason’ and not the theological ‘reason’. The natural law theories of this age proceed from supposition that ‘a social contract’ is the basis of the society.55

2.2.3.1 Social Contract Theory: Social Contract Theory is very old theory on the origin of the state. It emerged as a reaction against the Divine theory. The Social Contract Theory received prominence in the writings of Thomas Hobbes, John Locke, & Rousseau, who gave it a systematic and technical treatment. This theory states that

54 Supra note 15 at, 64.
55 Supra note 33 at 92.
state is not a growth, but a make; it is not made by the God, but deliberately and voluntarily created by man. It has come into existence not by force but by consent or agreement. The term ‘Social’ implies something connected with society, while ‘Contract’ means an agreement between two or more people. Thus Social Contract Theory holds that men of the pre-political society got together and agreed upon a contract establishing the state. It implies that the state is man’s deliberate creation to serve his needs. There are three elements in this Social Contract theory, they are: state of nature, contract or covenant and civil society.\(^{56}\)

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The theory of natural law in due course through Social Contract Theory. The Social Contract Theory does not possess any analogy to the contract in private civil law. The state is seen as the legal creation of individual will and the word ‘Contract' is applied as a suitable legal term. The typical exponents of the doctrine are Grotius, Hobbes, Locke and Rousseau. Let us examine the substantial feature propounded by each\(^{58}\):

**2.2.3.1. Grotius (1583-1645)**

According to him it is the absolute duty of every individual within a state to obey its government to maintain peace. He emphasis the external aspect of each state internationally to create basis for legally binding and stable relations among the states.


\(^{57}\) Ibid.

\(^{58}\) Supra note 26 at, 242-245.
His theory served the purpose of keeping order within the state and the independence of sovereign authority to conduct foreign relation as he likes. Thus Grotius built his legal theory on ‘social contract’. His view in brief is that political society rests on a ‘social contract’. It is the duty of the sovereign to safeguard the citizens because the former was given the power only for that purpose. The sovereign is bound by natural law. On this theory Grotius laid the foundation of the International law. From the social contract theory’ he deduced a number of principles in this regard: First, that the governments are equal; second, that the governments in their foreign relations are perfectly free; third, that the promises made between the governments are of a binding nature because to fulfill a promise is principle of ‘natural law’.  

2.2.3.1.2. Thomas Hobbes (1588-1679) the impersonal state and individualism or Social Contract Theory.

Social contract theory can be traced to the origin of the state to the Greek philosophers. His book published (1651) Leviathan established the foundation for most of western political philosophy from the perspective of social contract theory. Hobbes was the champion of absolutism for the sovereign but he also developed some of fundamentals of European liberal through, ‘the right of the individual, the natural equality of all men, the artificial character of political order; the view of all legitimate political power must be ‘representative’ and based on the consent of the people. Hobbes is credited with enriching the earlier notions of social contract theories as propounded by Grotius and Others. He should use the combined power and strength of the citizens to promote peace, safety and security to all. According to Hobbes, concept of man is intrinsically selfish, malicious, brutal and aggressive. If a man is left alone in the state of nature, he will be wolf to every other man, as every body is at war with every other person. Thus law’s, according to Hobbes are central and immutable to achieve peace.

The essential principle of natural law for Hobbes was the natural right of self-preservation. The condition prevailed in society was one of the perpetual warfare, to escape from which people unconditionally surrendered all their natural rights of self preservation to one ruler for the sake of obtaining peace and security.

59 Supra note 33 at 102-103.
2.2.3.1.3. Locke (1632-1704)

(individual rights and majority government)

According to John Locke, “The state exists for the god life of its citizen.”

He was the liberal philosopher who proclaimed the inalienable rights of the individual including the right to property. He resorted to natural law its power and superiority over positive law. He invested the individual with inalienable natural rights, including his right to his private property. He held that government as a trustee for people. The individual has a natural inborn right to ‘Life, Liberty and Estate. Estate indicates private property. He lays the foundation of the democratic government when he states that a majority agreement is identical with an act of whole society, as the consent by which each person agree to join a body politic obliges him to submit to the majority. As long as the government is faithful to this pledge, it is entitled to rule. Otherwise it forfeits its right.

Thus, having sketched the historical development of the idea of natural law, let us consider what doctrine Locke contributed in his published works. His teaching in the Second Treatise of Government can be summarized as follows: The law of nature is a declaration of God's will and a standard of right and wrong. It is a law that already governs the state of nature, i.e. a pre-social state in which all men are free and equal, and in which they live together in peace. If men make promises to one another in the state of nature, they must consider themselves bound by them, 'for truth and keeping faith belong to men as men, and not as members of society.' It is likewise according to this law and prior to any positive civil laws that each man's private property is determined. Though God has given the earth and all its fruits to men in common, the law of nature sets bounds to what each man is allowed to appropriate and keep for himself. Since within these bounds a person's 'right and conveniency' go together, there can be little room for quarrels about property. Further, for Locke part of God's purpose in creating man was to 'put him under strong obligations of necessity, convenience, and inclination to drive him into society, as well as to fit him with understanding and language to continue and enjoy it.' Throughout man's life in society and under political government, the obligations of the law of nature remain valid, and

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61 Supra note 33 at 170.
62 Supra note 26 at 242-245.
it is only as they are founded on this law that the municipal laws of countries are just laws. In general, political power for Locke is justified only in so far as it preserves men's natural rights, especially those of life and property. Government is thus limited both by natural law and by men's rights, and these two came to be almost identical for Locke.\textsuperscript{63}

2.2.3.1.4 Rousseau (1712-1788)

He proclaimed the people’s sovereignty. He laid emphasis on the original inalienable freedom and equality of all men. His social contract is not based on any historical fact, but as a postulate of reason. His state of nature was one of simple happiness of primitive communities based on freedom and equality which is lost in modern civilization.

Thus many theories of natural law still have a religious base, but 18\textsuperscript{th} century was a witness to secular approach to legal and political questions. Hence identifying the binding force of natural law became difficult. Therefore the easier answer that it was based on the will of God was not acceptable to all men. Yet this period was the ‘golden century of human reasons.’\textsuperscript{64}

2.2.3.1.5. Immanuel Kant (1724-1804)

The natural law philosophy and doctrine of social contract was further supported by Kant. They emphasized that the basis of social contract was ‘reason’ and it was not historical fact. Kant drew a distinction between natural rights and acquired rights and recognised only the former which were necessary for the freedom of the individual. He favoured the separation of the powers and pointed out that function of the state should be to protect the law. Kant’s philosophy destroyed the foundation of the natural law theories towards the end of the 18\textsuperscript{th} century which suffered a death blow at the hands of Bentham in the early nineteenth century because of his theory of hedonistic individualism.\textsuperscript{65}

\textsuperscript{64} Dr. Veena Madhav Tonapi, Textbook on Jurisprudence, 26 (Universal Law Publishing Co. New Delhi,, ed. 2010).
\textsuperscript{65} Supra note 32 at 105.
2.2.4. Modern Period:-

The nineteenth century jurists rejected the previous speculative notions concerning natural law legal philosophy and attempted to make jurisprudence as a science as distinct from make believe natural law philosophy. Therefore, jurisprudence in nineteenth century became a science of unaffected by ideal of justice or equity.

The natural law theory received a set back in the wake of 19th century pragmatism. The profounder of analytical positivism, notably Bentham and Austin rejected natural law on the ground that it was ambiguous and misleading. Bentham called it a simple nonsense since absolute equality and absolute liberty were repugnant to the existence of the state. The doctrines propagated by Austin and Bentham completely divorced morality from law. All these developments shattered the very foundation of the natural law theory in 19th century. Latter in the 21st century there was revival of natural law school where jurist like Stammler, Fuller and Finnis had made their contribution towers the revival of this school.\textsuperscript{66} The nineteenth century opened with the French revolution and was a century which saw vast economic and technological changes, with capitalist enterprise aggressively expanding as a dominant feature of the century. It was the century that saw the rise of the nation state and unrestrained empire building, but most importantly it witnessed the virtual institutionalization of the previous ‘Age of Reason’ that had characterized the eighteenth century. This century saw the birth of the social sciences such as the introduction of Sociology, Economics and Political Science. It was believed that all intellectual endeavors could be pursued from a scientific basis and ideas and human behavior, investigated with a scalpel and microscope. Increasingly, science was viewed as the fundamental tool of progress. It was believed all elements of society could be objectively studied, and as result provide an accurate basis for large scale social engineering. Natural law, based on morality and incapable of being subjected to objective analysis, would fade away as it failed to stand up to scientific rigor and the challenge from Legal Positivism.\textsuperscript{67}

\textsuperscript{66} Supra note 34.
Nineteenth Century: Twentieth and Twenty-First Centuries: in the twentieth and twenty-first centuries, jurisprudence, instead of being as a science, has again become a philosophy or way of life with basic values and fundamental freedoms touching the boundaries of all other social sciences.\(^{68}\)

2.3 The Decline of Natural Law and Rise of Positivism

Natural law, which may be said to have occupied a pervasive role in the realms of ethics, politics and law is the oldest part of law and belongs to the remotest past. Its influence has been so great that it has not only played an important role in practical life but also in scientific theory of law. No other philosophy moulded and shaped the American thinking and American institutions to such extent as did the philosophy of natural law in the form given into it the 17\(^{th}\) and 18\(^{th}\) centuries.\(^{69}\)

The beginning of 19\(^{th}\) century might to be taken as marking the beginning of positivist movement. People were looking for finality & certainty as to law which was lacking in natural law.

But the natural law theory received a set back in the wake of 19th century pragmatism. Because, the natural law is based on reason, law could not be based only on reason but instead legislature and other source should also be considered. The tradition, customs moral values, judge made laws, society also should be taken into account which is not emphasized in natural law theory. During the Medieval Period wherein church was the absolute to make rules or law whereby they said that Law is divine and made by God himself is not acceptable to many theorists according to medieval period theorist the church made laws are supreme and laws are Law of God or external law divine law or law of scriptures is not justified as those era Church tried dominating the whole of Europe saying the supremacy of law rather it is made by the Church fathers and it may be called as law made by fathers. Although law may be of a divine origin but all laws in the society could not be made by divine, even society makes law by its customs and traditions. As Thomas Aquinas said that law is a law of God or eternal law but we see the legal implications in modern world the God made laws although playing an important role in legal system but it is not extensive as he have failed to give light on the scope of modern scenario where the Judge made law,

\(^{68}\) Supra note 30 at 31-33.
\(^{69}\) Supra note 19 at 116
customary laws, king made laws has its own role to play. Thomas Hobbes natural law theory of self-preservation of person and property and his saying of endowing the rights to absolute authority is not justified as we had seen in the past events that endowing the absolute power to authority leaves peoples in tyranny or monarchy where the absolute power had spoiled many societies in the history and if it is implied in the present day the same situation may replay. The monarch may exploit the society for his selfish needs. Thus Thomas Aquinas saying of giving absolute power is not much applicable in the modern society. As modern society needs everyone to be equal wherein giving absolute power to some authority may create chaos in the society. It may also lead to revolution as we have seen that after any vesting of absolute power to any authority the authority tries to exploit the subjects thus the revolution starts among the subjects to being down the absoluteness of power vested in the authority.

For eg:- In India the theory was applied in the old age wherein the poor farmers took shelter for protection under the Zamindars to escape from being killed or exploited by others. The Zamindars as time passed became very powerful and they became the absolute power authority as the absolute rights of the farmers are being vested in them. Zamindars had started to exploit the poor farmers and took away land and amenities leaving nothing to them but to get more exploited in hands of those Zamindars. Thus then the revolution against the Zamindars had started wherein all the poor farmers being exhausted of all the atrocities by those Zamindars came along. They tried to take back their rights which were endowed to the Zamindars for their protection.

Thus it is evident from the history that giving absolute power to an authority results in being exploited by that authority. So we can say that Thomas Hobbes is not justified in saying of endowing absolute power to an authority which may lead to abuse of power by that authority. The natural law theory saying „ought to be“ may not always confirm to the needs of the society. For instance it is natural to beget children as it is natural but there is some restrictions in those natural right as to the number of children in conformity with Indian laws such as family planning measures etc. So the natural right may not be superior always. The concept of morality in natural law theory is of great importance but this theory is not applicable as such it may happen in Indian laws as according to Muslim law marring 3 wife is moral but in Indian law it is immoral.
Thus the theory of morality as said in natural law theory is not applicable in all times or in all aspects.\textsuperscript{70}

Further Legal Positivist Hans Kelsen, acknowledged in his \textit{Pure Theory of Law} (1934), ‘the changeover of mainstream legal science from natural law to positivism went hand in hand with the progress of empirical natural sciences and with a critical analysis of religious ideology.’ It was indeed, David Hume, in his work \textit{Treatise of Human Nature}, who first attacked the idea that right reason could lead to objective moral truth; that we cannot objectively know what is right or wrong through moral reasoning. What has become known as ‘Hume’s Law’, basically claims that we can never validly deduce an ‘ought’ from an ‘is’. Therefore for Hume, law ‘must be regarded as separate from morals’. Following the same empirical spirit, Legal Positivism was born with Jeremy Bentham and John Austin as its most prominent pioneers. Jeremy Bentham’s view of natural law was expressed in his vicious attack on the natural law ideas of Blackstone’s \textit{Commentaries} (1765), where he viewed natural law as a ‘formidable non-entity’ and natural law reasoning as a ‘labyrinth of confusion’ based on moral prejudices. Bentham was most disturbed by the mysticism and complexity that surrounded the law of the British Common Law System. Bentham sought to reform a system where the law was retroactive, incomprehensible to the layman, and concealing what were sometimes considered the corrupt interests of judges. In critiquing the theory underpinning the common law system, Bentham disapproved of any appeal to the law of nature which he expressed as nothing more than ‘private opinion in disguise’. Bentham’s critique of natural law was influential and inspired the important work of John Austin’s the \textit{Province of Jurisprudence Determined} (1832). Austin, commonly considered the founder of contemporary Legal Positivism, believed, as did Bentham and Hume, that questions of what the law is, is separate from, and ought to be kept separate from questions of what the law should be. Austin indeed pioneered the ‘analytical form’ of jurisprudence purporting the presentation of legal systems as structures of ‘laws properly so called’ without regard to their moral quality. The ideas of Bentham and Austin spread widely throughout the nineteenth century and indeed natural law theory could scarcely be found anywhere outside of Catholic circles.\textsuperscript{71}

\textsuperscript{70} Supra note 34.

\textsuperscript{71} Supra note 67.
Thus in the nineteenth century, many different types of philosophies emerged to justify positivism and reject natural law theory. Utilitarianism was one of them which made an elaborate attempt to seek justification of legal positivism based on proposition that greatest happiness of greatest number of people is the most reasonable indicator to test the validity of law. In its endeavours to promote legal positivism, the philosophy of utilitarianism rejected the all assumptions that have been propagated by the natural law theory.\textsuperscript{72}

So, the close of 18\textsuperscript{th} century witnesses a reaction against both Kantian idealism and Jus- naturalism (natural- law- theorizing). The scientific temper of the age, reflected in the practical achievements of the early decades of the industrial revolution, was felt not conducive to deductive reasoning from a priori hypotheses, which appeared as an impractical method of solving the problems of the complex societies. Such problems might better approach via a thorough analysis of existing law and institutions. This new climate of opinion came to be known as positivism. Among the chief meaning of positivism in the legal analytical sphere are the separation of law as it is and law as ought to be, stress on the analysis of legal concepts, reliance on logical reasoning in the search for applicable law, and denial that moral judgements can be based on observation and rational proof. Analytical positivism in England began with the work of the philosopher and legal reformer Jeremy Bentham. His work influenced Austin, the most outstanding figure in English jurisprudence, who defined positive law as the command of sovereign addressed to political inferior and backed by threats of evil in the event of disobedience. Positive law might well be derived from moral precepts and other sources, but such precepts become law only when commanded by the sovereign.\textsuperscript{73}

The concept of morality is a varying content changing from place to place; therefore, it would be futile to think of universal application of law. For example, one society may adhere to monogamy while the another society may permit plurality of marriage.

Thus in the end of 19\textsuperscript{th} century natural law received death blow from all the corners and was abandoned. Natural law with its basis in higher law and values like idealism,

\textsuperscript{72} Dr. Yabraj Sangroula, Jurisprudence: The Philosophy of Law, 147(The Loquitur Publishing Company, New Delhi, ed. 2, 2014).

\textsuperscript{73} Supra note 46 at 189-190.
morality, justice, etc. were discarded and rejected as unreal unhistorical, non-scientific. Analytical positivists and associates of Historical School held low opinion and hatred towards natural law. The separation between ‘is’ and ‘ought’ law and moral was complete. Law now only meant a set of rule set by authority obliging others to obey it irrespective of its moral or ethical aspects. ⁷⁴

Diametrically, opposed to natural law is the positivists/ imperative, theory of law. This theory distinguishes the question whether a rule is a legal rule from the question whether it is just rule, and seeks to define law, not by reference to its content but according to formal criteria which differentiate legal rules from other rules such as that moral, etiquette and so on. ⁷⁵

The rise of analytical positivism in jurisprudence accompanied the displacement of a loosely organized secular or ecclesiastical international order by the modern national state. The contention that a legal system is a ‘closed logical system’ in which direct legal decisions can be deduced by logical mean’s from pre-determined legal rules without reference to social aims, policies, moral standards. Analytical positivists can concentrate their attention on the structure of ‘positive’ legal system. This leads positivists to the elaboration of the structure of the laws in modern state, from Austin’s ‘command of the sovereign’ to Kelsen hierarchy of norms derived from hypothetical ‘Grundnorm’. ⁷⁶

The major premise of positive school of jurisprudence is to deal with the law as it exists in the present form. It seeks to analyse the first principles of law as they actually exist in a given legal system. The advocate of analytical school are neither concerned with the past of law nor with the future of it, but they confine themselves to the study of law as it actually exists, i.e. positus. It is for this reason that this school is termed as the Positive School of jurisprudence. ⁷⁷

Legal positivism is a doctrine about the nature of law according to which (a) all laws are laid down or posited by a certain person or procedure, and (b) something counts as a valid law of a certain system in virtue of being laid down by a certain someone or according to a certain procedure. In other words, the legal validity of a rule or

⁷⁴ Supra note 22 at 73.
⁷⁵ Supra note 11 at 18.
⁷⁶ Dr. Mononita Kundu Das, Jurisprudence, 136-137 (Central Law Publications, Allahabad, ed. 1st 2012)
⁷⁷ Supra note 32 at 17.
decision depends on its sources (e.g. where it has come from, and how, and when),
rather than its merits (e.g. whether or not it is a good rule or decision). This way of
understanding law was made famous during the nineteenth century by the ‘command’
theories of law espoused by Jeremy Bentham and John Austin. According to these
theories, something is law if it has been commanded by a Sovereign, and is backed up
by the threat of a sanction in case of non-compliance.\textsuperscript{78}

Legal positivists claim that the objective of legal science is merely to describe the
legal system or positive law of a society as it is, not to suggest what its positive law
ought to be. Sometimes they add that a suggestion as to what the positive law ought to
be belongs to some extra-legal field such as ethics, political ideology or, indeed, the
theory of natural law. However, because these are extra-legal sources, they should not
enter into the description of the positive law of a society—unless, of course, ethical or
political or natural law arguments have been absorbed in the positive law, for then
they are part of what the positive law is. In fact, the confusion of law and morality is
the critics’ own. First, they subsume both the concept of law and the concept of a
moral order under the concept of a system of rules; thereby obliterating in one go the
logical distinctions between the lawful, the legal and the moral. Then they try to
explicate the difference between ‘law’ and ‘morality’ in terms of some logically
irrelevant characteristic such as the manner of enforcement of rules. Thus, they arrive
at the conclusion, say, that while ‘law’ is an officially or legally recognised, applied
and enforced system of rules, ‘morality’ is a system of rules without official or legal
recognition, application or enforcement. That conclusion will not do. It implies that a
morality can become law overnight merely by being embraced and imposed by the
powers that be—and that hardly is a solid basis for insisting on the difference between
law and morality. On top of that, the critics also confuse ‘natural law’ and ‘un-
enforced morality’, ending up with the proposition that natural law theories fail to
distinguish between law (officially enforced rules of conduct) and morality (rules of
conduct without official backing). The distinction between law and morality is of
primary importance to the theory of natural law. Indeed, the great medieval
theologian, moralist and natural law theorist Saint Thomas Aquinas denied that legal

\textsuperscript{78} Article on ‘Legal Positivism: Law As A Social Practice’
Available at:
http://s3.amazonaws.com/oxbridgenotes/samples/74/original/Legal\%20positivism\%201\%20\%20law\%20as\%20a\%20social\%20practice\_sample (visited on April 21, 2016).
authorities had any business enforcing morality: only vices that are destructive of society should be countered with legislative measures, not vices that only the most virtuous of men would avoid. Yet, Thomas Aquinas is a favorite target for those who charge natural law theory with confusing law and morality. With its gradual elucidation of the concept of natural rights, the natural law tradition gave rise to the ideas of the ‘rule of law’ (respect for the natural law) and the Rechtsstaat by insisting that legal authority should be restricted to the enforcement of law (not morality). If ‘law’ is taken to refer to a legal system of rules of conduct the question arises who made or chose those rules. With respect to legal systems the obvious answer nowadays would be that behind every legal system there are some legislative authorities that choose, make, modify or scrap rules—or perhaps that every legal system has a subsystem that defines its own legislative authorities and regulates their conduct. Obviously, speculations about the legislative authority behind or within the natural law presuppose the notion that the natural law is a sort of legal system. They may lead to such claims as that in nature or beyond nature there is an immanent, transcendent, supernatural or other non-human person that is the legislative authority of the natural law: God, the gods, or another quasi-personal power (Nature, History, Reason, Humanity). Such speculations and claims have no scientific value. If the natural law is understood to be an order of things then there is no reason to look for a legislator of the natural law. Even one who believes that God created the natural order of the human world will appreciate this: creation does not imply legislation. A creator probably wants others to respect his work but that does not mean that what he has created is a system of rules for respecting his work. Moreover, the fact that a creator wants his work to be respected does not by itself make it a respectable work. Another positivist conception is that no rule can be law unless there is some mechanism or arrangement for enforcing it on those to whom it is addressed. Thus, positivists raise questions about the mechanism or arrangement that more or less effectively would enforce the natural law of the human world on individual human beings. It is a common charge against natural law theory that it presents law not as something natural or even human but as something beyond nature. Indeed, natural law theories often are derided for being metaphysical or wedded to a particular theology or a theory of the supernatural. It cannot be denied that there are many theories of the natural law that obviously and self-consciously are metaphysical or theological. However, that does not imply that there can be no theory of the natural law that is not
metaphysical or theological. Moreover, the fact that some theories of natural law are
metaphysical or theological does not mean that they assume that the natural law is
something metaphysical or theological. A theory of mice and men can be
metaphysical without assuming that either mice or men are metaphysical or
supernatural things. Thus, a drawback of natural law theory- the main drawback of natural law theory is
that jurist interpreted its nature differently. Therefore, it is doubtful to decide the
moral law of nature by human reasons.

Although the tradition of natural law is by no means homogeneous, it is nevertheless
united by a resilient core of ideas. The most important of these are (1) the conviction
that there exists a universal justice that transcends the particular expressions of justice
in any given set of positive laws; (2) that the universal principles of justice are
accessible to reason and independent of human volition (i.e., they are discovered, not
made by man); (3) that a positive law contrary to these universal principles is not
properly speaking a law, since it lacks the moral content necessary to put us under
obligation. In contrast to legal positivists, philosophers of natural law insist that
commands accompanied by sanctions are not sufficient to make things legal. Law is
binding not simply because it is a command backed by threat, but because of the
intrinsic worth of the action commanded. A morally iniquitous law cannot be valid.
To be valid, law must have moral content. Natural law theorists therefore insist that
the definition of valid or true law cannot be independent of the moral content of the
law in question.

Thus, the natural law theories reveal that the concept of natural law has been used to
support different ideologies from time to time. It has been used to support absolutism,
individualism and has even been used by revolutionists to overthrow the government.
The contribution of natural law philosophy to the development of law is not less
important. The natural law principles of justice, morality and conscience have been

79 ‘The Pure Theory of Natural Law’, available at:
http://users.ugent.be/~frvandun/Texts/Articles/Natural%20Law%20-%20part%20I.pdf (Visited on
on June 30, 2016).
embodied in the various legal system. It generated a favourable climate for reformation, renaissance and provided foundation for fundamental human rights.

2.4 Natural law theory in India

During the medieval and British period in India, natural law found its expression in the religious preaching Ramaniya, Kabir, Nanak, Swami Dayanand, Raja Ram Mohan Roy etc. who reiterated in the Vedic philosophy to re-establish the age old Indian values of truth, righteousness, morality and justice. The principle of natural justice doctrine against bias, judicial review, reasoned decisions and many others precepts of administrative law are based on principle of natural justice.81

2.5 Conclusion

The concept of natural law has played a considerable role in the history of western society. It is ably propounded in the classical period by the Stoics. Cicero equated natural law with ‘accurate reason’. St Thomas called it ‘as a expression of divine reason in created things’. Hobbes identified natural law with ‘a rule based on reason.’ To Locke the law of nature is the law of reason, common to all and which controls everyone. The theory of natural law was used by its exponents to maintain status quo or uphold equality or the realization of justice. The philosophers tried to undertake ‘the rational construction of society’ through the application of natural law. The main factors for decline the natural law have been the empirical approach of David Hume, followed by the rise of the schools like positivism and historicism. The theory of natural rights is closely related to natural law. Its exponents assert that all men are born with certain rights and these rights are inalienable. According to Hobbes, the right of self-preservation is a natural right. Locke provided a clear cut statement of the theory of natural rights. He argued that life, liberty and property are the natural rights of the individual. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever the government becomes destructive of these ends, it is the right of the people to alter or abolish it. Thus the main feature of natural law is the reason common to all and which controls everyone equal. It builds up the theory of equality.82

Natural law has been envisaged as a mere law of self preservation or as an operative law of nature constraining man to a certain pattern of behaviour. The term natural law has been understood to mean a varieties of things to different people at different times of ideas which guide legal development and administration, basic moral quality is law which prevents a total separation of is from the ought, the method of discovering the perfect law. The natural law philosophy has occupied an important place in the realm of politics, law, religion, and ethics from the earliest time. It has played the role of harmonizing, synthesizing and promoting peace and justice in different periods and protected public against injustice, tyranny and misery. Blackstone observed, “the natural law being co-existent with mankind and emanating from God himself is superior to all other law’s, 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”.  

According to Dias and Hughes, ‘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 state or its agencies.’

According to Cohen, ‘Natural law is not a body of actual enacted or interpreted law enforced by courts. It is infact a way of looking at things and a humanities approach of judges and jurists.’

Supra note 81 at 64-65.