■ Chapter 2: Natural Law

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2.1 Introduction

"Natural" law has a long and distinguished history, and many talented people hold the view that a "natural law" account of law is vastly superior to the "positivist" account of law held by so many people since the time of Bentham. The idea of laws of nature, familiar to the Greeks over 2,000 years ago, is very familiar to us today in our understanding of scientific laws. But the very sharp distinction that people maintain today between science and morality did not exist then. People were aware of some sort of distinction, but thought that there were certain laws inherent in human nature itself that governed how we ought to behave. Thus it was thought to be natural that we should live well, develop relationships, strive to make our communities and ourselves better. This idea, naturally, can be developed into an understanding that law could only properly be appreciated in terms of its being able to contribute to individual and communal well-being. So, instructions, decrees, rules, etc., announced by rules which contravened certain requirements of substance, or content, were not to be understood as generating legal obligations. It is not such an odd idea even in today's positivistic climate of thought that courts, which pronounce with finality on the existence and validity of laws, are courts of justice and presided over by judges!

2.2 Some problems of definition

The general thread uniting classical natural law theories is that they attempt to describe law as it ought to be, with reference to the content of the law, rather than the manner in which it is made. There are several "sources" for the necessary content to make something "law", as detailed in the following table:

Author	Source	General Description
Plato/Socrates (c. 400 BC), Greek philosophers	Reason	Legal rules are morally binding where they can be shown to be in accordance with the concept of reason, which is itself relatively determinate.
Justinian (AD 483–565), Roman emperor, force behind the creation of the Civil Code	Divine providence	Natural law is observed equally in all nations, is established by Divine providence and is therefore forever and settled and immutable.
St Thomas Aquinas (c. 1224–1274), theologian/ philosopher	God	"The rational guidance of created things on the part of God, as the Prince of the universe, has the quality of law." This provides the basis for all human law, which is valid only as far as it does not conflict with the natural law.

Natural law theories tend to share, to a greater or lesser extent, all or some of the following characteristics:

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- value judgments, which come from an absolute source, for example the revealed word of God (from the writings of Aquinas, amongst others);
- agreement to a greater or lesser extent between those value judgments and the dictates of nature and reason (from the writings of Plato/Socrates, amongst others);
- because the value judgments reflect the essential nature of the universe, most theories of natural law claim that they are immutable (unchanging) and eternally valid (from the writings of Locke – see **2.5** – amongst others);
- they can be grasped and understood by the use of human reason (from the writings of Plato/Socrates again, amongst others);
- law is a fundamental requirement of man's life in society (from the writings of Hobbes – see **2.5** – amongst others); and
- perhaps most importantly of all, any conflict between the precepts of natural law (however defined) and ordinary human law have to be resolved in favour of the former (from the writings of most, if not all, of the natural law theorists).

Some secular (worldly rather than spiritual) jurists condemn the natural law school's search for absolutes and for immutable truths as pointless and doomed to failure. They do so because principles that are not, and cannot be, proved, are an inadequate basis for a legal theory. On the other hand, it has been noted in **Chapter 1** that a continuous process of speculation on the "value" content of legislation is one of the things that the study of jurisprudence is supposed to encourage. Radbruch (1878–1949, jurist and co-author of the constitution of the Federal German Republic) suggested in *Five Minutes of Legal Philosophy* that natural law concepts can be influential in at least three situations:

- when a legislator is seeking a source of values upon which to formulate a sound law;
- as a source of justification or reason which can be used by judges who are exercising a discretion; and
- as a source of theory in international law (in a sense, the general principles of international law might be regarded as a species of natural law, and so might the particular doctrines of international law dealing with war crimes, genocide and so on).

Chapter 9 of HLA Hart's *The Concept of Law* contains a valuable review of abstract natural law theory. The rest of this chapter introduces some of the principal theorists and their respective doctrines.

2.3 Classical natural law

The classical Greek period (c. 500–146 BC) saw the emergence of notions of universal harmony and a natural order in the world. In the writings of Heraclitus of Ephesus (dates unknown, about 500 BC) can be found a picture of a natural world of rhythm, pattern and an interrelated order. While change was fundamental in the universe, it was an ordered process – imposed by destiny. The "shape" of things was discoverable to man through his divine gift of reason. This was the soil in which later notions of natural law were rooted.

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A century or so after Heraclitus, the Sophists started drawing distinctions between law and nature, seeing nature as primary, wise and creating human equality, and law as secondary, deriving from nature, expedient and imposing inequality. Law, however, bound men together whether it was good or bad. Plato (c. 427–347 BC, the leading sophist and author of *Republic*) drew up an idealist philosophy, in which direct sense experience is merely a shadowy reflection of a reality consisting of a number of absolute values. This reality could not be detected using the senses, but it was capable of discovery by the wise philosopher. Justice (along with truth and beauty) is amongst the absolute values that can be grasped by those properly schooled and can be realised in a state ruled by philosopher kings.

Aristotle (384–322 BC, said to be a student of Plato) contributed to legal theory by a formulation of the essential problems of justice, differentiating between its abstract form and equity. He is also said to have illuminated the continuing problem of distinguishing between natural and positive law. On the second point he wrote: "[L]aws, when good, ought to be supreme; and the ruler or ruler should regulate those matters only on which the laws are unable to speak with precision." For Aristotle, the state that ceased to operate in this way ceased to be a state, just as a doctor who treats a patient according to passing whim rather than accepted medical standards ceases to be a doctor.

The Stoic philosophy which arose after Aristotle in the 4th century BC stressed the universality of human nature and the brotherhood of man: it emphasised reason as the essential characteristic of humanity. To quote Lloyd, "For the Stoics, therefore, there was a universal law, of nature ascertainable by reason which provided a touchstone for determining the justice of man-made laws."

After the Greeks came the great age of Rome. Developments in Roman Law (which owed a great deal to Marcus Tullius Cicero's (1st century BC) drawing upon the notions taken from the Greek schools and followed in the work inspired by Justinian resulted in the approximation of the *Jus Gentium* (the law of the people of universal application) to the *Jus Naturale* (rules of universal application emerging from the common nature of all human beings everywhere).

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2.4 Divine law

Religion and law have been closely intertwined throughout the ages. From the Code of Hammurabi (ruler of Babylonia from c. 2123–2080 BC), through the Mosaic Law (c. 1230 BC) and the tenets of Christianity, to the founding principles of Islam in about AD 600, a Supreme Being can be found prescribing basic rules of conduct that bind all humanity.

A review of all these codes would require at least one separate book, so there is a compulsion to select just one. The principal influence of men such as St Augustine and St Thomas Aquinas on Christian natural law theory has been chosen.

St Augustine (AD 354–430, bishop of Hippo in what is now Algeria) wrote *De Magistro* and *De Peccatorum Meritis*, in which he described an absolute ideal of a law of nature which existed in the "pre-Fall" golden age. This ideal ended with man's fall from divine grace (the story of Adam, Eve and the Garden of Eden). This fall led to consequent human creations of a morally dubious nature, such as positive law, property and the institutions of the state. St Augustine wrote that, "while these creations were probably sinful, it was clearly necessary to exercise control, and to this end positive law was useful if it strove to obey the commands of the eternal and divine law." The need for the state to keep order was a necessary concomitant of the defence of God's church which was, itself, supreme over the state. A more accessible version of this theory can be found in his *Confessions*.

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Published in 2009 by:
ILEX Tutorial College Ltd
College House
Manor Drive
Kempston
Bedford
United Kingdom
MK42 7AB

British Library Cataloguing in Publication Data

A catalogue record for this manual is available from the British Library.
ISBN 978-1-84256-444-8