

## **A COMPARATIVE ANALYSIS OF THE NATURAL LAW DOCTRINE IN ANCIENT AND MEDIEVAL PERIODS**

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### **INTRODUCTION**

The doctrine of the natural law is as old as philosophy with many interpretations that cut across different philosophical epochs. With about 2,500 years of history, it is not surprising that the natural law doctrine has had very different meanings and has served entirely different purposes<sup>1</sup>. However, for the purpose of understanding, an attempt shall be made in this paper at examining the natural law doctrine in the ancient and medieval periods. In this regard, the view of some of its articulate proponents in these historical periods shall be comparatively discussed. Outlined for our discussion among the ancient natural law theorists are Heraclitus, the Sophists, Plato, Aristotle and the Stoics. The Medieval natural law theorists are the Romans, medieval Christian scholars like St. Aurelius Augustine, St. Thomas Aquinas, Don Scotus, William Ockham, and Francis Suarez. However, in order to enhance our subsequent cogitation on the historical analysis of natural law doctrine in the ancient and medieval periods, there is the need to first possess an understanding of the conceptual underpinning of the meaning of law and natural law respectively.

### **Meaning of Law and Natural Law**

Law is controversially difficult to define. While we do not intend to embark on an omnibus survey of arrays of definitions and scholarly extracts depicting the meaning, nature, features and assumptions of law, our intention here is to present the idea of law in its general sense. Law means a rule of action or events in nature or in human activities, which covers human beings and other things in nature, whether animate or inanimate. As a rule, law has two senses. First, law as the uniformities or regularities of things in nature<sup>2</sup>. Here, law is seen as natural or scientific laws such as cosmological sequence and natural occurrence (day and night, generation and degeneration, gravitation, etc). Second, law as a norms or rules of conduct made obligatory by some sanctions, which are imposed and enforced for their violations by a controlling authority. Here, law is viewed as human or municipal laws.

Law in the above two senses is termed as descriptive and prescriptive notions respectively. Where the former only describes the way objects normally behave or react informally all over the universe under certain conditions, the latter prescribes how things should be done or how men should behave. While the law in the descriptive

sense is discovered, law in its prescriptive connotation is made and is only applicable to human beings<sup>3</sup>.

The term natural law can be defined as an observed or inferred regularity or uniformity of events, which holds or is supposed to hold out of some sort of necessity as contrasted with accidental or coincidental regularity. Like the concept of law, natural law also has two meanings. In the prescriptive sense, natural law is an order or command intended by nature to regulate human behavior, that is, it is a natural injunction. It applies to human beings and it can be synonymous with what can be called the moral law<sup>4</sup>. The natural law in the descriptive sense is the physical laws of nature. It describes the regularity with which certain physical things happen universally under certain conditions. To talk of the natural law, we mean the two senses of the term. We need to be wary of this distinction because many protagonists of natural law who argue that it is the ideal and source of legal and morals features of all laws easily allude and confuse the prescriptive sense with the descriptive sense as equivocally the same. However, for our purpose in this paper, our use of the term natural law should be construed in the prescriptive sense alone.

### **The Idea of Natural Law: A General Survey**

The natural law doctrine is one with surpassing variety and many versions with many interpretations. According to R.W.M. Dias, it can mean ideals which regulate legal developments and administration. It may also designate a central quality in law, which prevents a total separation of the 'is' from the 'ought'. It can further mean "the conditions that must exist of law"<sup>5</sup>. In a related discussion of the variations in the understanding of the natural law doctrine, Gurvitch points out six closely related uses of the term. Natural law, according to him can be seen as "a moral justification of all laws; as the apriori elements of laws, as the ideal by which all existing positive laws can be judged, as referring to immutable rules, as an autonomous law valid because it is based on an ideal, as a spontaneous law, as opposed to a law forced in advance by the state"<sup>6</sup>.

Of course, from the above outline of some of the uses of the concept of natural law, we can decipher that the idea of natural law is ambiguous with no precise meaning. One major reason responsible for the difficulty in understanding the notion of natural law stems basically from the fact that what constitutes "nature" in the sense in which natural law is used, appear to be problematic. D'Entrieves underscores this point in his remark that "many of the ambiguities of the concept of natural law must be ascribed to the ambiguity of the concept of nature that underlie it"<sup>7</sup>. Nature can mean types, model, features, or environment. Because of this ambiguity underlying the concept of nature itself, its no surprise that the notion of natural law is also ambiguous. However, regardless of the diversity of conceptions, natural law theorists, as David Walker argues, "belief in a system of right or justice common to all men dictated by the controlling force of the world and distinct from positive law, law laid down by any particular state or other organization"<sup>8</sup>. For Jim Unah, natural law doctrine, irrespective of its versions or age "is borne out of man's desire for objectivity and uniformity in the operation of legal system"<sup>9</sup>. Natural law theorists, even though may differ on the sources and emphasis of

natural law, agree that the morality of law determines the validity of law. They believe that common or municipal law is based on certain universal principles, discoverable through reasons or revelation, which is seen as being eternal, immutable, and ultimately based on nature of human laws, which ought to approximate these higher principles of natural law.

There are two groups of natural law theorists. First, are those who argue that municipal or human laws have divine origin, eternal source God. Majority of the natural law theorists started from a religious foundation. For them, if reason has a role to play at all, it has to be validated by the scriptures. The second group of natural law theorists is made up of scholars who believe that reason is the source of municipal laws.

On a general characteristic note, natural laws are immutable; they do not change. They are self-evident; they do not require proof. Natural laws apply to every society regardless of place or location. Natural law can also be said to prohibit all intrinsic evil. It demonstrates what is intrinsically good and that which is intrinsically bad. Such a theory of law invites us to embrace virtues and neglect vices. Natural laws are apriori in nature, requiring no experience for their apprehension. In fact, they are either manifestation of divine will or they proceed from reason.<sup>10</sup>

However, irrespective of the group or age that a natural law theorist may belong, the thesis of natural law theory is clear, and that is an immoral law is not a law; only moral laws are valid. Emphasis on natural law has two sides, namely, the obligations or prohibitions that it imposes on all human beings (both rulers and ruled), and the rights (popularly known as 'natural rights' or simply as 'human rights'), that it confers on all human beings". As we shall subsequently see, the natural law theorists of the Ancient and Medieval periods emphasized the obligations or prohibitions of the law of nature, while in modern and contemporary periods, emphasized on human or natural rights.

Giving the foregoing general survey of the Natural Law Theory, let us now attempt a thematic historical analysis of the doctrine explicit in the ancient and medieval philosophical periods.

### **A Thematic Historical Analysis of the Natural Law Doctrine in Ancient and Medieval Periods**

The history of natural law doctrine can be first traced to the Greek era. Natural law amongst the Greeks had a pagan origin and approach. This was prior to 400 B.C.<sup>12</sup>. This conception of natural law was reminiscent of the thought of eminent pre-Socratic Greek philosophers. The pre-Socratic philosophers were eminently known of their metaphysical search for the underlying unity in the diversity of the universe. Heraclitus, one of the greatest pre-Socratic cosmologists, carried this search for unity to the realm of human society. He attempted finding an element that unifies the entire human society. This he identified as divine law; a common law of nature. According to him,

"all human laws are sustained by one divine law, which is infinitely strong, and suffices for them all."<sup>13</sup>

Heraclitus was famous for his thesis that "all things flow; nothing abides." But this ceaseless changing of things led him directly to the idea of an eternal norm and harmony, which exist unchangeably amid the continual variation of phenomena. A fundamental law, divine common logos, a universal reason holds sway: not chance, lawlessness, or irrational change.

Natural occurrences are ruled by a reason that establishes order. Man's nature as well as his ethical goal consists, then, in the subordination or conformity of individual and social life to the general law of the universe. This is the primordial norm of moral being and conduct. Heraclitus notes that "Wisdom is the foremost virtue, and wisdom consists in speaking the truth, and in lending an ear to nature and acting according to her. Wisdom is common to all. ... They who would speak with intelligence must hold fast to the (wisdom that is) common to all, as a city holds fast to its law, and even more strongly. For all human laws are fed by one divine law."<sup>14</sup> The laws of men are but attempts to realize this divine law. Thus in the diversity of human laws (not beyond them), there flashed upon Heraclitus the idea of an eternal law of nature that corresponds to man's reason as sharing in the eternal *logos*.

The Sophists, who also dominated the philosophical scene in pre-Socratic era, also wrote on the natural law doctrine. The laws of the state are, according to them, conventional and should not conflict with the demands of nature. Nature is the ideal or the standard to which the laws of the state should conform. For instance, Antiphon's argument in natural law is that it is innate in man and it is the product of truth; whereas the laws of the state are products of mere opinion. The relationship between natural law or state law is like the relationship between truth and mere opinion.<sup>15</sup> Where natural law treats men equally with objectivity in its adjudication of claims and praise, positive (state) law is however biased, discriminates and limited in punishing violators, especially when not caught. To the Sophists the laws were not venerable because of tradition or by reason of having stood the actual test of life in the city-state: they were artificial constructs and served the interests of the powerful (Thrasymachus). Thus the laws possessed no inherent value, for only what is right by nature can have such value, and to this the Sophists were continually appealing. They did not deny, therefore, the form of the natural law and of what is moral by nature. They merely brought out the sharp contrast between the prevailing order of the city-state and the natural law as they preached it, and they ridiculed Socrates who looked upon the laws of Athens as purely and simply "just."

By contrasting, in the light of their social criticism on what is naturally right with what is legally right, the Sophists attained at this early date to the notion of the rights of man and to the idea of mankind. The unwritten laws, said Hippias, are eternal and unalterable: they spring from a higher source than the decrees of men. According to Hippias, "all men are by nature relative and a fellow citizens, even if they are not such in the eyes of the law. There, with the distinction between Greeks and barbarians,

fundamental for Greek cultural consciousness vanished into thin air. God made all men free; nature has made no man a slave" <sup>16</sup>. Though Plato held fast to the institution of slavery, and Aristotle was ever striving to justify it by means of his theory that certain men are slaves by nature, and even things, Hippias tells us that such views of Plato and Aristotle are incorrect with reference to the natural law that distinguishes not a master from a slave, all men are free and equal.

The Sophists, thus put three ideas heavily charged with social explosives for the world of Greek culture as part and parcel of the natural law. These ideas were henceforth to be subjected to a ceaseless reprocessing in the history of the mind. The first idea was that the existing laws serve class interest and are artificial constructions. Only what is naturally moral and naturally right can be properly called moral and right. Next came the idea of the natural-law as freedom and equality of all human beings and, as a consequence, the idea of the rights of man as well as the idea of mankind. The *civitas maxima*, or world community, is superior to the city-state. According to the third idea, the state or polis is nonessential-it owes its origin to a human decision, i.e., to a free contract, not to a necessity of some kind. The political organization of man must therefore have been preceded by a state of nature (portrayed optimistically or pessimistically), in which the pure natural law was in force.

The metaphysical natural law of Plato as well as the more realistic one of Aristotle formed the high-water mark of moral and natural-law philosophy in Greek civilization. For Plato, natural law is the law of reason. It is the ideal law; the absolute norm of conduct and absolute standard of justice where positive laws imperfectly reflect. As the imperfect expressions of the natural law, positive laws are needed because men are weak and cannot observe the law of reason without the help of the positive laws. In an ideal state, which was envisaged by Plato, men are perfectly rational and willingly submit to the rule of the law of reason. But because the present state is not ideal, positive law would be necessary. Aristotle sought the source of human law in the law of nature, which is reason. In fact, to go against this natural dictate of law, Aristotle tells us, will amount to being not only lawless - a beast, but also unjust<sup>17</sup>.

Plato and Aristotle also directed their attacks at the Sophists and their destructive criticism. Plato and Aristotle were chiefly, though not in the same degree, concerned with goodness and its realization in the state. Their interest, however, did not center in the individual. It is quite common, rather, to speak of both as leaning towards state socialism or totalitarianism. For them, then, in accordance with the idea of order, the first and fundamental aim of justice is not freedom for its own sake, but order. Freedom is aimed at only so far as it realizes order. For this reason, the law occupied the foreground of their thought. They were at great pains to discover and to establish the ethical basis of the law; unlike the Sophists, in the interest of freedom from the laws. The state and its order as the sphere of morality, as the realization of all virtue, engaged their attention. This explains their preoccupation with the best form of state or government, in which the individual, whom the Sophists made so much of, is swallowed up. If we should think of the natural law in terms of its long accepted identification with socio-philosophical individualism,

there would really be little room for the idea of the natural law in Plato or even in Aristotle.

A deeper penetration into the thought of Plato and Aristotle will show, however, that they too distinguished between what is naturally just and what is legally just. Nor is this distinction merely a borrowed formula: it is an integral part of their metaphysical doctrinal structure. Yet in the case of both, we can observe a certain aversion to the "naturally just," which is accounted for by the Sophists' abuse of this distinction. An abuse which Plato severely ensured. In his idealist metaphysics, Plato acknowledges the world of the senses and the world of ideas, that become manifest in intellectual contemplation. The things of this world are or exist only so far as they participate in the being of the eternal ideas, which exists in the world of forms. Reality lies in the world of ideas or forms and every thing in this physical world participates in the reality of things in the world of ideas. Hence we speak of the true physician, the true judge, the true lawmaker, the true law. These two starting points of Platonic speculation lead then to such conclusions as that the judge ought to be a true judge, i.e., he ought to complete in himself the ideal of judge. The ideal concept becomes a norm. The law should be a true law: one that benefits the common will. Therein ideal achieves its completion. Thus, Plato contrasts the true, real and proper law with the positive law, and he makes the former the measure and criterion of justice for the latter.

The difference between Plato and the Sophists lies elsewhere. The Sophists started from the freedom of the individual, who had to be liberated from traditional religious and politico-legal bonds. For the polis, the state is not something eternal, nor is its law. It is mankind that is eternal: the civitas maxima of free and equal men. In the eyes of Plato, however, the polis and its law were the indispensable means for realizing the idea of humanity, which reaches completion in citizenship, in the ethical ideal of the citizen of the law-abiding and just man. The state is the great pedagogue of mankind. Its function is to bring men to happiness and justice through the moral virtues. Hence Plato's thought revolves continually around the idea of the best state or government. But this is also why he recognizes a natural law as ideal law, as a norm for the lawmaker and the citizen, and as a measure for the positive laws. His metaphysics and the ethical system, which he built thereon, made natural law possible and furnished its foundation.

Aristotle who was known for centuries as the "father of natural law" is not really the father of the natural law. Nevertheless his theory of knowledge and his metaphysics have provided ethics, and consequently the doctrine of natural law, with so excellent a foundation that the honorary title, "father of natural law," is readily understandable. In his metaphysics, Aristotle believed that reality consists in both matter and form. Unlike Plato, who is purely an idealist in his metaphysics, Aristotle is a dualist for he believed that everything in the universe is composed of both matter and form. Matter is completely indeterminate and cannot exist without the form; neither can form exist without matter. In the light of this, Aristotle advances a distinction between what is naturally just and what is legally just. Both are objects of justice. Justice, however, taken in the narrower sense (for in the wider sense the virtuous man is the just man purely and simply) and distinguished from morality, is directed to the other, to the fellow man, whether 'as equal

(commutative justice) or as fellow member of the comprehensive polis-community (distributive and, in the behavior of the member with regard to the whole, legal justice). It finds expression in the natural law and in the positive law. The latter originates in the will of the lawmaker or in an act of an assembly; the natural law has its source in the essence of the just, in nature. That which is naturally right is therefore unalterable. It has everywhere with the same force, quite apart from any positive law that may embody it. Statute or positive law varies with every people and at different times. Yet the natural law does not dwell in a region beyond the positive law. The natural law has to be realized in the positive law since the latter is the application of the universal idea of justice to the many manifolds of life. The immutable idea of right dwells in the changing positive law. All positive laws are more or less successful attempt to realize the natural law. For this reason the natural law, however imperfect maybe its realization in the positive law, always retains its binding force. Natural law, i.e., the idea and purpose of law as such, has to be realized in every legal system. The natural law is thus the meaning of the positive law, its purpose and its ethically grounded norm.

Concerning the content of the natural law; Aristotle had a little to say as Plato. This was in sharp contrast to the Sophists, who because of their political and socio-critical bias had admitted many reform proposals and demands into their natural law. The silence of Plato and Aristotle finds its explanation in their idea of the natural law by setting out from the conservative conviction that the positive law wishes to realize the natural law. In contrast to the individualistic attack launched by the Sophists against them, the natural law of Plato and Aristotle served precisely to justify the existing laws and not merely as a basis for criticizing them. Although the function of criticism was regarded as included in the idea of natural law. Furthermore, for Aristotle and as for Plato, their doctrine of natural law was from the political standpoint conservative, but it was based on metaphysics. Neither Plato nor Aristotle was interested in natural law in the form of normative rule.

With the disappearance of these intellectual giants from the scene, we have stoicism propagating the idea of natural law. Until the Stoics, nature had meant the order of things: with them, it came to be identified with man's reason. When man lived according to 'reason', he was living both naturally and virtuously. Virtue for Stoics consists in the positive determination of conduct, through will power in accordance with rational insight into man's essential nature. Virtue is right reason. Nature and reason are one. Right reason and the universal law of nature, which holds undisputed sway throughout the universe, are also one. Obedience to the eternal world law is a life lived according to reason. Such, embraced with religious fervor, is the ethical principle of Stoicism. It thus means to live in harmony with oneself, to live in accordance with one's rational nature; for the latter manifests the world law. Law, too, has its basis in nature. Man has an inborn notion of right and wrong, and law in its very essence rests not upon the arbitrary will of a ruler or upon the decree of a multitude, but upon nature, i.e., upon innate ideas.

Cicero (106-43 B.C.) was the interpreter and transmitter of the Stoic doctrine of natural law'<sup>8</sup>. The *LEX NATA*- the law within us, is regarded as the foundation of law in general. Since it is identical with right reason, it is universally valid, unchangeable and

incapable of being abrogated; for its author is the divine reason itself-taken, of course, in a pantheistic, impersonal sense. It is also called eternal law. Stoicism prepared the way for the Christian natural law. Zeno, who lived from 'about 340 to 265 B.C, founded it in Greece as a school of philosophy. It came to its full flowering in Rome in the imperial age. Cicero, however, was its great popularizer, and the wealth of Stoic thought was handed down to the medieval world mainly in his writings. Stoicism, moreover, greatly influenced the various schools of Roman jurisprudence. The passages of Roman law, which touch the natural law, have their source mostly in Stoic philosophical literature.

Epictetus (cir. A.D. 60-110) likewise called attention to the diversity of the laws that prevail at various times and among different peoples. He taught that the test of whether or not a law accords with nature consists in its agreement or non-agreement with reason. The laws that upheld slavery he called laws of the dead, an abysmal crime. Seneca (d. A.D. 65), in the teeth of the prevailing institution of slavery, gladiatorial combats, featuring the turning of human beings to beasts, voiced this magnificent sentiment apropos of human dignity: *homo sacra res homini*.<sup>19</sup> What were originally Sophist doctrines were gaining fresh currency: the dignity of the human being and the natural-law basis of freedom and equality. Slaves, too, are men, blood relations and brethren. Like freemen, they are God's own children, members of a great community. As Marcus Aurelius expressed it, "My city and country, so far as I am Antoninus, is Rome, but so far as I am a man, it is the world."<sup>20</sup>

Under the influence of Stoic philosophy the doctrine of the natural law passed into Roman law. The great jurists of the golden age of Roman law were for the most part also philosophers. Thus Stoic philosophy may be rightly called the mother of Roman jurisprudence. The Roman jurists still lacked a clear distinction between law and morality. Even the norm "worship must be paid to God" pertained to law, and so did "live honorably." To the jurists, indeed, jurisprudence was knowledge of things divine and human; the science of what is just and unjust."<sup>21</sup>

Like Stoic philosophy, Roman law also passed on this idea to the new Christian era and to the age of scholastic philosophy, which as true *philosophia perennis*<sup>22</sup> has remained the permanent home of the natural law. Scholastic philosophy has been the place of sanctuary for the natural law when arid positivism has driven the latter out of secular jurisprudence. The history of the natural-law idea shows that Christianity took it over at a very early date. Paul, the Apostle of the Gentiles, declares that the natural law is inscribed in the hearts of the heathen, who do not have the Law and is made known to them through their conscience. It is valid both for pagans and for Jews because it is grounded in nature, in the essence of man. (Cf. Rom. 2:12-16).<sup>23</sup>

Belief in the existence of natural law was common in the medieval period. As G.H. Sabine tells us, "everyone in the middle ages, whether a professional lawyer, or a layman, believed in reality of natural law"<sup>24</sup>. The history of the natural-law idea exhibits a uniform doctrinal development from the first Scholastics down to the able leaders of the scholastic revival of recent times. Its two culminating points were the

synthesis of St Augustine, St. Thomas Aquinas, Suarez, Vasquez, and Ockham. Medieval Christians scholars, of which St. Aurelius Augustine was prominent, saw natural law both as a divine law (which God uses in governing the world) and as a law of reason (which is based on man's rational nature.) For Augustine, law of nature or natural law is the reason and will of God, which commands the preservation of the natural order and prohibits its disturbance. "<sup>25</sup> He believed that natural law is the highest reason and it ought to be obeyed. His point here is that law of nature is a supra law that takes precedence over all positive laws and it is the standard to which all positive law must conform in order to qualify as law. Any positive law that contradicts it is automatically null and void because "there is no law except it be just."<sup>26</sup>

For Augustine, the substantial ideas, which Plato had conceived of as dwelling in a heavenly abode, became thoughts of God. The impersonal world reason of the Stoics became the personal, all-wise and all-powerful God. The purely deistic Nous of Aristotle became the Creator-God who transcends the world, but who continually sustains it through His omnipotence, direct it through His providence, and governs it according to His eternal law. This eternal law was for Augustine identical with the supreme reason and eternal truth, with the reason of God Himself, according to whose laws the inner life and external activity of God proceed and are governed. God's reason is order, and His law rules this ontological order, the order of being, of essences and values. But since this norm is identical with the immutable, immanent nature of God, it does not stand above Him; it is connatural to Him, and it is as unchangeable as He. No power, no chance event, not even the complete collapse of all things can alter it.

St. Thomas argues that the law is reason, not mere arbitrary will." The natural law remains the measure of the positive law. But this position is intimately connected with the doctrine of the immutability of the natural law and the enduring essential nature of man, as well as with the primacy of the intellect over the will in both God and man. For Thomas Aquinas, "Law is an ordinance of reason promulgated with a view to the common good by him who has charge of the community"<sup>28</sup>. Common good here can be interpreted to mean preservation of order. Aquinas distinguished four kinds of law, namely: eternal law, natural law, divine law and positive law. These are categorized in order of importance. The eternal law (*lex aeterna*) is divine reason, known only to God and the blessed that see God in his essence. It is God's plan for the universe, which everything is subject to. The natural law (*lex naturalis*) is the participation of eternal law in rational creatures. The divine law (*lex divina*) is the law of God revealed in the scriptures. Finally, the positive law (*lex humana*) is a man-made law, which derives its validity from the natural law.

His idea of positive law deserves further comment. This is necessary for two reasons. First, positive law does not provide all or even most of the solutions to everyday life in society. Secondly, there is need for compulsion, to force selfish people to act reasonably<sup>29</sup>. Human laws are either just or unjust. To be just, a positive law must be virtuous, necessary, useful, clear and for the common good. Unjust laws are a perversion of law and do not bind man's moral conscience. The natural law precedes the divine law and is the actualization of the eternal law by reason for rational beings.

Aquinas, as a natural law theorist, described natural law as a dictate of right reason towards the bad to be avoided or rejected and the good to be pursued or attained. The natural law participates in and reflects on the eternal as it relates to man and his free act. He maintains that there is a close relationship between the order of natural inclination towards the good and the order of the precepts of the law of nature. The natural inclination towards the good is common to every substance because each tends to conserve its existence according to its own kind. Man, Aquinas argues, had an immanent faculty to grasp the basic principles of morality, which are self-evident. This natural ability imparted to man by nature is termed *synderesis*. It helps in the understanding of moral principles. "While other creatures are governed by the laws of physical necessity, man is governed by the moral laws whose principles are known by *synderesis*"<sup>30</sup>. They derive from human nature put in man by God. They are the basic principles from which man derives secondary precepts e.g. thou shall not kill.

Aquinas observed further that man's inclination to conserve life and avoid death is an instance of the natural law. He agreed with St. Augustine and Aristotle that any human law, which opposes or contradicts the law is unjust, is not valid and is a pervasion of the law. He is of the view that political obligation and obedience to law shouldn't be, as a result of the imposed sanctions, rather a hinged on its moral foundation. However, it is worthy to note that Aquinas equally concedes, "an unjust law should be obeyed if its non-observance would cause a scandal or public disturbance. But if besides being contrary to natural law, a law commands something, which is distinctly immoral, it should not be obeyed."<sup>31</sup>

Next to St. Thomas Aquinas, and perhaps last in the medieval discourse on the natural law doctrine is the great contribution of Duns Scotus and William Ochkam<sup>32</sup>. With Duns Scotus, who emphasized the principle of the primacy of the will over the intellect, there began inside moral philosophy, a train of thought, which in later centuries recurred in secularized form in the domain of legal philosophy. For Duns Scotus, morality depends on the will of God. A thing is good not because it corresponds to the nature of God or, analogically, to the nature of man, but because God so wills. Hence the *lex naturalis* could be other than it is even materially or as to content, because it has no intrinsic connection with God's essence, which is self-conscious in His intellect. Now, however, an evolution set in which, in the doctrine of William of Ochkam on the natural moral law, would lead to pure moral positivism, indeed to nihilism. For Ochkam, the natural moral law is positive law, and a divine will. An action is not good because of its suitability to the essential nature of man, wherein God's archetypal idea of man is represented according to being and oughtness, but because God so wills. God's will could also have willed and decreed the precise opposite, which would then possess the same binding force as that which is now valid-which, indeed, has validity only as long as God's absolute will so determines. Law is will, pure will without any foundation in reality, without foundation in the essential nature of things. Thus, Ochkam believes in the Divine Command theory as the standard of morality and it is on this supra ethical foundation that natural law is based.

Next to Ockham and Scotus is Francis Suarez. Suarez defines law as "a common, just and stable precept which has been sufficiently promulgated"<sup>33</sup>. Following Aquinas, he noted that it is essential for law to be intended for the common good of the community just as the natural law is intended for the common good of community of mankind. Thus, for a law to be just, there are conditions to be met. Beside the first one stated above, law must be intended only for those who are under the jurisdiction of the legislator and lastly, it must not impose disproportionate burden inequitably on people, and what it commands must be practicable <sup>34</sup>. Like Aquinas, Suarez equally talked about natural law as the dictate of reason.

However, he rejects two notions of natural law. The first is the one that sees natural law as simply indicating what is intrinsically good and what is intrinsically evil without any prescriptive feature. Natural law, understood in this sense, is misconstrued because it does not express the will of a superior and it is prescriptive rather descriptive. The second view is that of William of Ockham, which sees good and evil simply in terms of God's command and prohibition<sup>35</sup>. Suarez rejects these two views. Suarez maintains that natural law is not mere demonstrative, stating what is intrinsically good and intrinsically bad. Rather it is prescriptive, commanding the former and prohibiting the latter. He argues that the goodness or badness of actions do not derive from the fact of their commanded or prohibited by God, but because such actions are in themselves good or bad that is why God commands or prohibits them as the case may be <sup>36</sup>. This position of Suarez is a modified version of Ockham's Divine command theory, which sees God's will as the standard of morality. However, unlike Ockham's descriptive view, the standard of morality here is prescriptive Divine will.

## CONCLUSION

So far in the paper, we have attempted an exploration of the understanding and interpretations of the natural law doctrine by scholars (philosophers) in the ancient and medieval periods. We have attempted a comparison of the views of the natural law theorists within the purview of the historical periods in which they belong. However, it is instructive at this point to attempt, a philosophical comparison of the general similarities and differences between the understandings of natural law doctrine in the two historical epochs. Arguably, the natural law doctrine is complex in the history of philosophy. Spanning through the positions of scholars on natural rights starting from Heraclitus, the pre-Socratic Greek philosopher, to the Sophists, down to Plato, Aristotle, the stoics, the Romans, Sts. Augustine, to Aquinas, to Don Scotus, Ockham and Francis Suarez, one would see that they place emphasis on three themes in their discussion of natural law doctrine. These are the sources, validity and the duties and obligations of natural law. However, they failed in outlining such issues as the efficacy of law and the natural right conferred on man by natural law. These limitations are however covered-up by natural law theorists in the modern and contemporary periods. While it is beyond the scope of this paper to delve into that, it is pertinent to examine further the similarities as well as differences in the conception of natural law in ancient and medieval philosophical traditions.

It is implicitly accepted by scholars in both periods that natural law principles do not always have the effect that they would like them to have but that the doctrine remains true even if they are ignored, or abused in legal practice. Natural law doctrine in both periods is accepted to be objective and unchanging universal moral principle superior to any man-made laws and which the latter (positive laws) must thrive to conform with. Where in the ancient period, natural laws were thought to depend upon the metaphysical nature or reality of the universe, (with the exception of the stoics who interpreted nature with reason and virtue) in medieval period; natural laws were thought to be discoverable by reason with Supreme God as the sole source of the law. Discourse on natural law is more pronounced in the medieval age than the ancient period. In the medieval period, natural law took a uniform doctrinal development than in the ancient era where scholars differ both in meaning and purpose of natural law.

Natural law doctrine is susceptible to unhealthy criticisms and damaging insinuations. Critically, the main problems connected with the idea of natural existed already in antiquity. The positivism of the Sceptics and of Epicurus stood in opposition to the natural law in its two recurring forms: the metaphysical one in Plato and Aristotle, and the individualistic one in the earlier Sophists. Furthermore, the continually recurring definitions of law, which have stirred up and divided philosophico-legal thinking down to the present day, had already been formulated: law is will, law is reason; law is truth, law is authority. One of the principal obstacles which natural law must surmount, as noted by M.D.A. Freeman, centers about the problem whether moral propositions can be derived from propositions of fact, whether an 'ought' can be deduced from 'is'<sup>37</sup>

Moreover, the problem of the connection between morality, validity and legality will always remain a puzzle in discourse on natural law tradition. It is pertinent to stress that it is difficult to discuss the legality of law from the perspective of morality because there is no acceptable criterion or standard of morality, which distinguishes bad from good behaviour. S.O. Opafole recognizes this when he avers that "it is question begging to describe natural law; as the dictate of right reason towards the good to be pursued or the bad to be avoided. If consensus on what is right or wrong is lacking, then what constitutes right reason is controversial"<sup>38</sup>. In fact, the claim that natural law is right reason or that it is discoverable by right reason is ambivalent because what is considered or thought to be right reason in one age may become wrong in another. A just law discoverable by reason in Europe may be repulsed by the right reason of the Africans. In addition, as pointed out by Jim Unah, laws are not the dictates of nature as the naturalist law theorists want us to believe, rather, they are laudable invention of great civilized men. "All the "oughts" and "should be's" in the legal systems are put there by man, not spelt out by nature".<sup>39</sup> With all these contentions, the question is how can we substantiate the reality of existence of an external law of unchanging moral values of universal moral conscience, which human positive law should approximate?

Despite logical and philosophical problems arising from the natural law theory, it is arguable that it has played significant roles in the development of law and the course of world history. The tenets of natural law thesis played an important role in the various political revolutions, which we have had till date- the English, the French, the American

and the Soviet revolutions. The leaders of these revolutions were moved by the tenets of natural law thesis, that is, by the ideals of freedom and equality, which were presupposed by the natural theory.

It was through the development of the thesis of natural law that we have a synthesis of divine inspiration and the wisdom of men reflected in law books. The tenets of the natural law theory have continued to serve, as challenges to human beings to resist oppression of all kinds and to secure fairness and justice for themselves from political authority.<sup>40</sup> Historical instances of the prominent role of natural law doctrine suffice here. Without the natural law, it would have been impossible for the judges of Nuremberg tribunal to denounce the atrocities of Hitler, which emanated from the man-made kinds of law in Germany. Also, the belief in the existence of natural law allows the oppressed majority blacks in South Africa to say in spite of the provisions of the constitutions to Apartheid regime, what the legal and political situation in that country ought to be, which eventually led to the end of apartheid era in South Africa. The thrust of these cited examples is that the natural law doctrine is quite basic to the issue' and promotion of justice and human rights in human affairs. It is on the above background that this paper concludes in consonance with William Idowu that the ideals of natural law doctrine aids obedience to law. While law is not just a social fact, it essentially has a normative character, which has to be accounted for.<sup>41</sup> Where this is done, there is a high possibility that the obligation to obey the law will be influenced greatly and determined by the extent at which the thesis of the natural law doctrine is recognized in positive laws.

## ENDNOTES

<sup>1</sup>M.D.A Freeman, *Lloyd's: An Introduction to Jurisprudence*, seventh edition. (London: Sweet & Maxwell Ltd., 2001) p. 90

<sup>2</sup> John Hospers, *An Introduction to Philosophical Analysis*. Second Edition (London: Rontledge and Kegan Paul, 1956, paper back, 1976) p. 231.

<sup>3</sup> Joseph Omoregbe, *An Introduction to Philosophical Jurisprudence: Philosophy of Law* (Lagos: Joja Educational Research and Publishers, 2004 )pp. x-xii.

<sup>4</sup>Maduabuchi, Dukor, "The Role of Natural law Theory in Identifying Unjust laws," in *KPIM of Morality, Ethics; General, special and professionals*,\_\_Pantheon Iroegbu, Maduabuchi Dukor (eds.) (Enugu: ABC publishers, 2006) p.236

<sup>5</sup>R.W.M. Dias, *Jurisprudence* (London: butleril 1996) p. 653.

<sup>6</sup>Cf. George, W. Paton, *A Textbook of Jurisprudence*, (Oxford: Clarendon Press, 1951) p. 78

<sup>7</sup>. D' Entreves, *Natural Law* (Revised, 1970) p. 16

<sup>8</sup>David walker, *The Oxford Companion to Law*.(New York: Oxford University Press, 1980) p.869.

<sup>9</sup>Jim Unah, *Fundamental Issues in Government and Philosophy of Law* (Lagos: JERP, 1993) p.17.

<sup>10</sup>Francis, O.C. Njoku, *Studies in Jurisprudence: A Fundamental Approach to the philosophy of Law*. (Owwerri: Clarentine Institute of Philosophy, 2001) p. 13.

" J.O. Omoregbe, op.cit., p.xiii

<sup>12</sup>William Idowu, "Law, Morality and Justice: An Appraisal of Legal Naturalism and Legal Positivism Over the `Is ought' Question", in Pantheon Iroegbu, Maduabuchi Dukur (ed.), op.cit.,p.102.

<sup>13</sup>Cf. Diog Laert, ix,5: Ernest Barker, *Greek Political Theory*, (London: Methuen, 1970) p.59.

<sup>14</sup>C E Charles M. Bakewell, *Source Book in Ancient Philosophy* (New York: Charles Scribner's Sons, 1907), p. 34.

<sup>15</sup>Cf. J.O. Omoregbe, op.cit., p.3.

<sup>16</sup> *ibid.*, p. 31.

<sup>17</sup> Cf.Francis. O. C. Njoku, *Philosophy in Politics, law and Democracy*, (Owerri: Claretian Institute of Philosophy, 2002) p. 54.

<sup>18</sup>On these idea of Cicero, see the excellent discussion of George H. Sabine, *A History of Political Theory* (New York: Henry Holt and Co., 1937), pp. 25-34.

<sup>19</sup> *Epistulae morales ad Lucilium*, XCV, 33.

<sup>20</sup>cf. W. W. Buckland and A. D. McNair, *Roman Law and Common Law. A Comparison in Outline* (Cambridge: The University Press, 1936), p.180.

<sup>21</sup>K. F. Reinhardt, *A Realistic Philosophy* [Milwaukee: Bruce Publishing Co., 1944], p. 17.

<sup>22</sup> *Philosophia perennis* (a term seemingly coined by Steuchus in 1540, used by Leibnitz, and popularized by the Neo-Scholastic movement) denotes a body of basic philosophical truths that is perennial, enduring, abiding, permanent, eternal-a philosophy that "is as old and as new as philosophical speculation itself." It is one whose "validity and truth content is not confined to any particular age or civilization but is absolute and enduring.

- <sup>23</sup> see *The Holy Bible, King James Version*.
- <sup>24</sup> George H. Sabine, *A History of Political Theory*, Op.cit., p.35.
- <sup>25</sup> St. Aurelius Augustine, *Contra Faustum* (West Minister Press, 1953) xx, C.27.
- <sup>26</sup> St. Aurelius Augustine, *De libro Arbitrio*, Augustine Earlier Writings, 1, C, 6.
- <sup>27</sup> Thomas Aquinas, *Summa Theological* 1-11, V. 90, art 4,
- <sup>28</sup> Anthony. G. Pegis (ed.), *St. Thomas Aquinas*, (New York: Random House, 1945) Vol. 2, pp. 747-748.
- <sup>29</sup> Finnis, *Natural Law and Natural Rights* (London: Clarendon press, 1980) p. 28
- <sup>30</sup> Jim Unah, op cit., p.123
- <sup>31</sup> Ibid., p.125.
- <sup>32</sup> For a detailed discussion on the positions of Scotus and Ochkam, see Anton-Hermann Chroust, "Hugo Grotius and the Scholastic Natural Law Tradition," *The New Scholasticism*, XVII (1943), pp. 101-12.
- <sup>33</sup> Francis Suarez, *De Legibus ac Deu Legislatore* 1, 5, 24.
- <sup>34</sup> Cf. Walter Farrell, O.P., *The Natural Moral Law According to St. Thomas and Suarez*, pp. 122-30.
- <sup>35</sup> Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (1936), trans. Thomas R. Hanley, ed. Russell Hittinger (Indianapolis: Liberty Fund, 1998), p.19.
- <sup>36</sup> J.O. Omoregbe, op.cit., p.22.
- <sup>37</sup> M.D.A. Freeman, op.cit., p.90
- <sup>38</sup> S.O. Opafole, "Thomas Aquina's Conception of Law: A Critique", in *The Nigerian Academic Forum; A Multi disciplinary Journal*, Vol. 7, no. 1, October 2004. P.103.
- <sup>39</sup> Jim Unah, o .cit., p.21.
- <sup>40</sup> S.O. Opafole, op.cit., p. 106.
- <sup>41</sup> William Idowu, "Law, Morality and Justice; An Appraisal of Legal Naturalism and Legal Positivism over the 'is - ought' Question," op.cit., p.110.

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