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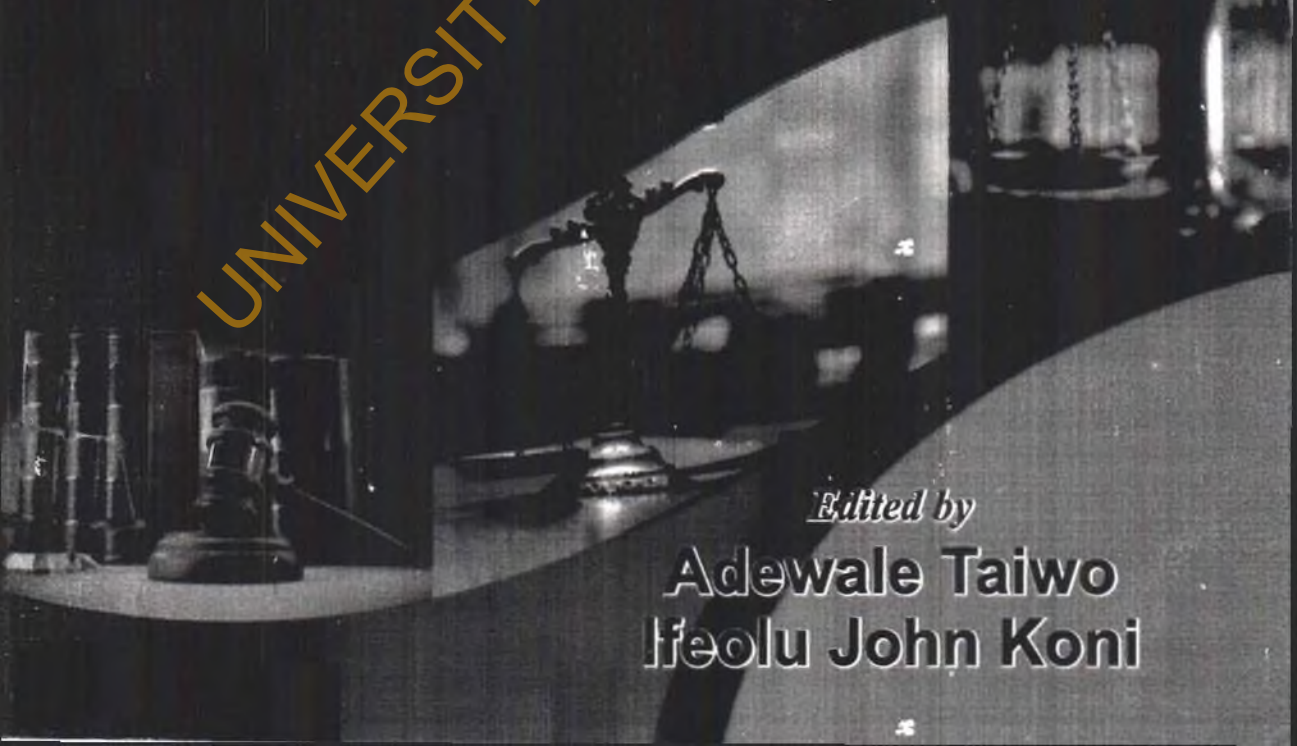
JURISPRUDENCE AND LEGAL THEORY IN NIGERIA



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The Natural Law School: Another Viewpoint

1. Aim and Objectives of the Chapter

The aim of this chapter is to discuss the natural law school of jurisprudence. It is expected that at the end of the chapter, the reader should be able to understand the following:

- The different meanings ascribed to the expression "natural law";
- That the natural law is a ready tool in the hands of philosophers during the various periods of human existence;
- the various periods of human existence namely, the Greek Period, the Roman Period, the Medieval Period, the period of Reformation and the Renaissance Period; and
- that the natural law school of jurisprudence should be undertaken largely on the basis of the various periods highlighted above.

2. Introduction

The expression "natural law" has had different meanings and has served entirely different purposes in the course of over 2,500 years of history. What appears constant in the various forms and guises of the expression is the claim that it contains certain principles. While opinions differ as to the source

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and contents of these principles it has been constantly asserted that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason. These principles coagulate to constitute what is presently known as natural law. It should not be assumed however that there is a general agreement as to whether or not the principles of natural law can be derived purely from human reasoning.

According to Akomolede, there is a plethora of natural law theories and these have made it difficult to delineate precisely the boundaries of natural law.[1] Lloyds views natural law as an operative law of nature which constrains men to a certain pattern of behaviour without any higher purpose inherent in such laws. It consists of higher and metaphysical sets of laws to which all positive laws must conform for them to have validity and consequently, acceptability. He therefore describes natural law as a higher law that is ordained by God or given by divine inspiration which is often pictured as an ideal system but laid up in heaven and regards all positive or man-made laws as imperfect[2]. For, as pointed out by Fuller, the Greeks put theoretical moral foundation under law by the doctrine of natural rights. The Roman jurists read natural rights into natural law and sought to discover the contents of this natural law and to declare it. The seventeenth and eighteenth centuries took out this theological foundation, giving rise to a rational theological or rational-ethical natural law. At the end of the eighteenth century, Kant replaced the rational foundation by a metaphysical foundation giving us a metaphysical natural law. It remained only for the analytical jurists to argue that no foundation was necessary.[3]

1 Akomolede, I.T., *Introduction to Jurisprudence and Legal Theory* (Niyak Print and Law publications 2008) 22.
2 Lloyd, D., *Introduction to Jurisprudence with Selected Texts*, 4th ed. (Frederick A. Praeger, Inc. 1969) 80-81.
3 Fuller, L.L., *The Morality of Law* (Yale University Press 1964).

Thomas Hobbes sees natural law as a mere law of self preservation.[4] The origin of natural law postulations is not completely free from controversies. What is however clear, and in respect of which jurists, scholars and philosophers have been unanimous is that natural law was conceived and developed in Greek city states. The early Greek philosophers, like Socrates, Plato and later Aristotle, tenaciously held on to the belief that the universe was governed by intelligible laws capable of being grasped by the human mind through reason and as such, should be able to determine rational principles to govern man's conduct anywhere and everywhere in the society. In spite of its tenacity for survival natural law idea has not succeeded in overcoming the obstacle of deriving moral proposition from propositions of fact that is, deriving an "ought" from an "is". Consider the following statement, for example: "it is part of human nature to reproduce". Does that lead to a proposition that every man or woman "ought" to marry and have children or that the use of contraceptives is contrary to human nature and therefore should be prohibited?

2.1. The Nature and Characteristic of Natural Law

Natural Law thinking possesses the abiding virtue of subjecting positive law to the scrutiny of moral judgment unlike the authority-worshipping approach of legal positivism. Lloyds states that the most compelling attraction of natural law to the students of jurisprudence is that in exposing deficiencies in positivist thinking, it broadens the whole scope of the discipline. Perhaps, the most significant characteristic of natural law is its idealism. That is, it is concerned with what 'ought' to be. Its approach is deductive being based on abstraction from a higher (metaphysical) order in contrast to positivism which is secular, empirical and relativist. Positivism concentrates on a description and analysis of social facts.

However, natural law has fulfilled many functions in the course of its long history. It has influenced the transformation of the old civil law of the Romans into a broad and cosmopolitan system. It has been called in aid by other side in the fight between the medieval church and the German emperors, it has given force and validity to international law, and it has provided the platform for launching appeal for individual liberty against absolutism. It was by way of appeal to principles of natural law that American judges were able to resist the attempt to modify and restrict the unfettered economic freedom of the individual.

Natural law theories have appeared in various forms. They could be divided, according to Friedman, "into authoritarian and individualistic, into progressive and conservative, into religious and nationalistic, into absolute and relative."[5] Nonetheless the most important distinction appears to be between natural law as a higher law which invalidates any inconsistent positive law and natural law as an ideal to which positive law ought to conform without its legal validity being affected. Even though Socrates, Plato, and Aristotle had different views about natural law, it was deducible from their teachings and beliefs that they conceived the idea of justice as a form of law decreed by nature to which man-made laws must of necessity conform.[6] The rest of the discussion will now focus on the historical survey of these various theories.

3. Historical Survey of Natural Law Theories

Ideas about law and of the nature of law date back to the history of man but law and religion remain largely undifferentiated prior to the sophist era of Ancient Greek. The early philosophy of law, like philosophical speculations in other disciplines, was largely credited to the Ancient Greek thinkers. It must be borne in mind however that the greatest problem of the ancient Greek

4 Thomas Hobbes, *Leviathan* cited in Akomolede (n 1).
5 Friedman, S., *Legal Theory* (Yale University Press, 1960) Chapter 1 Part 111.
6 These views of Plato and Aristotle were expressed in their classical works: Aristotle, *Politics* at page 127 and Plato, *Ethics*, para 1134(b).

city-state was instability. It is against the background of the quest for peace and stability that the views of these thinkers must be considered. It is also relevant to keep in view their main concerns, namely-

(a) the universal and permanent underlying basis of law;
(b) the relationship of law and justice; and
(c) the problem of social stability.

The early Greek philosophers fall into two groups on their views of natural law. There are those (the materialists) who believed that in the beginning was matter (not God) and that natural example Heraclitus found the essence of being in events in contradistinction to substance. This event was broken into destiny, order and reason as the components of natural law. The others are the idealists who seek to derive natural law from idea or human reason. The Sophists (500 B.C.) must however be singled out for their empirical approach. They probably qualify as the earliest positivists.[7]

By and large, natural law had been a ready tool in the hands of philosophers during the various periods of human existence, especially in the following periods in history- The Greek Period, The Roman Period, The Medieval Period, The period of Reformation and The Renaissance Period[8]. This discussion on natural law school of jurisprudence shall be undertaken largely on the basis of the various periods highlighted above.

3.1. The Greek Period

3.1.1. Sophists (School of Enlightenment 5th Century BC)

They conceived law purely as human invention born of expediency and alterable at will (Antiphon) as opposed to the notion of an unchanging command of a device being which was the prevalent view up to that time.

7 MacCormick, N., "Natural Law Reconsidered" (1993) *Oxford Journal of Legal Studies* 1; 99.

Their concept of justice was also stripped of its metaphysical attribute and analyzed in terms of human psychological traits or social interest e.g. 'right of might' (Treasymachus). Prota-goras, a leading proponent of the sophists, denied that man could have knowledge of the existence or non-existence of gods and asserted that man as individual was the measure of all things.

3.1.1.1. Socrates

From his views (known through Plato), he does not share the right of might interpretation of justice by the sophists. For Socrates (and Plato) justice mean that a man should do his work in the station in life to which he is called by his capacities. In Socrates' view man's intelligence and insight are the measure of the good and it is this insight which tests the reason and goodness of law.

3.1.1.2. Plato[9]

He employs his idealist theory – that the physical phenomena of the world were mere manifestations of a superior order laid up in heaven and should be studied in order to gain insight into the ultimate pattern– in his philosophy of law and justice. For him it is possible for a man suitably educated in philosophy to attain a vision of the perfect realm which lies beyond the world of the senses. Justice is presented as a kind of absolute spirit, which can be apprehended only by the philosopher and can be fully realized only in an ideal state rule by philosopher – kings. Justice presented in a particular state can be no more than a pale shadow of real justice. For Plato the differences of human personality, the variety of human activities and the restless inconsistency of all human affairs make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times. Hence the best thing of all is not full authority for laws but rather full authority for a man who understands the art of Kingship and has wisdom.

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8 Ijalaye, D.A., "Natural Law Theory and the Nigerian Experience" in Elias, T.O. & Jegede, M.I. (eds.), *Nigerian Essays in Jurisprudence* (M.I.J Publishers Ltd., 1993) 25.

9 The modest view of Plato and Aristotle were espoused indirectly in the classical works: Plato; *Ethics* para.1134b.

3.1.1.3. Aristotle (384 – 422 BC)[10]

Perhaps it may be useful to state Aristotle's basic premise which may throw further light on his view, that is: Man partakes of nature in a two-fold sense:

(i). Part of God's creature and as such partakes of experience (Biological interpretation);

(ii). Man being endowed with active reason is capable of framing his own will in accordance with the insight of reason.

He rejected the idealist philosophy of his master (Plato) recognizing that justice might be either conventional – varying from state to state according to the needs of particular community - or natural, that is, common to all mankind being based on the fundamental law or purpose of man as a social or political being. In his view, nature may either be regarded as an ideal, expressing the fundamental aspiration of man if his full potentials were attained or simply regarded as the way man behaves by reason of his psycho-physical make–up. The former view involves an ideal while the latter is essentially factual. Most of the subsequent views of natural law have oscillated between these two differing ideas of nature as fact or as ideal. Aristotle however tends to blur the distinction as he regards natural justice as based on rules actually common to mankind and at the same time he regards as natural to man that which best enables him to fulfill this purpose as a social being. "Man", when perfected, he believes, is the best of animals but if he be isolated from law and justice he is the worst of all. Aristotle advocates rule of law and application of equity in particular cases of hardship.

3.1.2. The Stoics (Led by Zeno 350 – 260 BC)[11]

The stoic philosophy which developed after Aristotle did not only popularize natural law but monumentally expanded its frontiers. To the stoics, there is a universal law of nature ascertainable by reason which provides the basis for

10 *ibid* at 127.

11 The philosophy of the Stoicism stresses the universality of human nature and the brotherhood of man. It also emphasizes reason as an essential characteristic of humanity.

determining the justice of man-made or positive laws. The recognition of human reason as part of human nature by Aristotle provides the basis for the stoic conception of the law of nature. By nature, the stoics understand the ruling principle which pervades the whole universe and which they identify with God. To Zeno the whole universe consists of one substance and that substance is reason. Reason, as a universal force pervading the whole cosmos was considered by the stoics as the basis of law and justice. Divine reasons dwell in all men everywhere. To live according to nature is to live naturally. The law of nature thus becomes identified with moral duty. They developed a cosmopolitan philosophy founded on the principle of the equality of all men and the universality (transcending national frontiers) of natural law.

Their ultimate ideal is a world-state in which all men would live together harmoniously under the guidance of divine reason. In the view of the stoics, in the golden ages of absolute natural law there was no family, slavery, property nor government. They all became necessary with moral deterioration of man. Relative natural law demands that laws should approximate as closely as possible to natural law. From the time of the Stoics the notion of natural law as a principle of human conduct gradually prevailed over the biological interpretation.

3.2. The Roman Period

The Greeks did not succeed in translating their notion of natural law into practical rules. It was left for the genius of Roman jurist who used the conception of nature based on reason to transform a rigid – *just civile* – into a cosmopolitan system – *jus gentium*–fit to rule the world. At no other time has the ideal of natural law exercised a great and constructive influence on positive law. With the granting of citizenship rights to most of the Roman provincial subjects around 200 A.D., the idea of a community of civilized mankind as opposed to the parochialism of the small city-states of earlier periods was becoming realized. With the rise and spread of Christian ideas the stoic concept of a world-state with a common citizenship and a common

law based on natural reason and equality of men acquired a very real and significant meaning under the prevailing circumstances and consequently had a major impact on the political and legal development of Roman the Empire.

3.2.1. Cicero (106 – 43 BC)

Influenced by the idea of stoic philosophy, Cicero postulated a natural law, universal, unchanging and predicated on right (human) reason. The mind and reason were to him the standard by which justice and injustice were to be measured. To Cicero, the sense of justice though capable of growth and refinement, is a universal possession of all reasonable men. According to him, since an intelligence common to us all make things known to us and formulates them in our minds, honourable actions are ascribed by us to virtue and dishonourable action add to vice while only a madman would conclude that his judgments are a matter of opinion and not fixed by nature. Cicero appears to favour the position (as the first natural law jurist) that utterly unjust law lacks the quality law.

On the whole, it should be stated that the works of Roman jurists were largely of practical nature and that they had little occasion to engage in abstract theoretical discussions about the nature of law and justice.

3.3. The Middle Age Period

The Church Fathers (Saints Augustine, Iraneaus, Ambrose, Gregory the Great and Isidore)

Legal philosophy like all other branches of sciences and thinking was dominated in the Middle Ages by the Church and its doctrines. The relative peace of the Roman Empire facilitated the spread of the new universal faith of Christianity. It was however a combination of Christian theology, Greek philosophy and Roman law that fused into the medieval scholastic doctrine of natural law.

Initially, the Christian faith postulated the superiority of God's law over man-made law. Nevertheless the stoic teaching of brotherhood of men, which was embraced by the Christian philosophers, was indifferent to the theory of law based on reason. It was left for St. Augustine to give stoic idea of absolute and relative natural law a divine twist. In his view, only the fall of man from Christian love made human institutions necessary. He was of the view that in a golden age of mankind, prior to man's fall, an absolute ideal of the 'law of Nature' had been realized. Men lived in a state of holiness, innocence and justice.

They were free and equal, slavery and other forms of domination of man by man were unknown. Human laws were seen as mere evils arising out of man's sinfulness deriving from the fall of man. Law assumed three-fold divisions – *lex temporalis* (positive law), *lex naturalis* and *lex aeterna*. Natural law was the revelation of eternal law through men's 'soul, reason and heart' – the medium by which God 'speaks to us in our conscience'. Eternal law is defined as the reason or will of God – (Absolute natural law). Natural law was thus equated with divine law partly miraculously revealed and partly ascertained by reason. It became the task of the Christian Church to require the utmost approximation of human laws to eternal Christian principle.

However, the defects of man's nature, due to sin called for a natural law which lacked many of the features of ideal justice. Natural law being imposed by God could only be expounded by the head of the Catholic Church – the Pope-who as Vicar of God was invested with the power to expound and interpret the law of God which was binding on all men, ruler and the ruled alike – a philosophical justification of the claims of the Church for sovereign political authority. The state though bad, could justify its existence by protecting the peace and the church and striving to fulfill the demand of eternal law. A law which is not just within the contemplation of eternal law is no law at all.

3.4. The Thomist Philosophy of Law

(St Thomas Aquinas (and his followers viz: Saints Salisbury and Albert the Great) 1226 – 1274)

3.4.1. St. Thomas Aquinas[12]

He is generally acknowledged as the most constructive and systematic thinker of the middle ages. His philosophy remains the most authoritative expression of what may be called the Roman Catholic view of life. His system represents an incisive synthesis of Christian doctrines of Roman Law and Aristotelian philosophy. Thomas Aquinas distinguishes between four different kinds of law, namely:

(a). *Lex eaterna* (eternal law) which he defines as divine reason known only to God and 'the blessed'. Eternal law governs the entire universe.

(b). *Lex divine* (divine law is the law of God revealed in the scriptures.

(c). *Lex naturalis* (natural law which consists of the participation of the eternal law in rational creatures). It has been suggested by Friedman that divine law appears to be the written and natural law the unwritten exposition of God's eternal reason. Natural law is made up of primary and secondary principles. The former is unchanging and universal (though may be added to) while the later could be changed in rare cases.

(d). Positive law which derives its validity from natural law and changes with human circumstances and human reason. When this law is unjust either in respect of the end or in respect of the author it is irredeemably invalid. However, when it is only unjust in respect of form, Aquinas recommends obedience in spite of injustice in order to avoid scandal or disturbance. Aquinas also differentiates between the positive law of

12 Aquinas defines law as an ordinance of reason for the common good, made by him who has the cause of the community who also promulgated such law.

particular societies and laws common to all societies (*jus gentius*). The latter is analogous to natural law. Thus he was able to endow common institutions like private property with a special sanctity. He considers the right to the acquisition of property as one of the matters left by natural law to the state as a proper agency for the regulation of social life. However, the following pertinent questions appear unanswered.

First, it is not clear which precepts of natural law are primary and which are secondary. Second, it is also not clear how the secondary principles are derived from the primary ones. These criticisms, notwithstanding, St. Thomas system has provided the foundation for modern principles of Catholicism which goes to show the greatness and the elasticity of the system.

While St. Thomas system stresses the superiority of reason over the will, two Francisco monks, namely- duns Scotus (1265-1308) and William of Ocean (1290-1349) postulated the supremacy of will over reason. The freedom of men, they argued, to love or to hate, to do good or evil means of necessity that the will is independent of reason. Thus they inadvertently provided the launching pad for the philosophy of absolute power of the sovereign (Machiavelli, Hobbes & Hitler).

Mention should be made of the role of Victoria and Sucrez for their contributions in reviving and further developing Thomism in the 16th Century.

3.5. The Classical Era

The Reformation and the Renaissance periods brought about radical changes in the existing state of affairs. Their combined effect has been the strengthening of secular, individualistic and liberalistic forces in political, economic and intellectual life. Although the law-of-nature philosophy during this era was built on a foundation provided by the preceding ideas of natural law yet it has the following distinctive features:

(1). It completed the divorce of law from theology for which the Thomistic distinction between divine and natural laws has prepared the ground.

(2). While the Medieval scholastic philosophers tended to limit the scope of natural law to a few first principles and elementary postulates, the classical natural law jurists favoured elaboration of system of concrete and detailed rules hence their theory is often referred to as natural law of content.

(3). The classical natural law jurists shifted the emphasis on the law of reason to a doctrine of natural rights.

(4). It accomplished a shift from the mode of approach from a teleological and speculative to a casual and empirical view of the nature of man.

There appear to be three distinctive periods in the evolution of the classical natural law philosophy. First, the process of emancipation from medieval theology and feudalism which took place after the Renaissance and reformation brought a rise in Protestantism in religions, enlightened absolutism in politics and mercantilism in economics. To this period belong the theories of Hugo Grotius, Thomas Hobbes and Samuel Pufendorf, among others. Their common feature is the postulate that the ultimate guarantee for the enforcement of natural law is to be found largely in the wisdom and self-restraint of the ruler.

The second period starting from about the English Puritan Revolution of 1649 was marked by a tendency towards free capitalism in economic and liberalism in politics and philosophy. The views of John Locke and Baron de Montesqueu belong to this era. They seek to guarantee by means of separation of powers the natural rights of individual against undue encroachment by government.

The third period was marked by a strong belief in popular sovereignty and democracy. Natural law was entrusted to the 'general will' and the majority decision of the people. To this period belongs the theory of French political thinker, Jean-Jacques Rouseau. This last stage had profound impact on the political and constitutional development in France while the second period had similar effect in the United States of America.

3.5.1. Hugo Grotius (1583 -1645)[13]

He is reputed to be the father of international law. He defines natural law as a dictate of right reason which points out that an act, as it is or is not in conformity with rational nature, has in it quality of moral baseness or moral or moral necessity. This law of nature would, in his view, obtain even if we should concede that which cannot be conceded without the utmost wickedness that there is no God or that affairs of men are of no concern to him. By thus detaching the science of law from theology and religion he prepares the ground for the secular, rationalistic version of modern natural law.

He indicates two methods of proving whether or not something is in accordance with the law of nature. Proof *a priori* consists in demonstrating the necessary agreement or disagreement of anything with a rational or social nature. Proof *a posteriori* includes, if not with absolute assurance, at least with every probability, that there is according to the law of nature which is believed to be such among all nations or among all those that are more advanced in civilization. No conclusion unfavourable to human nature needed to be drawn from the practices of nations that were savage or inhuman. To find out what was natural we must look at those things which are in sound condition and not the corrupted.

He enumerates the following axioms of natural law:

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13 Lloyds (n 2) 85.

(a). Abstain from that which belongs to other persons.
(b). Restore to other any goods of his which you may have.
(c). Abide by part and fulfill promises made to other persons.
(d). Repay damages done to another through fault.
(e). Inflict punishment upon men who deserve it.

To Grotius, the paramount principle of natural law is the keeping of promises. A promise once given is absolutely binding – *pacta sunt servanda.*

With the harrowing experience of the thirty years war, Grotius evolved a social contract theory to achieve international order and peace which was his main concern. A state, in his view, originated in a contract whereby the people transferred their sovereign power to a ruler, and losing all power to restrain the ruler into the bargain. The ruler is only bound by natural law. He then employed the 'social contact' doctrine internationally to create a basis for legally binding and stable relations among the states on the principles of natural law and consent from natural law determined the principles as to how states should conduct themselves. The idea of consent was utilized to infer rules from the observed practice of states.

3.5.2. Semuel Pufendorf (1632 -1694)

Pufendorf (German Law Professor) was of the view that nature commended self-love to man and that self-love is tempered by man's social "impulse." He then deduced two fundamental principles of natural law from these two sides of human nature:

(a). Man should protect life and limb as far as he can, and to save himself and his property.
(b). Man should not disturb human society i. e. he should not do anything whereby society among men may be less tranquil

The two principles were further integrated to a single fundamental rule formulated as follows: that each should be zealous so as to preserve himself that society among men be not disturbed.

From the second principle mentioned above Pufendorf derived an important legal postulate that let no one so bear himself towards a second person so that the latter can properly complain that his equality of right has been violated in the case, a principle of legal equality.

His own social contract assumes two dimensions. First men agree among themselves to abandon the state of natural liberty and to enter into a permanent community for the purpose of organizing or guaranteeing their mutual safety. A decree is then made as to the form of government whereby the ruler binds himself to take care of the common security and safety while the citizens promise obedience to him and subject their wills to the authority of the ruler in all things that make for the safety of the state. As there is no sanction against the ruler his obligation remains imperfect. However, in extreme case when the prince has become a real enemy of the country and in the face of actual danger the individual or the people may defend their safety against him.

3.5.3. Thomas Hobbes (1588 – 1679)[14]

The life of man, in Hobbes view, in a state of nature's absence of organized government was solitary, poor, nasty, brutish and short. Everybody had a right to all things and profit was the only measure of lawfulness. However owing to man's passion for peace, strong fear of death and the desire for things necessary for commodious living reason suggests to mankind certain articles of peace to be sought whenever it can be found. From this law the following specific precepts were deduced:

(a). Everybody must divest himself of the right he has to do all things by nature.
(b). Every man stands by and performs his covenants.
(c). All men should help and accommodate each other as far as may be done without danger to their persons.

14 Dias, R.W.M., *Jurisprudence* (LexisNexis, 1964) 512.

(d). No man should reproach, revile, or slander another man.

(e). There must be an impartial arbiter in controversies.

(f). Men should not do to others what they would not wish others to do to them.

In order to secure peace and enforce the law of nature it became necessary for men to enter into a compact mutually among themselves whereby everybody agrees to transfer all his power and strength upon one man or an assembly of men on the condition that everybody else does the same. The "Leviathan of mortal God" thus constituted should use the combined power and strength of the citizens for the purpose of promoting the peace, safety and convenience of all. The sovereign imposes his will through the civil law which now becomes his command. There could be no right or wrong, no justice or injustice apart from the command of the sovereign power. The sovereign was subject to no law other than the law of nature and no sanction other than an after-life pain of eternal death should he enact iniquitous or tyrannical laws.

Furthermore, the authority of the church as the interpreter of God's law was vigorously denied. All legal powers became vested in the secular sovereign and this marked the final break-up of the Catholic international order of things. Hence Hobbes' social contract may be described as a charter of complete subjection to an absolute sovereign.

However, there is one situation in which the subjects are absorbed from their duty of loyalty towards their rulers, when the sovereign has lost the power to preserve the peace in society and to protect the safety of the citizens. That is, the individual right to self-preservation remains inviolate. It may be argued that Hobbes is a precursor of modern positivism or analytical jurisprudence. In the assessment of Hobbes' view it is important to remember that he lived through the civil war in England which explains his avowed desire for a strong government.

4. Second Period

The rise of absolute rulers throughout Europe made it evident that a shield of individual liberty against government encroachments was urgently needed. While legal theory favoured security in the first period the emphasis is placed on liberty during this period and evidenced in the views of Locke and Montesquieu.

4.1. John Locke (1632 – 1704)[15]

The reign of the Stuarts in England has revealed the menace the absolute monarch would be to the individual. It was not a matter of mere coincidence that Locke evolved a theory of a social contract to protect him. Unlike Hobbes, Locke presented a picture of the state of nature as one of perfect peace, in which men were in a position to determine their actions and dispose of their person and possession as they saw it. Moreover, it was a state of equality between man and man; no one was subject to the authority or will of another. The state or nature was in turn governed by the law of nature which taught men that all persons being equal and independent, no one ought to harm another in his life, health, liberty or possessions. Everybody had the power to execute the law of nature and punish offences against it with his own hand. Properties (i. e. life, liberty and estate) was however insecure because: (a) there was neither an established law nor an impartial judge; and (b) the natural power to execute natural law was out of proportion with the claim. To remedy this flaw, man entered into the social compact (contract) by which he yielded to the sovereign not all his rights but the power to preserve order and enforce the law of nature. The individual retained the natural rights to life, liberty and estate which were "inalienable right of man". The supreme power, in Locke's view, cannot take away from any man any part of his 'property' without his own consent tacit or express. If it deals arbitrarily and improperly with lives or fortunes of the people, it violates the essential conditions of the social contact and the trust relationship under which it holds its power.

15 Lloyd (n 2) 114-117.

Locke advocates a separation of executive from the legislative power in order to prevent tyranny and arbitrariness. And in the event of the legislative or executive power attempting to make its rule absolute and to enslave or destroy the people, the people could exercise their right of resistance or revolution so that natural law may be re-vindicated.

To Locke, unlimited sovereignty is contrary to natural law. He, therefore, postulates the following basic limitations:

(a). The sovereign may not rule by arbitrary decrees but through known laws administered by known judges.

(b). Sovereign power cannot be justifiably used in arbitrary fashion over the lives and fortunes of people.

(c). The people may not be deprived of their possessions without their consent.

(d). The sovereign may not transfer the power to make law to other person.

It should be added that Locke indeed championed the revolution of 1688–1689 and that his version of the social contract greatly influenced the American Revolution of 1775–1781 as well as the formation of the United States Constitution.

It should be noted, however, that Lockian theory of "consent", tacit and express, without a clear dividing line between them justifies the criticism that Locke leaves us with a hazy notion of who has full right of membership in a society. Moreover, his shift from "contract" to "trust" in defining the status of the sovereigns is somewhat confusing.

4.2. Louis De Montesquieu (1689 – 1755)

Montesquieu postulated that laws are the necessary relations arising from the nature of thing. This 'nature of things' manifests itself partly in universal and partly in variable tendencies and traits of human nature.

According to him, the universal conditions of man's existence in society include-

(a). the desire for peace;
(b). satisfaction of certain primary needs such as food, clothing and shelter;
(c). attraction arising from sexes; and
(d). man's inherent sociability.

Other 'necessary relations' which are relative and contingent depend on such things as geographical (especially climatic) conditions, religious factors and political structure of a particular country.

He shares in common with other classical natural law jurists the view that law is generally based on 'human reason' and that justice precedes positive laws by which they were established. His fame however rests on his political theory of the separation of powers. He was of the view that every man invested with power is apt to abuse it and to carry his authority as far as it will go. To prevent that abuse it is necessary that power should be checked by power. The safest form of government will be constituted where the legislative, executive and judicial powers are separated. They should be so constituted that they hold one another in check. This view greatly influenced the fathers of the American Constitution. It was the combination of Locke's theory of natural law with Montesquieu's doctrine of separation of powers that formed the philosophical basis of the American system of government.

5. Third Period

5.1. Jacques Rousseau (1712–1778)

Rousseau (a Swiss) shares with the classical natural law jurists the belief in the existence of "natural rights" but he seeks the ultimate norm of social life in the supremacy of a sovereign and collective "general will".

By his social contract theory each individual alienates all his natural rights without reservation to the whole community. Yet it appears the individual loses nothing for in Rousseau's view each man in giving himself to all, gives himself to nobody, and as there is no associate over whom he does not acquire the same right as he yields others over him he gains an equivalent for everything he loses and increase of force for the preservation of what he has. What the individual has lost by the surrender of his natural rights, he will regain in the form of civil liberty and in the guaranteed security of his possessions. Rousseau seeks to justify the people's sovereignty on the one hand and the original and inalienable freedom and equality of all men on the other. His work abounds in contradictions that he could be quoted as a champion of inalienable individual rights as well as of absolute supremacy of the community, as a nationalist- or as a cosmopolitan, as a defender of reason or as the apostle of instinct and sentiment, as a democrat or as an autocrat.

6. Summary and Conclusion

In this chapter, it is clear that the basic or primary ideas about the nature of law date back to the history of man or better still, to the history of civilization of man in the Ionian Coast of Cisily in Alexandria and the Ancient Greek. The early philosophy of law, like philosophical speculations in other disciplines, was largely credited to the Ancient Greek thinkers. The chapter also noted that the greatest problem of the ancient Greek city-state was instability. It is against the background of the quest for peace and stability that further fired their aggressive search for the nature and function of law to human existence and the role of law in the society. It is also relevant to keep in view the main concerns about law which was the main reason for categorizing them as Natural Law Theorist as copiously done in the chapter, namely,

(a) the universal and permanent underlying basis of law;
(b) the relationship of law and justice; and
(c) the problem of social stability.

By and large, natural law had been a ready tool in the hands of philosophers in very long periods of human existence, especially in the periods in history as this chapter submits- the Greek Period, the Roman Period, the Medieval Period, the period of Reformation and the Renaissance Period. These periods as noted in this chapter, are the very important periods of the formation of the concept of law in the history of mankind.