ISSN 1119 - 9261

THE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

Vol. 7 No. 2 2003

ARTICLES

Published by the Department of Jurisprudence and International Law
Faculty of Law, University of Ilorin, Ilorin.

PHILOSOPHY OF LAW: THE JURISPRUDENCE OF NATURAL LAW SCHOOL OF THOUGHT IN PERSPECTIVE

K. A. Olatoye*

Introduction

Philosophy of law can be described as the study of meaning and nature of law. It is often used interchangeably with the word "Jurisprudence". The term "Jurisprudence" has been variously defined although no particular definition can be said to have exhaustively captured the true meaning of the concept. The term jurisprudence comes from the Latin word Jurisprudential, meaning a knowledge of law or skill in law. According to professors Lloyd and Freeman:

> Jurisprudence involves the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law.[1]

Salmond sees Jurisprudence as:

> The name given to a certain type of investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems.[2]

In John Austin's view, Jurisprudence is:

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* LL.B (Hons.), LL.M., Solicitor and Advocate of the Supreme Court of Nigeria, Lecturer in the Department of Islamic Law, Faculty of Law, Lagos State University, Nigeria.

[1] M.D.A. Freeman; Lloyd's *Introduction to Jurisprudence* (London: Stevens & Sons Ltd., 5th Edition, 1985) p. 25

[2] P.J. Fitzgerald, *Salmond on Jurisprudence* (London: Sweet and Maxwell 12th Edition, 1966) p.1.

> The science concerned with the expositions of the principles, notions and distinctions which are common to systems of law...[3]

The foregoing definitions are collectively reflective of the general characteristic of philosophy of law or jurisprudence, which is mainly an exploration, or speculation of what the law is or ought to be and what its role should be in society.

From the foregoing, it is deducible that one of the goals of philosophy of law or Jurisprudence is the analysis of some abstract and theoretical ideas about law with a view to discovering certain ultimate truths and principles that are common to human societies which might possibly lead to replacing or reforming those principles or improving upon their functioning.[4] In attaining the foregoing objective, the field of jurisprudence has thrown up several philosophers of law or jurisprudents whose explorative ideas or postulates have eventually culminated in the variegated schools of thought we have in this field of study. These schools of thought *inter-alia*, are: the Natural Law school; the school of Positivism; Sociological school of jurisprudence; school of Analytical Realism; school of Economic Realism; the Historical and Anthropological school of thought.

The Natural Law School is represented by its leading philosophers like Zeno, Socrates, Plato, Aristotle, Ulpian, Cicero, Thomas Aquinas, Hugo Grotius, Thomas Hobbes, John Locke, Jean Jacques Rousseau, Thomas Paine and Fuller. The main postulate of this school is that law is that which "ought to be" (as opposed to that which "is"). They see law as a collection of objective moral principles based on the nature of the universe and discoverable by human reason and serving as a standard to which all laws must conform.

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[3] L. B. Curzon, *Jurisprudence* (Estover, Plymouth, Macdonald & Evans Ltd., 1979) p. 21.

[4] F. Adaramola, *Basic Jurisprudence* (Lagos: Raymond Kunz Communications, 3rd Edition, 2004) p. 2

The school of Positivism has as its leading proponents philosophers like Jeremy Bentham, John Austin, Hans Kelsen, Oliver Crona, Alf Ross, Lundstedt, Hohfeld and H.L.A Hart. The main thrust of the concept of positivism is that laws are commands of human beings and that law as it "is" actually laid down has to be separated from the law as it "ought" to be or from morals. They see other normative laws such as international law or customs as law improperly so-called or a corruption of law.[5]

The leading proponents of the Sociological school of jurisprudence are Heck, Leon Duguit, Gmelin, Kantoro wicz, Eugene Ehrlich and Roscoe pound. They perceive law in any given society as an instrument of social engineering, which must seek to balance the various conflicting interests. Accordingly any law, which is not set out to balance or is incapable of balancing the conflicting interests, is no law. Rudolf Von Jhering, the German Jurist and the "forerunner" of sociological jurisprudence in his concept of "Jurisprudence of Interest" (INTERESSEN JURISPRUDENZ) pontificated that human wants to be satisfied in any society are in three categories namely: Extra-legal wants such as food, air et cetera; mixed legal wants, such as preservation of life, reproduction et cetera; and pure legal wants such as maintenance of army et cetera. Roscoe Pound also of Sociological school, however categorized interests that a law must impartially seek to protect into three namely: public interest such as the interest of the state (Government); individual interest such as the various freedoms to the individuals and the protection of property; and social interests such as the maintenance of peace and order, safety, good health and general security.

Analytical Realism school of jurisprudence was spearheaded by the likes of Olivercrona, Llwellyn, Alf Ross, Vilhelm Lundstedt, Axel Hagerstorm and Wendel Holmes. The approach of this school of thought is establishing a bridge between law and the human being in society. Emphasis is laid on judge made and administrative laws by the American Realists who believe that any law sourced from other sources than this is no law.

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[5] R.W.M. Dias, *Jurisprudence* (London: Butterworth & Co. Ltd., 5th ed. 1985) p. 344.

Economic Realism is the economic espousal of jurisprudence as represented by the postulates of philosophers such as Karl Marx and Engels, Descartes, Holbach, Feurbach Diderot and V.I. Lenin. They see the society as being full of contradictions, i.e. the existence of a thesis in reaction to which an antithesis necessarily arises and the resulting conflict being resolved continually in a synthesis on a higher plane. To them there is history of class struggles through ages from one epoch to another and that hitherto law has been used by the bourgeoisie as an instrument of oppression of the proletariat. The same law will be used as a class weapon by the proletariat for the eventual elimination of the capitalist bourgeoisie being part of the dialectical process by which the working class will eventually establish a classless community after which law will wither away.[6]

Notable amongst the Historical and Anthropological Jurisprudents are Gierke, Hegel, Herder and Von Savigny. Through the prism of Savigny's postulates, one can read the main theme of this school of thought. They analyse law as it is from an historical or anthropological point of view. According to Savigny, a legal system develops in response to the people's national spirit or *Volkgeist*. "Law grows with the growth and strengthens with the strength of the people and finally dies away as the nation loses its nationality".[7] That custom predates legislation and is superior to it, therefore legislation must conform to the popular consciousness (i.e. custom or the *Volksgeist*).

While the foregoing constitute the basic representation of the various schools of jurisprudence it is by no means a detailed analysis of the pontifications of the philosophers amongst whom there are philosophers even of the same school whose postulates differ either slightly or substantially from others of the same school on the same subject and which variations are not herein represented.

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[6] Karl Marx, *Capital*, (Trans. B. Fowkes and D. Fernbach). (Re-printed by permission of Penguin books Ltd and Random House Inc.), 1976). Cf. Adaramola, Op Cit; 327.

[7] Cf. Dias, *Jurisprudence* (London: Butterworth & Co. Ltd., 5th Edition 1985) p. 378.

The present attempt is calculated to have a more detailed analysis of the Natural School of Jurisprudence with a view to laying bare its impact on modern day society.

Natural Law

This concept is otherwise known as *Jus Naturale* in the Latin parlance. The term natural law means either of two things. It means physical or scientific laws. For example, that the sun, moon, and the stars must rise and set is a natural phenomenon; that what ever is thrown up must necessarily come down by the law of gravity is equally a dictate of nature (Natural Law).

Secondly natural law means a normative system of law, which is deemed to lay down general principles of behaviour for the guidance of human beings. It is discoverable by human reason and is believed to be the same for all peoples in all places and at all times in identical situations and circumstances. It possesses the quality of universalism since it is a collection of objective moral principles based on the very nature of the universe. It is in the second sense of its definition that natural law concept is being examined here.

As I mentioned earlier on some notable natural thinkers are Zeno, Socrates, Cicero, Thomas Aquinas etc all these among others did not come at the same time. They came at different periods, some being teachers of some others and some yet being independent thinkers of the same school. Their philosophies at different epochs represent a chronology of Natural Law thinking

The chronology of Natural Law thinking started with the Greek period in the 5th Century B.C with the establishment of the Sophists' school of philosophy under the leadership of Protagoras. Following this closely was the emergence of the stoics' led by Zeno in the 4th century B.C. Socrates, Plato and Aristotle also belong in this school of "Stoics". The Roman period succeeded the stoics providing one of the best examples of the practical application of natural law principles. Ulpian, Gaius and Marcus Tillius Cicero were the leading protagonists of natural law at this period. After the Roman period came the medieval period with the leading natural law

protagonists of the era such as Thomas Hobbes, Hugo Grotius, Thomas Paine, Thomas Aquinas, J.J Rousseau and John Locke.

There is also in the modern times Natural Law thinking engendered by the resurgence of natural law Philosophy in the twentieth century. This modern days natural law thinking is exhibited in the emergence of sub schools of formal idealism, Neo-Thomism and concealed idealism. While the leading proponents of 'formal idealism' are Rudolf Stammler and Del-Vecchio; the protagonists of 'Neothomism' are Jean Dabin, Jacques Maritain, Patrick Delvin, John Finnis and Catherine. Having highlighted the basic natural law thinking epochs from the Greek period to the modern day periods as well as the philosophers thereof, it is pertinent at this stage to give an exposition of the main perceptions of law at these epochs in a chronological manner.

The Chronology of Natural Law Thinking

As posited earlier, the philosophical thoughts of the various natural law school proponents over what the nature and role of law in any given society ought to be, span over different but successive epochs. While the postulates of all the philosophers of different periods hover around the central theme of the natural school of thought, each epoch and or philosophers have peculiar expressions of the concept in a manner reflective of the peculiarities of their periods. However before delving into these there is need to state the main theme of the natural school of thought.

The main postulates of the natural law school of thought is that law in any given society is that which 'ought' to be and not that which 'is'.[8] That the standard by which any law is measured is its moral content. That the right law in any society is natural law i.e. a normative system of law, discoverable by human reason, but is superior to human law as its deemed to lay down general principles of behaviour designed to serve as models to which positive law (human law, state law, other laws) must conform.

[8] This position is opposed to the concept of positivism which deems law as that which 'is" and not any ought proposition.

The Greek period (5th & 4th Century B.C)

This period was essentially jurisprudentially ruled by both the Sophists and the Stoics. The sophists believe that man's life was modelled after the peaceable nature around him but that he had forsaken and refused to follow it. To them, the pattern of nature to be followed by man is set out in normative rules and if man would return to these normative rules namely: That man ought to do justice or that man ought to be good; then he would be able to enjoy a more peaceful existence. The stoics on the other hand posited that physical phenomena were a mere reflection of the superior order which is laid down in heaven and that man ought to study this in order to gain an insight into the ultimate pattern of life. To them natural law connotes those general principles of conduct which man's own reason showed to him to be desirable and which principle is common to the whole of the human race.

The Roman Period

The philosophers at this period saw natural law as "The true law". For example Cicero enunciated that natural law is 'right reason in agreement with nature'.[9] Clearly discernible is the fact that the revolutionary principles that any positive law that contradicted natural law should be disobeyed and destroyed was first laid down. However, similar to the postulates of the Greeks, the Roman Naturalists believe that natural law principles are revealed to man through his reasoning faculty and it's immutable and universal.

The Medieval Period

The natural law postulates of this period was essentially based on semi-theological promises before the secularisation of Natural Law set in between 16th – 18th centuries A. D. The Natural Law philosophy of this period is evidently reflected in the works of Thomas Aquinas,[10] who was described by Finnis as the "paradigm natural law theorist who dominated the period..."[11].

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[9] Marcus Tallius Cicero, *The Republica* (Leob Classical Library, Harvard University Press: William Heinemann) p. 211. Cf. Dias, op. cit, p. 76.

[10] 1224-1274 A.D

[11] John Finnis, *Natural and Natural Rights* (Claredon Press, 1980) Cf. Adaramola Funso, op. cit, p. 22

Aquinas in his work pontificated that there are four kinds of law namely; the eternal law (Lex eternal), the Divine Law (Lex Divina), the Natural Law (Lex Naturalis) and the Human Law or positive law (Lex Humana). According to him, Divine law is the essence of God, the law of God which controls all creation[12] and in his rating its is the highest form of law. Divine Law is the revelations to man through the holy books. Natural law (Lex Naturalis) is normative rules revealed to man through the exercise of his reasons. Human law is man made law. Aquinas saw Human Law as least on the hierarchy of laws and must therefore conform to Natural Law, failure which it becomes invalid. In his words Aquinas posited, "If a human law is at variance in any particular with the natural law, it is no longer legal but rather a corruption of law".[13]

Secularisation of Natural Law (16th-18th Centuries A.D)

The theological perception of Natural law during the medieval period got shifted to a secular perception of the law during the renaissance period. The effect of emergence of absolute governments, Protestantism, nationalism and the revolutions[14] in Europe culminated in the reassessment of Natural law from point of view of secularism.

Natural law secularisation is clearly discernible in the social contract theory attributable to Hugo Grotius, Thomas Hobbes, John Locke and Rousseau. The theory is such that in the state of nature, man lived in anarchy and great insecurity but it later downed on man through the exercise of reason and that the sensible thing for man to do was to enter into society (social contract) thereby limiting his own liberty of action provided that other man did the same.

While the postulates/perceptions of the social contractors about natural law and the secularisation of same are essentially the same,

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[12] In Thomas Aquinas's rating, this is the highest of the hierarchy of laws; Ecclesiastical laws like Islamic law as a derivative of Christian revelation. See Adaramola op. cit. P. 48

[13] Aquinas, *Summa Theologica* Cf M.D.A Freeman, *Lloyds Introduction to Jurisprudence* (London: Sweet & Maxwell, Sixth Edition, 1996) p. 136.

[14] The American Revolution of 1776 and the French Revolution of 1789 both inspired by the natural law ideas of fraternity, liberty and equality.

they differ in some respects. Hugo Grotius stated that natural law principles developed in the human intellect independent of any divine authority and is immutable that it would exist even if there were no God".[15] This he posited in order to make his theory acceptable to all believers and unbelievers alike. To him if natural law (reason) being an attribute of man exists independently of God, it becomes binding on both believers and unbelievers. Hugo Grotius further posited that man having entered into society comes under the sovereign (a ruler) who himself is subject to natural law, if he contravenes it and rules badly, revolt against such ruler is still forbidden except in very rare circumstances.

In Thomas Hobbes view in his book, the leviathan by entering into society, man tried to escape from the state of nature where his life was "Solitary, poor, nasty, brutish and short".[16] He posited that man entered in the following words (covenant) "I authorize and give up my right of governing myself to the ruler on condition that tho give up thy right to him and authorize all his actions in like manner". Hobbes further pontificated that the sovereign (ruler) is responsible to God for whatever he does. Consequently if the sovereign gives a command to kill, it is manifestly repugnant to right of self-preservation and therefore should not be obeyed.

John Locke in his view of natural law was opposed to absolutism in sovereignty. He subjected sovereignty to the will of the governed, as unlimited sovereignty is contrary to natural law. He argued that so long as a government fulfils the purpose of man coming into society, its law must be obeyed, but when it ceases to protect human rights a purpose for which it was formed, or when it starts to encroach on people's rights, its laws would lose their validity and the government could be overthrown.

Jean Jacques Rousseau in his own contribution democratised the concept of social contract by positing that man left the state of nature to form a society but he did not surrender his rights to any single sovereign. His contract was with all other men by which he

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[15] Hugo Grotius; *De Jure Belli ac Pacis* Prolegomena Cf. Dias R.W.M., Jurisprudence, op. cit, p. 80.

[16] Hobbes, *The Leviathan* (1651) Cf, Curzon, op. cit., P. 65

handed over his right to an artificial political and legal person called "community" or the "people" which is sovereign and possesses a will of its own the "General Will". In his pontification, each man in giving himself to all gives himself to nobody. The law and the government are dependent upon the General Will and people could overthrow them at will if they are not serving the ends of liberty and equality.

All the foregoing secularisation views of the social contract theorists have had one influence or the other in the adoption of the English Bill of Right in 1689; the American Declaration of independence in 1776 and the French Declaration of the Right of man in 1789.

Natural Law Thinking in Modern Times

Natural Law thinking re-emerged vigorously in the 20th century[17] just as with much force as it got suppressed and went into oblivion in the 19th Century. The resurgence manifested in different dimensions ranging from Neo-Thomism represented by the views of Jacques Maritain, Catherine, Jean Dabin, John Finnis and Patrick Devlin[18] The thinking was also manifested in the philosophy of formal idealism which leading voices were that of Rudolf Stammler and Del Vecchio.[19] There is also the original position theory represented by the views of John Rawls[20] as well as the concealed idealism represented by Jeremy Betham with his principle of utility and Duguit with his principle of social solidarity.[21]

To the Neo-Thomist,[22] law is an aspect of human affairs and to know the real meaning of law, one has to find out the practical reasonableness of law in relation to the making of decisions and the execution of actions. To him the practical reasons for having law in society is good and proper order in society and in the conduct of

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[17] The period ushered in what I refer to as modern times.
[18] Adaramola , op. cit, p. 46.
[19] Ibid
[20] A Harvard University Professor born in 1921. Cf .M.D.A Freeman, Lloyd's Introduction to Jurisprudence (London: Sweet & Maxwell 7th Edition).
[21] Penner J, Schiff D & Nobles R; Introduction to Jurisprudence and Legal theory, London: Butterworths, 2002, P. 723.
[22] Especially the view of John Finnis drawing his inspiration from the works of Aristotle and Aquinas. See M.D.A. Freeman, op. cit. p. 182.

individuals who compose it.[23] Therefore, the lawyers' major occupation is to ensure that justice and the moral authority of the law are not only attained but also preserved and enhanced.[24]

From political point of view, the Neo-Thomists have impacted greatly on the world as its ideology and theorists have rekindled the spirit of liberty and equality worldwide.[25] It has also impacted greatly on both municipal and international economic systems via its emphasis on the right to private property.[26]

However, the Neo-Thomists philosophy of natural law has been said to comprise conflicting jurisprudential divides.[27] This philosophy for instance gave support to Mussolini of Italy and Adolf Hitler of Germany in their authoritarian rules and also to the attempted Biafran secession in Nigeria in the late 1960s.[28] This same philosophy, which premise is natural law[29], was the spirit behind the overthrow of Ferdinand Marcos, the Dictator of the Philippines. This indicates that if a law or legal system is manifestly unjust as to be humanly intolerable, conscientious citizens could oppose it and in the unavoidable ultimate, revolt and overthrow it but if the attempt to overthrow it fails, the revolutionaries must be prepared to pay the price.[30]

Influence of Natural Law on International Instruments and Municipal Arena

The thinking of Natural Law proponents has engendered the upholding of human rights as universal positive human rights.[31]

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[23] John Finnis, Natural Law & Natural Rights, Oxford, 1980. Cf. J.M. Elegido, Jurisprudence, Ibadan, Spectrum Law Publishing, 1994, P. 38. See also M.D.A. Freeman Op. Cit; P. 171.

[24] Adaramola, F., Op. Cit, p. 49

[25] Patterson. Edwin, Jurisprudence, Men and Ideas of the law, Brooklyn, The foundation press inc. 1953 Pp. 35, 3558

[26] Coleman, J. et. al, The oxford handbook of jurisprudence & hysolophy of law, Newyork, oxford university press, 2002, P. 196-199

[27] Adaramola, F, op. cit. 46-83

[28] Ibid, p. 55

[29] Historically, Natural law is always a reaction against force, whether of tyranny or of anarchy: Ibid.

[30] Adaramola, op. cit., p. 56; also cf Dias, op. cit., p. 72

[31] Ibid.

Universal values are posited to be timeless in scope and transcendental in character.

This has led to the promulgation of international instruments like the international covenant on civil and political rights, 1966; European convention for the protection of Human Rights and Fundamental Freedoms 1950; Covenant for the Enforcement of human rights in Africa; the International Convention on Civil and Political Rights 1966; and the African charter on Human and People's Rights 1981.

United Nations Universal declaration of Human Rights 1948 is another landmark international instrument engendered by the natural law thinking the international instrument has right as to life as one of its cardinal provisions. In its Article 16(3) "everyone has the right to life, liberty and security of the person".[32]

The influence and uses of Natural law thinking transcends international arena, it also cuts across various Municipal levels. For example in England the courts invoke the principles of Natural Justices as the test of validity of legal acts. Also the principles of *Nemo Judex in-causa sua* and *audi alterm patem* are used as checks on administrative acts, which are repugnant to natural justice.[33]

In Nigeria, the courts apart from the use of order of mandamus, certiorari, and prohibition also apply the "repugnancy" doctrine to determine the validity of customary laws. For example in *Edet v Essien*[34], the test was applied to render invalid a custom that deprives a biological father of his child due to irregularity in marriage because such custom was declared by court to be repugnant to natural justice equity and good conscience.

Also in Nigeria, the constitutional provisions on fundamental human rights, the provision on the code of conduct for public officers and the anticorruption law promulgated in the year 2000 are all evidence

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[32] Cf Adaramola op cit., p. 67

[33] Courts also use the orders of mandamus, certiorari and prohibition to control administrative acts.

[34] *Edet v Essien* 1932, II NLR. 47

of the principles and injections of natural law as well as the extent of influence which natural law ideas and principles exert on the Nigerian legal system.

Conclusion

This essay is an exposition of the pontifications of the various schools of thought about law and analysis of the natural law philosophy in particular as the premise around which all theories of law revolve due to the modern day reflection of the theory in practical lives of people and societies.

The deficiencies of natural law or what in some quarters is referred to as its non-empiricism made natural to go into oblivion in the 19th Century. However the resurgence of natural law in the twentieth century in spite of all odds of the compelling logic of science and the force of empiricism is a confirmation that its merits far outweigh its weak points. As Lauterpacht observed:

> ...the part of law of nature in legal history including the history of international law is more enduring and more beneficent to society than positivism which either identifies the law with or considers it the result of the mere will of the state and its agencies hence natural law has acted as a lever of justice.[35]

Though the natural law principle engenders questions such as which law is good and what purpose is it there to achieve for society and when the existing laws become obsolete or inadequate to meet the need of change what steps should be taken. It also enables the society to meet the post crises challenges of reconstruction and progress. According to professor Adaramola,

> "The atrophy suffered by most African legal systems is also traceable to lack of sufficient natural law influence on them. In spite of its obvious deficiencies, natural law provides a check on the abuse of power and liberty and against unjust, corrupt or inhumane system that is not

[35] Hersch Lauterpacht, *Kelsen's Pure Science of Law in Modern Theory of Law*, 1933,p. 76 Cf.Adaramola, op. cit, p. 82

only adaptable, constructive, resilient dynamic and progressive".[36]

To that view I also subscribe.

[36] Adaramola, op. cit p. 82.