

THE LEGAL NATURE OF THE NATURAL LAW

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The strongest objection to the natural law doctrine today is from the legal positivist school of jurisprudence which denies the reality of the natural law and claims to be able to explain law fully without any reference to the natural law. Leading members of this school — Jeremy Bentham, John Austin, Hans Kelsen, and H. L. A. Hart — have attempted to do precisely this. Each has given us what he considered as a full account of law without reference to the natural law. But each of them ended up giving us a distorted and incomplete account of law. Bentham and his disciple Austin tell us that law is essentially a *command* backed by sanction or threat of punishment, which implies that anybody who is able to issue a command and back it up with a threat of punishment or force has made a law. Thus even the command of an armed robber is, going by this account, a law. Hence Hart has rightly pointed out that this command-theory of law fails to distinguish between law and the command of a gunman.¹ Kelsen and Hart tell us that law is essentially a system of rules in which one rule derives its legal validity from another rule within the same legal system. The entire legal system itself derives its validity, according to Kelsen, from what he calls the basic norm or grand norm, which is outside the legal system itself. Thus to account for the validity of a positive legal system Kelsen felt obliged to go beyond the system and resort to a metaphysical concept, the grand norm, which is none other than the natural law introduced in disguise. Thus, while claiming to reject the natural law, Kelsen cleverly reintroduced it in disguise when he found himself unable to account for the validity of the positive legal system without it.

Hart who decided to remain within the positive legal system and not to re-introduce the natural law in disguise as Kelsen did, ended up telling us that the rule of recognition gives validity by the mere fact of its having been accepted by the people and used by court officials. It could be a draconian law, it could be a tyrannical law, so long as the people acquiesce in it and it is used in court by law officials, it is valid! Although legal positivists have different conceptions of law, they all agree, however, in rejecting natural law. "There is no law but positive law," says F. J. Stahl, expressing the legal positivist position.² Some scholars, however, see some value in the natural law doctrine but they see no reason why it should be called law. They contend that it is not law in the true sense of the word, that it is only in an improper or analogical sense that it is called law. Thomas Hobbes³ and John Finnis⁴ belong to this category of philosophers.

Now the question as to whether natural law is law in the true sense of the word raises the question as to what law really is. The question "What is law?" is by no means an easy question. This is the central question of the philosophy of Law, and it is as difficult as the question "What is truth?", or the

question "What is justice?". When Socrates asked his interlocutors "What is justice?" and they replied by telling him about instances of just acts he told them that they had not yet answered his question. Particular instances of just acts do not constitute justice. He was not asking them about particular instances of just acts but about justice. There is more to the concept of justice than we can derive from particular instances of just acts. Why are these instances considered as instances of just acts? What is the absolute and universal standard of justice with reference to which these instances are recognised as instances of just acts? Since particular instances of justice do not constitute justice itself, then justice itself must be distinct from its particular instances which are recognised as just acts. The particular instances of just acts relate to justice itself as concrete expressions of a reality relate to the reality itself. The same applies to law itself and its particular concrete expressions or instantiations.

The question "What is law?" cannot be answered by simply describing some particular legal systems any more than the question "What is truth?" can be answered by simply talking about some true propositions. "Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and even paradoxical ways as the question "What is law?", says Hart⁵; Kant rightly remarks that this question cannot be answered from the empirical viewpoint and that the answer must be sought from a metaphysical, and not empirical perspective. It requires an *a priori*, and not an *a posteriori*, approach. "A purely empirical theory of law, like the wooden head in Phaedrus fable, is a head that may be beautiful, but alas! has no brains."⁶ Freiherr Der Heydte remarks that one way in which this question has been answered by some jurists is by saying that law is an accidental order, determined by the respective historical circumstances and changing conditions — political and economic conditions. According to those who answer the question in this way, law is not something fixed and stable, but a relative phenomenon that is modified by changing conditions. Another way in which other jurists have answered the question is by saying that law rests on an eternal basic norm founded in reason or the divine will. These norms are independent of changing circumstances and of the wishes and views of men. "The history of legal philosophy", Freiherr Der Heydte concludes, "is a seasaw between these two basic views."⁷ Thus, some jurists adopt the *a posteriori*, empirical approach to the study of law while others adopt the *a priori*, metaphysical approach. Those who adopt the *a posteriori*, empirical approach define law in terms of concrete, existing legal systems while those who adopt the *a priori*, metaphysical approach define it in terms of a universal, unchanging, ideal standard of human behaviour.

The Science of law and the Philosophy of Law

In his book, *The Science of Law*, Karl Gareis distinguishes between three schools of jurisprudence, namely, philosophical jurisprudence, historical

"according to the law of nature: not, perhaps, according to that artificial law, which we invent and impose on our fellows."¹⁶ Alcides criticized the laws of the Greek City-States which made some people slaves whereas natural law "has made no man a slave."¹⁷

Plato and Aristotle later built on this solid foundation laid by the Sophists. Although Plato did not use the term "natural law" or the "law of nature", he however, spoke of absolute justice and saw *Reason* as the ideal law of human conduct. Thus, the identification of the natural law as the law of reason dates back to Plato. In the light of Plato's metaphysics the laws of the State can only be imperfect reflections or participations, of the ideal law. Aristotle's distinction between natural justice and legal justice is clearly a distinction between natural law and positive law. "That is naturally just which everywhere has the same force and does not depend on local opinion. . . . Things that are just not by nature but by man's enactment are not everywhere the same, because constitutions themselves are not identical."¹⁸

Natural law occupied a prominent place in the pantheistic metaphysics and cosmopolitan political theory of the Stoics. As they contrasted individual States with the World-State, so did they contrast the laws of individual States with natural law. All men are citizens of only one State, the World-State, and are ruled by only one law, the Law of Nature, which is the Law of Reason, coming from the Logos.

*By its command this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect on the bad. To invalidate this law by human legislation is never morally right. . . and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law. . . .*¹⁹

This passage from Cicero clearly expresses the Stoic doctrine of natural law.

Ulpian's description of natural law as the law "which nature has taught all animals" was unfortunate. "This law", he went on, "is not peculiar to the human race, but belongs to all animals."²⁰ Ulpian was writing in the 3rd century A.D., and his failure to distinguish between law in the descriptive sense and law in the prescriptive sense brought a lot of confusion and distortion into the natural law doctrine. It is only in the descriptive sense of the word law (that is, as the description of the regularity and uniformity of certain events or happenings in nature) that animals can be said to be subject to the natural law. Animals cannot be said to be subject to the natural law in the prescriptive or normative sense of the word law. In this sense of the word, natural law is clearly peculiar to human beings alone. Many prominent writers on natural law, including St. Thomas Aquinas and Montesquieu followed Ulpian in this confusion. In his *Spirit of Laws*, Montesquieu remarked that while other creatures obey the natural law only human beings disobey it. But natural law in the descriptive sense is not something that can

be obeyed or disobeyed since it is simply a description of the regularity with which things uniformly happen in nature. And law in the prescriptive sense can neither be obeyed nor disobeyed by non-rational beings since they cannot be conscious of it, nor is it intended for them. After Aquinas had described natural law as "a rational participation of the eternal law in a rational creature"²¹ which means that it is intended for human beings alone he went on, unfortunately, to quote and follow Ulpian, and later gave us another description of natural law as the law "which nature has taught to all animals, such as sexual intercourse, the education of offspring, and so forth."²² Aquinas then went on to locate the norms of the natural law in natural inclinations (some of which both men and animals have in common, such as the sexual inclination and the inclination to take tender care of offspring). "The order of the precepts of the natural law is according to the order of natural inclinations."²³ But natural law in the prescriptive or normative sense cannot be located in biological nature, in man's or animal's biological inclinations. Unfortunately, the followers of Aquinas, even up to our own day, have generally followed him in this confusion which he inherited from Ulpian. We find it, for example, in Thomas Davitt's *Elements of Law* where he tells us that natural law is "promulgated through" men's "basic drives",²⁴ and in Pizzorni's *Attualita del Diritto Naturale*.²⁵

Other writers who made significant contributions to the natural law doctrine include Francis Suarez (whose natural law doctrine followed that of Aquinas closely), Hugo Grotius (who is credited with having introduced the secular dimension into the doctrine), John Locke and Rousseau. In the 17th and 18th centuries the natural law doctrine became transformed into natural rights doctrine, and it was in this natural rights form that the natural law philosophy opened the minds of people to see the injustice in the laws and structures of the societies of their time. This was what led to the two great revolutions of the 18th century, namely, the American revolution and the French revolution. Lord Bryce remarks that the natural law doctrine was, in the 18th century, converted "into a mass of dynamite which shattered an ancient monarchy and shook the European continent."²⁶ As the primordial law and the ideal law, the natural law is the foundation of all laws and the source from which all laws derive their legal feature as well as their obligatory force. "Any law has the nature of law in so far as it derived from the natural law," says Aquinas.²⁷ Hence if any positive law is in conflict with any of the norms of the natural law, such a law is automatically null and void. That is why unjust and immoral laws are null and void. Cruel, oppressive and tyrannical laws are, for the same reason, null and void. All such laws have no binding force and do not deserve to be obeyed. The natural law thus sets limits to the powers of legislators, limits beyond which they cannot legitimately go in their acts of legislation. If any legislator oversteps these bounds and makes unjust, immoral, cruel, oppressive or tyrannical laws, his action becomes ultra-vires, and his purported "laws" intrinsically null and void.

History has shown that such legislators or rulers are only digging their own graves and precipitating the end of their regimes. For, nobody can defy nature and get away with it: nobody can flout the law of nature and get away with it.

Is natural law really law?

The answer to the question as to whether natural law is really law will become obvious when we ask the pertinent questions: Is natural right really right? Is natural justice really justice? The concepts of right and justice imply the concept of law since there can be neither rights nor justice without law. Rights are always granted by law while justice is always justice according to law. Hence, natural rights (more popularly known as human rights) are rights granted by the natural law, while natural justice is justice according to natural law. Thus, the recognition of the reality of natural rights (human rights) and natural justice implies the recognition of the reality of natural law. Once we acknowledge that natural rights are rights in the true sense of the word, and that natural justice is justice in the true sense of the word, then we also acknowledge, by implication at least, that the natural law is really law in the true sense of the word.

The essential feature of law is *not* command, as the command theorists (Bentham and Austin) would want us to believe. We have already seen the weakness of this theory. Nor is the essential feature of law sanction, as Justice Holmes contended.²⁸ Since sanction is only an appendage attached to law in order to encourage its observance and discourage its violation, it cannot be the essential feature of law. Sanction is stipulated by law itself for its own protection. How then can it be its essential feature? Nor does the essential feature of law consist in its being a system of rules, as Hans Kelsen and H. L. A. Hart would have us believe. R. M. Dworkin has rightly pointed out the weakness of this theory.²⁹ There is more to law than the legal rules in a legal system. There are also principles, which are in fact principles of the natural law to which Judges often resort in hard cases. In fact, in cases where the application of a legal rule would conflict with any natural law principle (a principle of natural justice for example) Judges generally set aside the legal rule and judge the case in accordance with the principle of the natural law (the principle of natural justice). This was what happened in the case of *Riggs versus Palmer* decided in New York in 1889, the example given by R. M. Dworkin.³⁰

The essential feature of law is *obligation*. This is what distinguishes the command of a law from the command of an armed robber, and this was what the command theorists of law failed to see. While a legal command by its very nature entails obligation, the command of an armed robber lacks any obligation. Law, by its very nature, entails obligation, which it imposes on those subject to it. This obligation, which is of a moral nature, accounts for the sanctity of law and the reverence it deserves. Hence, Lon L. Fuller is quite

right in contending against the legal positivists that law is inseparable from morality because it has its own inner morality as well as moral conditions which it has to fulfill in order to be valid.³¹ To separate law from morality as the legal positivists (especially Austin, Holmes, and Hart) advocates is to strip law naked and deprive it of its obligatory feature as well as its sacred feature, both of which it derives from the natural law. Stripped of its moral, obligatory, and sacred features, law ceases automatically to be law and becomes naked command backed by brute force like the command of an armed robber. Austin was, therefore, quite right in saying that if justice is removed from a kingdom, it automatically ceases to be a kingdom and becomes a gang of criminals on a large scale. "Remove justice, and what are kingdoms but gangs of criminals on a large scale?"³² Thus the obligatory feature of law, which, as I have said, constitutes the essential feature of law, derives from natural law and it is a participation as well as a reflection of the obligation of the natural law which comes to man through his moral conscience.

*In the depths of his conscience man detects a law which he does not impose upon himself, but which holds him to obedience, always summoning him to love good and avoid evil.*³³

If therefore the essential feature of law which gives it its sacred character comes from the natural law, it follows, obviously, that the natural law itself is really law in the true sense of the word.

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NIGERIA, AFRICAN SECURITY AND THE NUCLEAR OPTION: A RESEARCH NOTE

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The nuclear option controversy which surfaced in the Nigerian policy, media and academic circles in the late-seventies and eighties, was again a clear indication of the importance increasingly accorded the defence component in Nigeria's foreign policy planning.¹ This is all the more so in the orbit of nuclear diplomacy given Nigeria's earlier commitment in the nineteen sixties and early seventies to the declaration of Africa a "nuclear weapon – free zone" (no nuclear tests, bases, storage or transport) by the United Nations General Assembly (1965 and 1974).²

The complex socio-economic, bureaucratic and intellectual constituencies which underscore the current *volte face* in terms of changing perceptions and outlook for nuclear policy decision making of the 1980s and 1990s has been examined elsewhere.³ The paper focuses on the politico-strategic context of the policy debate concerning the acquisition by Nigeria of a viable intermediate retaliatory nuclear capacity: Political/military incentives, and infrastructural feasibility and prospects.

Context: Incentives for Acquisition

The acquisition of nuclear technology by most Third World states is often shrouded in secrecy and deception for reason bordering on international backlash. So is their *actual* as different from *declared* motivations and policy objectives. As Andrew Pierre aptly notes:

*the nuclear decision is likely to be made in many countries for reasons quite separate from a rational calculation of security requirements. These include factors of prestige, the desire to achieve regional dominance or to catch up with another state in the area, the interests of indigenous scientific and bureaucratic communities, or the pressures of domestic politics in which nuclear issues . . . can often become key ingredients of the national debate.*⁴

While motives undeniably vary, a distinction need be made at both conceptual and practical levels between the policy underpinnings of the 'atom for peace' and 'atom for war' programmes. While *economic motivation* might, for instance, be meaningful in the former context, it is essentially superfluous in the latter. In other words, within the context of 'peaceful uses of nuclear power', economic factors could, and have been, proffered as persuasive reasons. These cease to have any explanatory bearing once a definite intent has been made toward "weaponisation". At this level, the question becomes preeminently strategic: what policy objectives could the possession of a nuclear device by a particular country useful serve? This is the primary