



Natural Law and Positive Law: Knowledge and Understanding Questions

What is law? This question has been central to the study and philosophical debates of jurisprudence. This question has resulted in the development of two basic legal philosophies: natural law, and positive law. **Natural Law** is an ideal, enduring, and universal moral order existing independently of human wills, habits, or political decisions. **Positive Law** refers to laws based on human authority, such as political leaders or lawmakers.

ORIGINS OF NATURAL LAW

The earliest civilizations drew little distinction between the forces responsible for the physical properties of the natural world and the forces regulating human behaviour. In ancient Babylonian and Egyptian civilizations, mysticism and supernatural spirits were believed to be directly accountable for everything in the universe, including human activity manipulated “by divine will.” To the gods, the earth was a puppet theatre; its human inhabitants, the puppets.

Just as these gods were thought to control the rising and setting of the sun, they were also believed capable of toying with the outcomes of battles and, if provoked, of venting their divine vengeance upon rulers and their empires. In the same manner, these gods directed the formation of laws. Therefore, law and physical nature were inseparable. All human decisions were judged by the gods. If the decision pleased the gods, one could expect a reward. If, however, the decision displeased the gods, one could expect dire consequences. Although conceptions associated with natural law have varied throughout history, a common core of natural law theory can be identified.

Natural law supporters assume that it is human nature to be good, that all people strive to be good, and that goodness is essential to our well-being. Natural law is assumed to be universal, in that it applies to all humankind. It also imposes a moral responsibility on a society to give each person his or her due, regardless of the laws in place.

Natural Law:

Ancient Civilizations:

1. What was the Babylonian and Egyptian understanding of natural law?
2. What arguments would you make in support of natural law? What arguments would you make against natural law?

ORIGINS OF POSITIVE LAW

The theory of positive law is derived from the belief that law is simply what the political authority or lawmaker commands. Justice, then, means conformity to the law. Instead of law and justice being separate, as the naturalists propose, supporters of positive law argue that they are identical. Therefore, the condition that human laws must conform to certain standards of morality and justice in order to be valid is abandoned. The only real morality is in human obedience to civil law.

The theory of positive law grew out of a reaction to the power and domination of the Roman Catholic Church during the Reformation. Under Henry VIII, the English Parliament passed a number of statutes between 1529 and 1536 designed to strip the pope of his authority and spiritual jurisdiction within England. These laws included the confiscation of church properties and recognition of the Crown as the head of both state and church in England. The belief in the supremacy of the Crown (and, later, Parliament) and the separation of church and state gained acceptance. Secular authorities became empowered to enact laws governing spiritual matters and to impose constitutional restraints on lawmaking power. Previously, these restraints had relied on natural law. Unlike natural law, which was based on divine revelation and human reason, positive law reflected the will of the Crown and, later, Parliament. Positive law could be based on the principles of natural law, but did not have to be.

Some positive law supporters argued that law is coercive, or forceful, in order to preserve order. Hobbes, for example, argued that obedience to the existing law was essential, even if it meant that justice was not done.

As in natural law theory, philosophers played an important role in fully developing the theory of positive law. Prominent among them were Thomas Hobbes and John Austin.

Positive Law:

1. What is the basic understanding or theory of positive law?
2. What is the origin of positive law and how does this differ from natural law?