

Jurisprudential Doctrines on the Nature of Law and Impact on Contemporary Global Legal Systems

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Abstract

Law, like every other social concept, is not amenable to a straight-jacketed definition. This is because the concept has been defined by philosophers, jurists, scholars and commentators from variegated sets of backgrounds which reflect in the positions canvassed and claims made about law. It is not in dispute, and there seems to be an unusual unanimity among scholars, that law is a tool for the maintenance of law and order, peace and stability, as well as the regulation of the behavior and activities of human beings in the society. However, the controversy surrounding the meaning of law is one that has raged on from antiquity and even till today, the argument rages on. In the course of intellectual efforts to define law, several viewpoints have emerged. These viewpoints are what are known as the theories of law or schools of jurisprudence. Among these, natural law, legal positivism, realist theory, pure theory, sociological theory, historical theory and the economic law theory are the most prominent. The present paper seeks to expound the various jurisprudential doctrines or schools on what law truly is. In doing this, the paper presents the basic arguments or claims made by each school of jurisprudence regarding the notion of law, their major strengths and contributions to the Nigerian legal system and those of the contemporary world, as well as the major weak points of the theories. The paper argues that no one theory is self-sufficient; no single theory has been able to offer a satisfactory explication of the concept of law free from objections. There is no legal system that can survive by complete reliance on the views of a particular theory. It concludes that each theory has something to contribute to the development of the legal system and that the complete picture of law can only be achieved when the views, strengths and weaknesses of all the schools of jurisprudence are synthesized.

Keywords: Jurisprudential, Doctrines, Nature, Law, Impact, Contemporary, Global Legal Systems.

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1. Introduction

Law is a necessity in every human society. Wherever human beings congregate as a society, there must of necessity be the need for a system of regulating conduct or behaviour if such society will not relapse into the metaphorical state of nature where Hobbes described life as short, nasty, solitary and brutish. Law is the instrument for the stability of the human institution. Soyinka asserts that the need for some form of orderliness, stability and peace in nature transcends the human family or circle.¹ According to the erudite social and political commentator, even the lower animals, the so-called brutes, have some rules to live with.² Thus, there is some kind of system or codes of cohabitation that regulate the conduct and relations between individuals and groups within the communities of bees, ants, geese or fishes.³ This underscores the need and absolute inevitability of law in the ordering of human relations, or to the survival of any animal species, including man.

Law is the cement, the brick or the mortar that holds society together. Remove law from the society of humans and it will slide into anarchy and into extinction. Ordinarily, man may not need law if he could exist alone. But it is not in the nature of man to stay aloof. Man is not only a political animal as theorised by Aristotle. Man is also a social animal and his desire for law stems from his gregarious nature. According to Aristotle, only a beast or a god could live outside a political community and free from the protective covering of government.⁴ Essentially, man was created to congregate with his kind, which throws up the potential for friction, conflicting interests and conflicts. These conflicts need to be resolved for the stability of the human society.

Law functions as an instrument for the balancing of conflicting interests in the society, for distributing rights, privileges and obligations and duties. It is the instrument for achieving social cohesion and engineering in the society. Plato argued that law is not needed in the human society.⁵ His reasons are that laws can never issue an injunction binding on every person which really embodies what is best for each person. He argues that law lacks the pinpoint precision and accuracy to correctly prescribe what is good and right for each community of human beings at any one time.⁶ This, according to Plato, is due to the differences in human personality, preferences, activities and the restless inconstancy of all human affairs which combine to deprive law of the immanent ability

¹ W Soyinka, 'Constitution and Continuity' in *Path to People's Constitution* (Lagos: Committee for the Defence of Human Rights 2000) 13.

² W Soyinka (n 1)13.

³ *Ibid.*

⁴ Aristotle, *Politics* (B Jowett(TRAN), New York: Random House 1943) 54.

⁵ O N Ogbu *Modern Nigerian Legal System* (2nd edn, Enugu: Cidjap Press 2009) 13.

⁶ *Ibid.*

to issue unqualified rules holding good on all issues at all time.¹

He, therefore, posited that the human society will be well governed by a philosopher-king rather than law. His idea of a philosopher-king is a ruler whose knowledge is similar to that of the gods as to be capable of knowing what is good for each man. On the question, how do we purge such philosopher-king of the imperfections of the human nature as to get such perfect creation among human beings devoid of human idiosyncrasies, tendencies, prejudices, greed and the other human frailties, Plato believes that such a ruler is attainable through a system of education that will not only produce adequate rulers but will also serve to condition the rest of the human society into a state of obedience.²

Aristotle, a student of Plato, however, rejected the notion that laws are unnecessary in the human society and that entrusting the determination of what is good for the society to the discretion of a particular ruler was enough.³ Aristotle argued that the rule of law is preferable to the rule of any individual, no matter how good or perfect or well-intentioned. His argument is anchored on the view that perfection is far from the habitation of mortals. He believes that it is only law that is free from all human passions, since law is the pure voice of God and reason.⁴ The inevitability of law as the only objective criteria or standard for regulating human conduct dawned on Plato in his later work. After experimenting with the impracticality of his concept of philosopher-king in the city of Syracuse, Plato asserts that “without laws man differs not at all from the most savage beasts.”⁵

2. What then Is Law?

Law has come to be accepted as the main desideratum for harmonious co-existence, healthy human relationship and orderly conduct of human affairs in any society. No one can seriously dispute the ability of the law to regulate human activities, conducts and relationships. However, the true character or underlying basis or meaning of law is still open to definition and far from being settled. As Ladan puts it, “the more general question of legal theory... invariably raises two basic questions, namely:

- (a) What is the permanent underlying basis of law? and
- (b) What is its relationship to justice?”⁶

The questions: What is law? What is the underlying basis of law? What is the relationship between law and morality, what is the relationship between law and justice? Who is the law giver? What makes law tick? And such other questions, have exercised the intellectual effort of philosophers, jurists and commentators for centuries beginning with the natural law theorists. The variegated backgrounds of the theorists seem to add to fillip to the conflict in approaches and precepts. Thus, from time immemorial, mankind has been in search of answers to the two basic postulations covering what law is and its relationship with justice. It is the intellectual enterprise dedicated towards proffering answers to the above postulations that have birthed what is commonly referred to as schools of legal theory or jurisprudence or theories of law. The next section presents the salient and condensed views of some popular schools of jurisprudence, outlining their strengths and weaknesses as well as their contemporary relevance in today’s Nigeria and the global community.

3. Jurisprudential Doctrines on the Nature of Law

Several theories have emerged in an attempt to proffer answers to the question, what is law? The major theories are natural law, legal positivism, pure theory, legal realism, sociological theory, historical theory and economic theory. In this section, it is proposed to discuss their major tenets or arguments, strengths and major criticisms or weaknesses.

3.1 Natural Law Theory

This school of jurisprudence believes in the existence of moral order in the universe which is discoverable by the application of the human faculty of reason.⁷ It holds the view that there is a law of nature that dictates or sets a standard or moral bar for how all things in the universe, man inclusive, ought to behave.⁸ Thus, according to the natural law theorists, law is derived from nature for it is in nature to order the behaviour of humans.⁹

The natural law theory seeks to explain what the law is by reference to certain first principles of nature. The theory believes that God endowed man at creation with sufficient rationality which man is capable of discovering for himself if he applies his reason. The theory believes that these principles or reason can guide man’s actions and his relations with his fellow men. For instance, these principles can tell man what is right and what is bad.

¹ O N Ogbu (n 5).

² *Ibid.*

³ H W C Davis (ed), *Politics II* 16 (B Jowett (tran), 1916) 139.

⁴ E Barker, *The Political Thought of Plato and Aristotle* (London: 1906) 5.

⁵ G H Sabine, *A History of Political Theory* (New York: Dryden Press 1973) 78.

⁶ M T Ladan, *Introduction to Jurisprudence: Classical and Islamic* (Iagos: Malthouse Press Limited 2010) 41.

⁷ M D A Freeman, *Lloyd’s Introduction to Jurisprudence* (8th edn, London: Thomson Reuters 2008) 84.

⁸ J M Elegido, *Jurisprudence* (Ibadan: Spectrum Books Limited 1994) 20.

⁹ M D A Freeman (n 13).

According to the adherents, some things are objectively right while some other things are objectively wrong. They believe that these principles exist in nature and have universal application. Thus, what is bad is capable of being discovered by the conscience across cultural, linguistic, racial and geographical divides. This theory proceeds on the belief that even things which are not man-made (for example, plants, rocks, planets, and people) have purposes or functions, and the “good” for anything is the realisation of its purpose or function. It also believes that the good for all human beings is happiness, the living of a flourishing life. Happiness or flourishing life consists in the fulfilment of our distinctive nature, that is, what we by nature do best. This involves the development and exercise of our capacities for rationality, abstract knowledge, deliberative choice, imagination, friendship, social cooperation based on a sense of justice, and so on. This theory holds the view that moral virtues (for instance courage, justice, benevolence, temperance) are character traits that help us fulfil our true nature. The life of the heroin addict or of the carnal hedonist is not a good one, because it is inconsistent with our natural function.

Natural law theory believes that legal systems have a function—to secure justice. Adherents of the theory contend that grossly unjust laws (for instance, laws which provide that “White people may own Black people as slaves” or that “women may not own property or vote”) are not really laws at all, but a perversion of law or mere violence. As St. Augustine puts it, *lex injustia non est lex*. To St. Thomas Aquinas, positive law has as its purpose the common good of the community. However, Aquinas opined that any positive law which conflicts with or is inconsistent with either natural law or divine law is not really law at all. Hence, not only is there no moral obligation to obey it; there is also no legal obligation to obey it either.

For his part, Lon Fuller argued that there is some necessary overlap between legality and justice, because it is impossible to have a legal system without fidelity to the rule of law and formal justice. But Fuller does not go as far as Augustine or Aquinas, because he admits that a society can have a genuine legal system that satisfies the demands of formal justice, yet still have particular laws that are unjust. In such a society, judges are independent of the other branches of government and decide cases on their merits.

3.1.1 Contributions of the Natural Law Theory

In terms of contributions to law and to the legal systems of the world, Dias argues that no other firmament of legal or political theory is so bejeweled with stars as that of natural law, which scintillates with contributions from ages.¹ Thus, one of the contributions of natural law theory is the insistence that law must serve the ends of justice and humanity and not the arbitrary whim of the ruler as theorised by the legal positivists.² In this way, natural law has had and continues to have abiding influence on positive law. Natural law school of jurisprudence rejects as law any rule that is devoid of justice. It was thus the natural law theory that invented and developed the doctrines of equity to water down the harshness of common law doctrines.

Take the doctrine or principle of trust as an instance of the interventions of natural law in moulding justice into positive law. Positive law (that is, judge-made law) lays down the rules for the operation of the trust arrangement. Under the common law, the beneficiaries of trust cannot enforce a right under the trust since they do not have legal rights but only equitable rights. The trustee could use the trust property in a manner inconsistent with the trust arrangement but the common law did not recognise the right of the *cestui que* trust (that is, beneficiary of the trust) to sue to enforce his rights. This is a classic example of law without justice. But natural law, putting on the garb of equity came to the rescue and insisted that the law should strive to do justice. Equity recognised the right of the *cestui que* trust and provided avenue by which he can enforce his rights under a trust. For instance, equity provided the remedies of account, tracing as well as the removal of the trustee. With these weapons at the disposal of the *cestui que* trust, the trustee could no longer be a God unto himself since he could in law be held to account not only for the trust property entrusted into his care but also for the profits that could have accrued to the trust estate had the trustee acted diligently and prudently.

Another major contribution of the natural law theory to jurisprudence is the evolution and development of the concept of human rights. Natural law is the foundation of fundamental liberties.³ Flowing from natural law, nature ascribes to each individual a special status much higher than those of lower animals which accords human beings or members of the human family dignity and certain fundamental freedoms. These rights are universal in nature and apply to all members of the human species irrespective of race, colour, gender, class, nationality, religion, age, employment status, political orientation, sexual orientation, disability status and so forth.⁴ They are rights which are so fundamental to the existence of life that their deprivation or violation makes life illusory or non-existent.⁵ Thus, human rights are rights to certain claims and freedoms to which every member of the human race is entitled.⁶

¹ R W M Dias, *Jurisprudence* (5th edn, London: Butterworths 1985) 471.

² O N Ogbu (n 5) 13.

³ O N Ogbu (n 5).

⁴ J Donnelly, *Universal Rights in Theory and Practice* (2nd edn, Cornell University Press, New York 2003) 10.

⁵ *Ibid.*

⁶ *Ibid.*

These rights are not formulated by the state or government. These rights and freedoms predate any civil government and authority. Their paternity is not traceable to positive law but to the law of nature. It is thus in the nature of human beings to enjoy the fundamental freedoms and guarantees now articulated in international bill of rights and in national constitutions. Fundamental rights or human rights constitute a moral bar or limitation on how much power government is allowed to wield. The basic essence of government therefore is to protect and safeguard these rights.¹ The Supreme Court of Nigeria conceded to this position that much in *Ransome Kuti v Attorney-General of the Federation*² when Kayode Eso, JSC stated that human right “is a right which stands above the ordinary laws of the land and is antecedent to the political society itself. It is a primary condition for civilized existence”

Furthermore, natural law is responsible for the development of international law (*jus gentium*). Until recently, the basic principles of international law (otherwise referred to as customary international law) have been largely influenced by natural law thinking. Hugo Grotius and other scholars have argued extensively for the application of precepts or principles discoverable in nature in the ordering of the relations among nations. Thus, the law of the sea, the laws and customs of war, the law of consular and diplomatic relations, freedoms of the sea and many other aspects of customary international law sprang from the bowels of natural law.

3.1.2 Weaknesses of Natural Law Theory

Despite the contributions of natural law, it has been visited with scathing criticisms and shows a lot of weaknesses. In the first place, natural law does not believe that a piece of rule without moral content can be law properly so called. In other words, it views law and morality as Siamese twins which cannot be separated one from the other. To this argument, others have countered that though law often satisfies certain demands of morality, yet morality is not a prerequisite for the validity of the law. The law is valid even if it does not serve the end of morality. This means that there are times law may deviate from morality. For instance, there are quite a number of laws in most countries of the world that permit the doing of acts that may be considered to be against morality. Such acts include homosexual relationships, such as lesbianism, civil unions and same sex marriages. Natural law theorists will argue that these laws which decriminalise homosexual acts, such as the United Kingdom Sexual Offences Act³ are not valid because they lack moral content. But positivists are quick to point out that the validity of the law lies not in its moral content but in the source or origin of the law. That means, the law is valid because it emanates from the lawgiver – the sovereign authority to whom the people are in perpetual and unquestionable obedience.

In addition, it has been criticised on the ground that natural law is value-laden, imprecise and inconsistent. Thus, if law must conform to moral rules, law will be static and will cease to live up to its obligation as an instrument of social engineering – a tool of social change in human behaviour. This criticism is premised on the ground that moral rules rarely change – are always static and do not yield easily to the changing realities of the human society. As such, if law is to fulfill its role as an instrument of change, it must not be tied to the apron string of morality. The exigencies of modern welfarist states or societies require proactive and reactionary approach. The positivists have argued that the search for the validity of law outside of the law itself is not a scientific inquiry. The positivists argue that it is not possible for the human mind to go beyond man’s empirical experience to discover an absolute norm or an ideal law which lies beyond. There is no external standard to which law must conform to be valid.

Another criticism leveled against the natural law theory is that it denies the preeminent position of sanctions in the validity of law. The natural law theorists believe that the human reason or the principles of nature as discoverable by reason are enough to mould the character and conduct of man. The theory believes that sanction or punishment is not needed for the validity of the law. To this position, the realists and positivists have countered that a law devoid of sanction is nothing more than a piece of morality. According to Oliver Wendell Holmes, to say that a person has a legal duty to do anything means to predict that if he fails to do it, he will be made to suffer in this or that way by judgment of the court.⁴

It cannot be seriously disputed that sanction is necessary to give the law a biting teeth. It is true that some cases arise where obedience to the law is not based on the sanction attached to it or the fear of punishment. Some laws are obeyed even if no punishment is attached to disobedience. However, experience in contemporary human society shows that where sanctions are not applied to law, chances of the law falling into disrepute are certain. For instance, it is better to imagine what would have become of our society if the laws against terrorism, kidnapping, genocide, war crimes, crimes against humanity, crimes of aggression, economic and financial crimes, money laundering, corrupt practices, murder, armed robbery, cultism and many other revenue crimes such as failure to remit taxes and other revenues to the government, were not visited with sanctions but left to be obeyed based on each individual’s reasoning. Clearly, that would have marked the beginning of the end for the human society.

The criticisms of the natural law theory resulted in the emergence of another school of jurisprudence known

¹ J Donnelly (n 19) 4.

² (1985) 8 NWLR (Pt) 623.

³ Sexual Offences Act 1967 and Sexual Offences Act 2003.

⁴ O W Holmes, ‘The Path of the Law’ (10) (8) *Harvard Law Review* 459.

as the positive law theory.

3.2 Positive Law Theory

The positive law school of jurisprudence emerged in direct opposition to the views expressed by the natural law school. Some of the most influential defenders of legal positivism are the 19th century philosophers, John Austin and Jeremy Bentham, and the 20th century legal philosopher H.L.A. Hart. This theory holds the view that whether a certain rule is a law, creating legal obligations to comply with it all depends on its source of enactment. The adherents argue that the only valid laws are rules that issue from persons or authorities which are in the habit of securing unquestionable obedience from their subjects.¹

They contend that in every system, there are legally recognised law-making authorities (for instance, Kings or Parliaments). Laws are rules made by the sovereign authority in accordance with certain procedures which are obeyed and enforced by the society. The positive law theory rejects the notion that human conduct can be governed by natural law or elementary principles of nature. They equally reject the notion that human conscience or reason can lay down laws for the regulation of human conduct. Thus, positivists argue that only man-made law can be used to guide or order the lives, transactions and aspirations of man.²

According to the positive law theory, a rule can be a genuine, valid law even though it is grossly unjust. According to H.L.A. Hart, a contemporary legal positivist, the essence of legal positivism is the separation thesis. Separation thesis postulates that having a legal right to do x does not entail having a moral right to do it, and vice versa. Thus, having a legal justification to do something does not entail having a moral justification to do it and vice versa.³

John Austin defines law as a “rule laid down for the guidance of an intelligent being by an intelligent being having power over him.”⁴ This view of law presupposes two kinds of law: positive law (rules commanded by political superiors to their inferiors) and divine law (rules that God commands all human beings to follow). Austin believes that all law are commands. Therefore, Austin defines law as an expression of a wish by someone who has the willingness and ability to enforce compliance. Austin’s notion of law can be phrased as: “If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command.”

Unlike Aquinas, Austin does not distinguish between divine law and natural law. Austin assumes that God’s commands to us are the true morality. Austin distinguishes divine law (that is to say, the true morality) from “positive morality” (that is, beliefs about what is right or wrong, just or unjust) that are held by the majority of people in some society. The positive morality of our society is correct in so far as it coincides with divine law and incorrect in so far as it deviates from it. It is worth noting that Austin had an unorthodox view of the content of divine law. Austin believed that God commands us to be utility maximisers, thereby making utilitarianism the true morality.

The positivist theory of law holds that positive laws are commanded by political superiors. Austin calls these superiors the ‘sovereign.’ Accordingly, Austin defines ‘sovereign’ as the person or persons who are not in the habit of obeying anyone else, and whom everyone else is in the habit of obeying. Positive laws, therefore, are general commands by people who themselves are not bound by them, and who can enforce obedience from everyone else. The idea that the ‘sovereign’ is above the law is one that Austin shares with the 17th century political philosopher, Thomas Hobbes.

The positivist law theory has, more than any other theory, had a tremendous impact on the Nigerian legal system. The positivists claim that law is a command issued from a superior to his subjects.

This theory claims that law is characteristically laid down posited or created by an act of man for the governance of society.⁵ This school rejects the notion that law is discoverable from nature. It believes in the existence of laws created or enacted by an act of human beings in a society. This law-making authority in the human society provides the sole source of validity to the law made and not any external moral factor or content.⁶ It believes that law is a command issued by political superior to members of the society who are considered as political inferiors. The superior is a sovereign – a person or determinate group of persons who are in the habit of securing unquestionable obedience from all the members of the public.⁷

The sovereign himself is not subject to any other authority. He is law unto himself. He does not obey any other person or authority.⁸ The authority of the sovereign is undivided, illimitable and unquestionable.⁹ The

¹ J Austin, *The Province of Jurisprudence Determined* (1832) in J M Elegido, *Jurisprudence* (Spectrum Books Limited 1994) 51.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ R W M Dias, *Jurisprudence* (5th edn, London: Stevens & Sons 1985) 331-358.

⁶ M D A Freeman (n 13) 251.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, 252.

positivists see law as a command or a species of command. It is a command because it attracts punishment or sanction to non-observance.¹ It does not merely express the wish of the lawgiver. Failure to obey the command or wishes of the sovereign attracts consequences which could be imprisonment, fine, cost, penalty, forfeiture, loss of rights and other unpleasant results. This is a radical departure from the views held by the natural law theorists who believe that law does not require sanction to be law.

The positive law theory also believes in the internal validity of the law without its subjection to external criterion of morality for its validity.² Put differently, the adherents of this school of jurisprudence hold the view that law and morality belong to two separate and irreconcilable realms. Thus, law is law and morality is morality.³ Law is 'what it is' and not 'what it ought to be'. The law is as posited (that is enacted or promulgated) by the authority having the power to give laws. They claim that law and morality are two rivers that may flow in same direction (for instance, both seek to regulate conduct, human behaviour and to attain peace and stability in the human society) but do not always meet or mix (that is, they may disagree on the parameters of achieving their purpose).

Though this conception of law as a command has been attacked as misleading in the academic circles, and it is not possible to locate the 'sovereign' with the characteristics attributed to him by Austin, it is a fact that every society now have formal systems of law-making. In Nigeria, for instance, the National assembly has the constitutional burden for making laws for the peace, order and good government of the Federal Republic of Nigeria. The 1999 Constitution also assigns law-making responsibilities and powers to the House of Assembly of the various States in Nigeria with respect to each State.

3.2.1 Contributions of the Positive Law Theory

Legal positivism has made several contributions to the understanding of law in the world today. Its indelible marks can be seen in the legal landscape of every state in the world. The idea of law as expounded by the positivists is consistent and gives a clear-cut and simple test of distilling the meaning of law. This is because it sheds law of all the metaphysical elements woven into it by the natural law theorists. It is this theory, more than anything else that shaped the current dominance of the authorities of the state over the church. In the middle ages, there was tension between the state and the church over which authority was superior. By Austin's command, the political authority of the state over all other bodies or authorities within the state was firmly established. Therefore, only the state in contemporary legal systems and global jurisprudence is the unit of authority. Only the state can issue commands (laws) which every member of the society or state are required to obey. Disobedience to the law of a state attracts unpleasant consequences. Thus, in this way, legal positivism has solved once and for all the problem of inconsistency and instability which competition for authority within a state would have caused. Now we know the source of our laws. The law is consistent and devoid of external metaphysical elements such as the requirement that it must comply with the dictates of morality to pass as law. Therefore, if we are confronted with the question of how we test the validity of a piece of law, our recourse will be to the fact that it was issued by the lawgiver – the sovereign authority of the state, and not by reference to its moral content.

Thus, it showcases that law is valid whether or not it conforms to the notions of morality. This explains why in some countries, same sex marriage institutions are recognised and legalised even if such laws may offend the moral sensibilities of some members of the public. The courts are bound to apply them as law irrespective of their moral inclinations. The same rule applies to the abortion laws of most countries in Europe, the United States, Latin America and a few African States. These laws permit abortion on demand (that is, for any reason at all). This is despite calls from anti-abortionist movements for the restriction of abortion to only cases where the life of the mother or pregnant woman is threatened or imperiled based on the ground that permitting the indiscriminate killing of an unborn child or foetus offends the moral code against unlawful taking of life.

The positivists have also had profound influence on the legal systems of the world. In Nigeria, for instance, the need for certainty, objectivity and consistency in the law has led to the enactment of quite an uncountable number of laws to govern various aspects of human life, from private relationships, through public relationships and to international relationships. In Nigeria, we now have laws regulating contract, land, marriage, businesses, consumer relationships or protection, the environment, defence, security, law and order and internal security, corruption, cybercrime, money laundering, civil and criminal litigations, oil and gas development, local content, investment promotions, labour relations, fiscal and monetary regimes, banking, communications, drugs and narcotics, elections, non-profit organisations, and so forth. In fact, it can be asserted that every facet of human life is pervaded by positive law. At the global level, uncountable numbers of treaties and declarations have also been adopted as positive law. Even though there is no police or central legislature or executive at the global level that is meant to enforce international law precepts and obligations as would a national government, international law still has its own way of applying sanctions.

¹ *Ibid.*

² O N Ogbu (n 5) 18.

³ J M Elegido (n 14) 52.

3.2.2 Weaknesses of the Positive Law Theory

Despite the attractions of the positive law theory and its influence on contemporary legal systems, the theory has been criticised for some of its tenets. In the first place, its description of the sovereign as an un-commanded commander – one to whom all others in the state owes unquestionable obedience but who in turn is not subject to any other authority or check, be it constitution or law, is a conception that can breed despotism, dictatorship, tyranny and totalitarianism. In fact, the imperative or command theory of the positivists has been blamed for the emergence of the Nazi regime in Germany. Historical evidence abounds to demonstrate that anywhere there is a leader with such maximum power, he rules arbitrarily since absolute power corrupts absolutely. Mankind cannot afford to recede into the abyss of slavery and savagery.

Secondly, Austin's emphatic reliance on sanction as an inextricable component of law has been heavily criticised as giving a jaundiced notion of what law truly is. Objectors have pointed out that the element of sanction only fits the description of criminal law which is only but a fragment of the entire spectrum of law and that in the majority of cases the law does not supply sanctions for violations but yet obeyed as law. The most cited examples are the laws relating to the making of wills, contracts, marriages and other relationships and activities regulated by law for which penal sanctions are not provided. Critics have argued that legal positivism has failed to account for the ultimate justification of the obligation to obey law. It has been asserted that, "it is because a rule is regarded as obligatory, that a measure of coercion is attached to it; it is not obligatory because there is coercion".

Thirdly, the positive law approach to the meaning of law as command has been criticised as being unnecessarily narrow in scope. The couching of law as a command fulfills only the characteristics of criminal law. Law as a command compels the doing of an act or forbearance from the doing of an act upon pain of sanction. In either case, failure to do or forbear to do is visited with punishment. Austin puts the contention thus: "If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command although you utter your wish in imperative phrase." Essentially, Austin and the adherents of the positive school of jurisprudence reject any rule which does not prescribe the sanction or penalty a person will suffer if he violates the rule. But we may have to ask some pertinent questions. Are all legal prescriptions sanctionable in the terms argued by Austin? Till date, in Nigeria, there is no law couched in imperative terms that require a person to marry, to own a company, register a business name, or incorporate an incorporated trustee. There is no law compelling a person to enter into contract, to sell their property, to go to school or to take up employment. If a person decides to do or to refrain from doing any of the above enumerated acts, will any sanction attach? If I decide to write a Will, will I be penalised? What if I decide I will not make a Will in my lifetime? Will I be subjected to any penalty for not doing so? The answers to the above posers, of course, are in the negative. No sanctions will attach. But does that deprive the laws relating to the making of Wills, incorporation of companies and business names, as well as the law relating to marriage the character of law? The answers also are in the negative. This shows clearly that there are many aspects of the civil law which do not command anything but merely show how things are to be done.

In addition, the location of the sovereign with such unfettered power in any democratic setting or contemporary global legal system is difficult to fathom. Even in monarchical systems, the constitution and international law constitute checks on the powers of the ruler. The contemporary world is characterised by citizens' revolts against sit-tight and unpopular regimes. Fidel Castro of Cuba, Saddam Hussein of Iraq, Idi Amin of Uganda and Muammar Gaddafi of Libya have all been swept out of power by citizens' revolts. Recently, there has been a trend in the Arab world, where citizens have revolted against the unpopular regimes of their long-serving leaders. President Hosni Mubarak of Egypt, President Zine El Abidine Ben Ali of Tunisia, President Abdelaziz Bouteflika of Algeria and the more recent President Omar Al-Bashir of Sudan have at one point or the other been forced by their citizens to stepped down from power. It is, therefore, difficult to locate the type of 'leader figure' in any civilized society - be it constitutional democracy or monarchical set up, who possesses authority that is indivisible and illimitable as conceived by the legal positivists. The concept of sovereign in a constitutional democracy is a complete fallacy. The rule of law subjects both the ruler and the ruled to the supremacy of the law. International law also limits the sovereignty of states.

3.3 Realist Law Theory

Oliver Wendell Holmes who was a one-time justice of the US Supreme Court is credited with being the father of American realism. Other adherents of this school of jurisprudence are Gray and Karl Llewellyn. According to the realists, the decisions that judges hand down do not simply arise or flow from a mechanical application of the law to the facts of individual cases.

As a legal theory, legal realism postulates that it is not possible to know what the law at any given point in time until the court has had the opportunity of pronouncing on such statutory provisions.¹ In other words, it believes that the letters of a statute are dead letter words in themselves lack the potency to regulate human behavior. In fact, Oliver Wendell Holmes argued that "the prophecies of what the courts will do in fact, and nothing

¹ J M Elegido, *Jurisprudence* (Spectrum Books Limited 1994) 97.

more pretentious, are what I mean by the law.¹ The realist movement, which began in the late eighteenth century and gained force during the administration of President Franklin D. Roosevelt, was the first to attack formalism. Realists held a skeptical attitude toward Langdellian legal science. Holmes wrote in 1881 that the life of the law has not been logic, it has been experience. Realists held two things to be true. First, they believed that law is not a scientific enterprise in which deductive reasoning can be applied to reach a determinate outcome in every case.² Instead, most litigation presents hard questions that judges must resolve by balancing the interests of the parties and ultimately drawing an arbitrary line on one side of the dispute.³ This line is typically drawn in accordance with the political, economic, and psychological proclivities of the judge.

For example, when a court is asked to decide whether a harmful business activity is a common law nuisance, the judge must ascertain whether the particular activity is reasonable. The judge does not base this determination on a precise algebraic equation.⁴ Instead, the judge balances the competing economic and social interests of the parties, and rules in favor of the litigant with the most persuasive case.⁵ Realists would thus contend that judges who are ideologically inclined to foster business growth will authorize the continuation of a harmful activity, whereas judges who are ideologically inclined to protect the environment will not.

Second, realists believed that because judges decide cases based on their political affiliation, the law tends always to lag behind social change. For example, the realists of the late nineteenth century saw a dramatic rise in the disparity between the wealth and working conditions of rich and poor US citizens following the industrial revolution. To protect society's poorest and weakest members, many states began drafting legislation that established a minimum wage and maximum working hours for various classes of exploited workers. This legislation was part of the US progressive movement, which reflected many of the realists' concerns.

The Supreme Court began striking down such laws as an unconstitutional interference with the freedom of contract guaranteed by the Fourteenth Amendment to the US Constitution. US realists claimed that the Supreme Court justices were simply using the freedom of contract doctrine to hide the real basis of their decision, which was their personal adherence to free-market principles and laissez-faire economics. The realists argued that the free-market system was not really free at all. They believed that the economic structure of the US was based on coercive laws such as the employment-at-will doctrine, which permits an employer to discharge an employee for almost any reason. These laws, the realists asserted, promote the interests of the most powerful US citizens, leaving the rest of society to fend for itself.

Some realists only sought to demonstrate that law is neither autonomous or apolitical, nor determinate. For example, Jerome Frank, who coined the term '*legal realism*' and later became a judge on the US Court of Appeals for the Second Circuit, emphasized the psychological foundation of judicial decision making. He argued that a judge's decision may be influenced by mundane things like what he or she ate for breakfast. Frank believed that it is deceptive for the legal profession to perpetuate the myth that the law is clearly knowable or precisely predictable, when it is so plastic and mutable. Karl Llewellyn, another founder of the US legal realism movement, similarly believed that the law is little more than putty in the hands of a judge who is able to shape the outcome of a case based on personal biases.

Since the mid-1960s, this theme has been echoed by the critical legal studies movement, which has applied the skeptical insights of the realists to attack courts for rendering decisions based on racial, sexist, and homophobic prejudices. For example, feminist legal scholars have pilloried the Supreme Court's decision in *Craig v Boren*⁶ for offering women less protection against governmental discrimination than is afforded members of other minority groups. Gay legal scholars similarly assailed the Supreme Court's decision in *Bowers v Hardwick*⁷ for failing to recognize a fundamental constitutional right to engage in homosexual sodomy. The Supreme Court's decision in *Lawrence v Texas*⁸ that overturned the *Bowers*⁹ holding was a vindication for gay rights jurisprudence.

Other realists, such as Roscoe Pound, were more interested in using the insights of their movement to reform the law. Pound was one of the original advocates of sociological jurisprudence in the United States. Pound believes that the aim of every law – whether constitutional, statutory or case law should be to enhance the welfare of society.¹⁰ Jeremy Bentham, a legal philosopher in England, planted the seeds of sociological jurisprudence in the eighteenth century when he argued that the law must seek to achieve the greatest good for the greatest number of people in society. Bentham's theory known as utilitarianism continues to influence legal thinkers in the United States.

¹ O W Holmes, 'The Path of the Law' [1887] (10) *Harvard Law Review*; 457.

² K Llewellyn, 'A Realistic Jurisprudence: The Next Step' [1930] (30) *Columbia Law Review*; 431, 450.

³ *Ibid.*, 450.

⁴ K Llewellyn.

⁵ *Ibid.*

⁶ 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976).

⁷ 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986).

⁸ 539 U.S., 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

⁹ *Ibid.*

¹⁰ R Pound, 'The Call for a Realist Jurisprudence' [1931] (44) *Harvard Law Review*; 697.

The realist school of thought believes that the letters of a statute (legislative enactments) are dead. In other words, they believe that we may never know what the position of the law on any given subject is from the bare letters of the statute until the courts have made their own pronouncements on the provision. Thus, in the opinion of the realists, “the prophecy of what the court will do is the law and nothing more pretensions”.¹ Thus, it is the interpretation or pronouncement given by the court in carrying out its constitutional functions of rule interpretational adjudication that is meant by the law.² Therefore, until a statutory provision becomes the subject of controversy and litigation and consequently, the court’s interpretation such provision remains lifeless and acquires no legal meaning.

Experience has shown that most provisions may be interpreted differently from their literal meaning in the statute book. It is only when the statutory provision is married with the judicial position that the doctrinal legal researcher can have a truly balanced view of the law on the subject. It is not uncommon for the statutory provision to say one thing and for the judicial position to elaborate, modify, restrict or expand what the statutory provision has stated. This is because there are extra-legal factors that weigh heavily on the mind of the courts when deciding cases and reading decisions. Such extra-legal factors could be to deter certain antisocial behaviour as adumbrated in *Amaechi v INEC*,³ to prevent economic loss and disruption of the polity as evident in the decision in *Marwa v Nyako*,⁴ on ground of public policy to save the nation from disintegration and to avert political crisis and vacuum as seen in *National Assembly v. President of the Federal Republic of Nigeria*.⁵

Jeremy Bentham added the dimension known as legal pragmatism to the idea of law as articulated by the realists. The legal pragmatists provide no formula for determining the best means to improve the welfare of society. Instead, pragmatists contend that judges must merely set a goal that they hope to achieve in resolving a particular legal dispute, such as the preservation of societal stability, the protection of individual rights, or the delineation of governmental powers and responsibilities. Judges must then draft the best court order to accomplish this goal. Pragmatists maintain that judges must choose the appropriate societal goal by weighing the value of competing interests presented. by a lawsuit, and then using a “grab bag” of “anecdote, introspection, imagination, common sense, empathy, metaphor, analogy, precedent, custom, memory, experience, intuition, and induction” to reach the appropriate balance.⁶

Pragmatism, sometimes called instrumentalism, is best exemplified by Justice Holmes’s statement that courts “decide cases first, and determine the principle afterwards.” This school of thought is associated with result-oriented jurisprudence, which focuses more on the consequences of a judicial decision than on how the relevant legal principles should be applied.

Over all, legal realists claim that decisions of judges are products of ascertainable factors, which include the personalities and idiosyncrasies of the judges, their social and political environment, the economic conditions in which they have been brought up, emotions, psychology and so on. The realists contend that these factors are the underlying basis of decisions of judges which the judge then proceeds to rationalise with convenient legal doctrines, rules and principles.

3.3.1 Contributions of the Realist School

The realist position or conception of law has wielded enormous influence over all legal systems of the world whether those derived from the common law or those evolving from the civil law tradition. There is no doubt that all legal systems depend on the interpretation and application of legal rules by the courts in disputes submitted between litigating parties. Relationships, human transactions and activities are ordered and regulated by the decisions handed down by courts.

Legal realism helps us to understand that it is not exclusively the black letter law enacted in the statute books that is the law. It reveals that there are extra-legal factors which shape the content of law. Thus, because there are factors which are not legal in nature that are put into consideration in arriving at the decisions or constructions the court will place on a particular provision, it is safer to await the court’s decision before we know what the law in any set of transactions would become. In addition, the realist school sees law not as a set of abstract norms documented in statutes but as a process of synthesizing the legal rules to arrive at decisions in concrete cases. In this case, there could well be a difference or gap between the law as indexed in the statute book and the social reality in which it is meant to operate.

This school of jurisprudence has championed the growth of judge-made laws or judicial activism. It has ensured that the law is swift to the needs of society and changing realities of the times without waiting for the long and tortuous process of legislative amendment. It gives the law a reactionary outlook and thus helps in the realisation of its role as an instrument of social engineering.

¹ (2008) 5 NWLR (Pt 1080) 227.

² M S Green, ‘Legal Realism as Theory of Law’ (2015) (46) (6) *Wm. & Mary L. Rev.* 1915, 191.

³ (2012) 6NWLR (Pt 1296) 199.

⁴ [The Five Governors’ Case]

⁵ (2003) 9 NWLR (Pt 824) 104, 143-144.

⁶ R A Posner, *The Problems of Jurisprudence* (Harvard: Harvard University Press 1990) 73.

3.3.2 Criticisms of the Realist School of Jurisprudence

One of the criticisms levelled against legal realism is that it violates the sacred principle of separation of powers and encourages authoritarianism, particularly in a presidential system. This is premised on the fact that the realists believe the judge (a member of the judicial arm of government) can arrogate to himself law-making power reserved exclusively for the legislative arm. By becoming too forward looking in order to fill in lacuna in the law, the courts/judges descend into the unfamiliar terrain of law-making which is the core function of the legislative arm of government. Legislators are elected by the people based on experience in legislative business in a constitutional democracy but judges are not. Judges are supposed to interpret and apply the law as made by the legislature and not to dabble into the constitutional responsibility of the elected lawmakers. Obviously, fundamental freedoms and guarantees will be undermined where the same judge performs the function of law-giver and law adjudicator. There will be an end to everything as argued by Montesquieu.

Another criticism against legal realism is that its claim that only laws processed through judicial interpretation and pronouncement is law, is indefensible. A good many laws do not end up being tested in court, but their validity as laws cannot be seriously questioned. A case in point is bigamy (the criminal prohibition against polygamous marriage by a spouse married under the Marriage Act). In Nigeria, it does appear that there is no known case of prosecution for the offence so far. However, most people carry on their lives with the law in mind. It regulates their behaviour, transactions and activities. The law on sanitation is another example. In some cases, prosecutions are seldom undertaken. Yet, on the day declared for sanitation exercise, people generally stay at home, clean their surroundings and avoid travelling or moving about. If we must wait till all provisions of a law are tested in court and pronounced upon before knowing what the law is on every issue, we might well be living in uncertainty and anarchy will be let loose.

Finally, there have been instances where statutes are made or enacted to target certain judicial decisions. The Supreme Court decision in *Lakanmi v Attorney-General West*¹ was abrogated by the Federal Military Government (Supremacy and Enforcement of Powers) Decree² No. 28 of 1970. Similarly and more recently, the legislature appears to have targeted the Supreme Court decision in *Amaechi v INEC*³ by enacting section 141 of the Electoral Act.⁴ Section 141 provides that an election tribunal or court shall not under any circumstance declare any person winner at an election in which such a person has not fully participated in all the stages of the said election. If the decision of a court which the realists claim is law can be targeted by legislation and abrogated, one wonders what could be called law between the abrogated court decision and the abrogating statute. The realists failed to clear this confusion in the meaning of law.

3.4 Pure Theory of Law

This school of thought is essentially an offshoot of the positivist school of thought. The only major deviation of the pure theory of law from the positive theory is on the positive theorists' conception of law as a command. The chief proponent of the pure theory of law is Hans Kelsen. This theory proceeds on the premises that a theory of law must deal with the law as it is and not as it ought to be. By the name 'pure theory' Hans Kelsen sought a formula for explaining the concept of law that will be free law from the contaminating effects of other disciplines and concepts like morality, religion, sociology, ethics and politics and so forth.⁵ Kelsen felt that the other schools of jurisprudence in an attempt to provide an explanation of law got themselves enmeshed with other disciplines. This theoretical perspective believes that it is possible to purge the discipline of law from adulterants which are not strictly law.⁶

The major postulation of the pure law theory is that every legal system consists of a hierarchy of norms in which inferior norms derive their validity from a higher norm. Thus, for any legal system to thrive, it must be a dynamic one in which fresh norms are continuously created on the authority of an original norm.⁷ In other words, the validity of a norm must be based on a higher norm, which itself must be validated by yet another higher norm until we get to the ultimate or basic norm. The source from which the basic law derives its validity is referred to by the pure theorist as the 'grundnorm'.⁸ The validity of each individual norm in the system, except the grundnorm, does not depend on its effectiveness or whether it is observed or not. An individual norm will only cease to be valid if the legal order to which it belongs ceases being by and large effective.⁹

The basic norm or grundnorm is not created in a legal procedure by a law-creating organ. It is not, as a positive legal norm, valid because it is created in a certain way by a legal act, but it is valid only on the presupposition that

¹ (1986) 5 NWLR (Pt) 528.

² No. 28 of 1970.

³ (2008) 5 NWLR (Pt 1080) 227.

⁴ No. 6 of 2010 (as amended).

⁵ M D A Freeman (13) 309.

⁶ M D A Freeman (13) 309.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ M D A Freeman (13) 310.

the grundnorm is valid. Without this supposition, no human act could be interpreted as legal. In other words, the grundnorm is not law in the positive sense but has legal consequences.¹ It is the fountain and origin of legality. It imparts life and vitality into positive law. The pure law theoretical perspective views the grundnorm as the 'law creating force'. It is the grundnorm that furnishes other norms within a legal hierarchy life, sustenance and the oxygen of existence. The legal basis of existence of other norms vis-à-vis their validity is determined with reference to the grundnorm. Such is the paramountcy of the grundnorm that it becomes the barometer by which all other norms are measured for their validity. No norm which is not traceable to or given life to by the grundnorm can have an independent existence.

3.4.1 Contributions of the Pure Law Theory

Kelsen saw law generally as a means of ordering human behaviour, as a specific technique of social organization. He admitted, however, that other systems of norms (such as morality and religion) also seek to regulate human behaviour. But he identified a specific characteristic of the legal method of ordering human behaviour that both religion and morality lack. He calls that element the element of physical force.² He thus defined law as "a coercive order of human behaviour."³ According to him, the essence of law is the organization of force, and law thus rests on a coercive order designed to bring about certain social conduct. Sanctions are the key characteristics of law because they stipulate that coercion ought to be applied by officials where law is violated.

Kelsen summarizes his theory of law as 'a structural analysis, as exact as possible, of the positive law, an analysis free of all ethical or political judgments of value. Because it is concerned only with the actual and not with the ideal law, it is described as positivistic. Because it claims to strip the law of all illusions and distractions, it styles itself realistic. And because it strives to purge juristic theory of many elements that it considers to be contaminants, it claims to be pure'.⁴

3.4.2 Criticisms of the Theory

Notwithstanding the bold and audacious step taken by Kelsen to empty his idea of the law from the trappings of inadequacy, his theory has not escaped scathing criticisms. One of the points of criticisms relates to the sanctionist view of law. Both Austin and Kelsen claim that law properly so called must be secreted in the interstices of sanction. In other words, there is no law except it prescribes sanction. Clearly, this viewpoint, whether of Austin or Kelsen, blurs the distinction between criminal law and civil law.⁵ While sanction is an essential element of the former, the same cannot be said of the latter a good proportion of which merely prescribes how things are to be done. Insistence on a sanction as essential characteristic of law underplays the significance of duties. Many statutes impose duties on public authorities without accompanying sanctions attending upon defaults. Yet, such breaches are still regarded as violations of the law. The absence of sanction may make law ineffective but it does not invalidate law.

His theory's principle of effectiveness of the legal order can only be determined by involving theorists in sociological inquiry that will result in contamination of the pure theory. Kelsen's theory, which seeks to separate law from such concepts as justice, morality, ethics and so forth, will reduce positive law to an arbitrary body of rules, which can serve any end.

In addition, in tracing the validity of law, Kelsen stops at the grundnorm. He was not prepared to carry his inquiry beyond the question: whether the grundnorm has secured a minimum effectiveness. Thus his theory is unable to account for the ultimate validity of law.

3.5 Sociological Theory of Jurisprudence

The sociological school of jurisprudence is inclined towards the discipline of sociology. Its major exponents are Jherring, Ehrlich and Dean Roscoe Pound. Sociology means, broadly the study of society of which law is but a part.⁶ The sociological approach focuses on the function of law in communal existence. Sociological jurisprudence, according to its chief proponent, Dean Roscoe Pound, should ensure that the making, interpretation and application of laws take account of social facts. Law, according to this school, is a method of social engineering and a means of balancing conflicting interests in the society.⁷ In this view, there are many conflicting interests in the society to be satisfied. Law as a method of achieving peace and harmony should be formulated in such a way that peaceful coexistence will continue notwithstanding the impossibility of satisfying all wants.⁸ Thus, both the making and interpretation of law should take account of various interests in society and find a way of satisfying them.

3.5.1 Contributions of the Sociological School of Jurisprudence

The major contribution of this theory is that it lays the foundation for distributive justice. More than anything else, the sociological theory tells us that law should be applied as an instrument of social engineering. As an instrument

¹ *Ibid.*

² M D A Freeman (13) 310.

³ *Ibid.*, 313.

⁴ Cited in C K Allen, *Law in the Making* (7th edn, Oxford: Clarendon Press 1964) 55.

⁵ M D A Freeman (13) 313.

⁶ M D A Freeman (13) 313.

⁷ *Ibid.*

⁸ *Ibid.*

for social cohesion and control, law should strive to balance the conflicting interests in the human society.¹ Thus law should be devoted towards resolving the conflicting interests in every human society. For Pound, every human organization or society has sets of conflicts in interests among persons and among groups.² These conflicts could be about power, about the distribution of resources, about ownership of the means of production or the conflicts could be about supremacy *simpliciter*. Pound argues that the sole purpose of law should be to build a social structure as efficiently as possible in order to satisfy the maximum of wants with the minimum of friction, internal wrangling or waste.³

3.5.2 Criticisms of the Theory

Pound and other exponents of this school have been criticized on the ground that they misapplied the idea of law as an instrument of social engineering to law. This is based on the fact that the society is always changing and it is difficult to visualise at any one time what plan the society could be said to have for its own development. Secondly, Pound is criticized for failure to lay down the criteria for resolving conflicts or harmonizing the occurrence of friction in the human society. Is it to be achieved through the instrumentality of criminal law? Is it through adjudication? Is it through the civil law regime? We are thus left to speculate how we can resolve the competing wants, needs or interests and frictions that normally characterize the human society. This failure, therefore, can become a recipe for further friction and fragmentation of the society.

3.6 Historical Theory of Law

Another school of thought which emerged in the quest to explain the nature of law is the historical theory. The major proponent of this theory is the German philosopher and thinker Von Savigny. While the positivists preach that law is made by a human legislator, the historical school direct attention to the evolutionary nature of law.⁴ The historical school believes that however far back one goes into the past of a people, one will always find some law governing them. Von Savigny, who is considered the father of this school, has given the most comprehensive account of its tenets. He said:

In the earliest times to which authentic history extends, law will be found to have already attained a fixed character, peculiar to the people, like their manners, language and constitution. Nay, these phenomena have no separable existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view.⁵

Elias opines that Savigny does not give a strictly formal definition of law but merely describes it as an aspect of the total common life of a nation, not something made by the nation as a matter of choice or convention, but, like its manners and language bound up with its existence and indeed helping to make the nation what it is.⁶ The historical law theorists argue that law reflects the spirit and common consciousness of a people. He took custom to be superior to legislation and therefore the latter should always conform to popular consciousness.

3.6.1 Contributions of the Theory

The greatest contribution of the historical school lies in its recognition of the fact that law is not just an abstract set of rules imposed on society but it is an integral part of that society deeply rooted in the social and economic order in which it functions and embodying traditional value systems which confer meaning and purpose upon the given society.⁷ Thus, in almost all societies, custom is a source of law. It opposes the revolutionary character of law characterized by military decrees and arbitrary laws which are not the products of the community spirit.

3.6.2 Criticisms of the Theory

The historical notion of law as offered by Von Savigny and his disciples has attracted some objections. One of the objections is that the historical theory cannot account for the transplanting of law from one nation to another. For instance, English law has been successfully received in some parts of Africa, America and India. Secondly, subordination of legislation to custom by this school is not true of modern states where custom must be enlivened by legislation in order to be valid.

Also, if, as held by the historical school law is the popular consciousness of the community, the question could be asked as to what will obtain of the individual who 'breaks the law? Such individual is a member of the people, but what of his consciousness? Furthermore, Savigny postulated that legislation should always conform to the popular consciousness and that the *Volkgeist* itself cannot be criticized; rather it is the standard by which laws themselves are to be judged. In addition, some customs permit human sacrifices, killing of twins, or slavery, and

¹ D R Pound, 'Theories of Law' (1912) (22) *Yale L.J.* 114, 145-6.

² M T Ladan (n 12) 63.

³ *Ibid.*

⁴ M T Ladan (n 12) 60.

⁵ Cited in C K Allen, *Law in the Making* (7th edn, Oxford: Clarendon Press 1964) 16.

⁶ T O Elias and others (ed), *Nigerian Essays in Jurisprudence* (Lagos: M.I.J. Publishers Ltd 1993) 16.

⁷ D Lloyd, *The Idea of Law* (London: Penguin Books 1987) 252.

other harmful traditional practices. In the circumstance, is it necessarily wrong to use law in order to deliberately change such practices and ideas?

3.7 Economic Theory of Law

Karl Marx, a German Jew and materialist philosopher propounded the theory of economic realism in 1859. He was the most influential representative of the economic espousal of jurisprudence.

The Marxist theory of law is generally identified with the following three underlying assumptions: that law is a product of evolving economic forces; that law is a tool used by a ruling class to maintain its power or stranglehold over the lower classes; that in the communist society of the future, law as an instrument of social control will wither away and finally disappear. Marx distinguished between the economic structure of society (what he calls the ‘base’ or ‘infrastructure’) and the ‘superstructure’ which rose upon the real foundation.¹ Law, according to him, is one of the superstructures on an economic base. Marx wrote that a capitalist society will eventually be made up of two classes — the bourgeoisie (‘the haves’) and the proletariat (‘have-nots’).² Their common economic interests and roles in the processes of production and exchange define these classes and the opposed interests of the two classes produce conflict.

Law, to Marx represents the interests of the dominants class and is a prominent instrument of class repression.³ The bourgeoisie are but expropriators, who have seized control of the public property, including the means of production, and having accomplished this, they proceeded to construct and impose the law to safeguard their position — to sustain their dominance over the lower class. The state and the law are the instruments of oppression instituted for the purpose of facilitating and entrenching the exploitation of one class by another.⁴ Law is perceived by him as one of the means whereby the capitalist minority seeks to preserve and increase its power, while those who have property sought to protect it against those who have not. One of the main functions of law is to obscure power relationships.⁵ Thus it is usually said that there is freedom of contract, but in the absence of equality of bargaining power this freedom is illusory. Marx predicted that both the state and law will wither away on the achievement of a classless society and on the socialization of the means of production.⁶

3.7.1 Contributions of the Economic Law Theory

The most important contribution made by the Marxist theory, wittingly or unwittingly, appears to be that law cannot be indifferent to the material conditions of man. The state and the law must recognize that material conditions of a good, decent life are indispensable to the development of human personality and the enjoyment of fundamental liberties recognized and protected by law.

The economic approach to law raises fundamental issues relating to the eradication of economic imbalance in society and the exploitation and oppression of the masses by the rulers. The Marxist economic theory of law exposed the existence of strong economic influence on law to which previous legal theories had not paid adequate attention.

3.7.2 Criticisms of the Theory

The first objection to the Marxist theory is that it elevates social and economic rights into a supreme object in the pursuit of which individual liberty must be sacrificed or suppressed. The Marxist economic theory of law also over-emphasized only the stratification of society into economic classes while ignoring other dimensions of stratification like race, sex, place of origin, religion, language, colour, and so forth. Marx’s view of law is also over-simplified. Even if some laws do exist to exploit the workers and to promote the interests of the ruling class, it can be argued that law has many other functions as well. Indeed some laws restrain oppression. Ogbu has argued that there are also some laws, which are targeted against the interest of the ruling class.⁷ A ready example is the Failed Banks Act the provisions of which can only catch up with the bank-owning class. Contrary to the postulations of the Marxist economic theory of law, it is not feasible that at any moment in time society will exist without law. Marx also approbated and reprobated when he asserted that on attainment of communism, law and state will disappear but went further to say that there will be only an administration of things.

The Marxist theory of law has also been criticized as unnecessarily iconoclastic, anti-religion and amoral. It is asserted that it tries to substitute its own “gospel according to St. Marx” for religion and morality.⁸ Lastly, the Marxist economic theory of law is based on the general principles of Marxist economic theory, which is not only utopian and chimaeric but is also based on unrealistic and extravagant assumptions.

¹ M D A Freeman (n 13) 1132-34.

² O N Ogbu (n 5) 23.24.

³ M T Ladan (n 12) 66.

⁴ O N Ogbu (n 5) 24.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ O N Ogbu (n 5) 25.

⁸ Adaramola, Funso Basic Jurisprudence 2 edn (Illinois: University of Illinois Printing Services, 2001) 332-3.

4. Conclusion

This paper has shown that that no single concept of law has all the answers to the question of the underlying basis of law, the source of law, and the relationship of law to justice and morality. The discussion has proved that the complete idea of law can only be arrived at when the concepts of law as theorized by the various jurisprudential schools are analysed, evaluated and synthesized. It has been demonstrated further that no one theory or idea is completely right nor is any idea or conception of law completely wrong. Each school of thought has something substantial to contribute to a proper understanding of what law is, its relationship with concepts such as morality and justice, as well as its role in the human society. In fact, every legal system of the contemporary world is influenced by the ideas canvassed by the jurisprudential schools.

For instance, most laws in Nigeria are dictated by the desire to preserve the morality of the society. When laws are stripped of justice, they are rarely obeyed and sometimes such laws fall into disrepute. On the other hand, our laws are dominated by the pervading influence of legislation. Positive law, both in Nigeria and across the globe, has grown to become the most important source of law. The criminal aspect of our law mirrors the command aspect of the Austinian theory. Most times, our laws try to draw a line between law and morality as exemplified by the decriminalization of same sex relationships in a number of countries. It is equally true that the courts have had and continue to have tremendous influence on the content of law both in common law and civil law jurisdictions.

As argued by Holmes, experience has taught us that most times the provisions of legislation are not always the decisive factor in decisions. There are extra-legal factors that influence the decisions courts of law give. The same expositions can be said of the pure theory, sociological theory, historical theory and economic theory of law. Each of them has some basic truths about what the law is. These divergent views are illuminating and call attention to various dimensions of legal problems. The function of the law maker is to distill what is good in each point of view and to join them into an amalgam for the good of society. It is therefore necessary that in the making of the law the various ideas of the rival schools of thought be explored and harnessed in order that the law will ensure social order and justice in all its ramifications. ‘

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